

THE GR COURT DOCKET

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Professional negligence claim against lawyer dismissed as being statute-barred (*Kucerak v. Lamfromboise*)

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Under Ontario law, a claim must generally be commenced within two years from the date a plaintiff suffers damages or an injury. This two-year period is known as a limitation period and is established by section of the [Limitations Act, 2002](#) (the "Act"). Although this two-year period can be extended or suspended, the specific circumstances that permit such an extension or suspension are limited and will often be difficult to establish, particularly in professional negligence cases.

Where a claim is commenced more than two-years after the plaintiff discovers a cause of action against a defendant, the likely response will be a motion to have the claim dismissed. This is what happened in *Kucera v. Lamfromboise* (unreported, CV-20-00000081-0000, June 14, 2024, Justice Nightingale).

In this case, the Defendant lawyer had been retained to act on behalf of the Plaintiff in a matrimonial proceeding. The Defendant acted for the Plaintiff for approximately five years, from June 2011 until May 10, 2016. During this period of time, the Plaintiff's ex-spouse

alleged in the matrimonial proceedings that the Plaintiff's financial disclosure was inadequate.

Eventually, the Plaintiff retained a new lawyer and delivered a notice of change in representation. The Plaintiff owed money to the Defendant for his legal services, and accordingly, the Defendant wanted the Plaintiff to sign an irrevocable direction to pay his accounts from the proceeds of sale of the matrimonial property owned by the Plaintiff and his ex-spouse.

On June 6, 2016, the Plaintiff's new lawyer advised the Defendant that the Plaintiff would be consulting lawyers regarding a negligence claim against the Defendant and that the Defendant should put the malpractice insurer on notice of the potential claim. As well, the Defendant was warned that the Plaintiff was likely exposed to a significant costs award in the matrimonial proceedings and that he would be holding the Defendant responsible for those costs.

The June 6 communication to the Defendant was followed by correspondence dated July 4, 2016

to the Defendant in which the Plaintiff again advised the Defendant of being negligent in his representation of the Plaintiff throughout the matrimonial proceedings.

To repair the alleged negligence caused by the Defendant in the matrimonial proceedings, the Plaintiff incurred several bills from his new lawyers totalling, by late November 2016, \$78,000.

On April 11, 2017, a settlement was reached in the matrimonial proceedings, subject to costs being decided by the court. On July 6, 2018, the plaintiff was ordered to pay \$266,892.32 in costs to his ex-spouse.

On April 14, 2020, the plaintiff sued the defendant for professional negligence. The Plaintiff wanted to recover the amount of the costs award and the legal fees he incurred to correct the defendant's alleged negligent errors.

On a motion to dismiss the Plaintiff's claims as being statute-barred, the Defendant contended that the Plaintiff had discovered his claim against the Defendant in June-July 2016. This was more than four years before the Plaintiff actually commenced his action against the Defendant.

The Plaintiff argued that he had not been able to discover his injury, loss or damage or that same was caused by the Defendant until July 6, 2018 when the court ordered costs against him in the matrimonial proceedings.

The court ruled in favour of the Defendant.

The outcome of the case was governed by section 5 of the [Act](#).

Under [section 5\(1\)\(a\)](#), a court is required to consider the four factors set out therein to assess when a Plaintiff had discovered material facts to bring a claim.

In general, based on the Supreme Court of Canada judgment in [Grant Thornton LLP v. New Brunswick, 2021 SCC 31](#) at [paragraph 44](#), a claim is discovered when the Plaintiff

has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the Defendant's part can be drawn.

An exact act or omission by the Defendant need not be known to start the limitation period from running. A Plaintiff will be found to know that they have a claim if there is an evidentiary basis to demonstrate a belief that the Defendant did an act or made an omission that caused damage to the Plaintiff.

To avoid having his claim dismissed on the grounds that it was statute-barred, the Plaintiff further argued that his action against the Defendant was comprised of two separate causes of action.

The first was related to his claim for legal fees incurred by his new lawyers to repair the Defendant's alleged negligence.

The second was tied to the costs award dated July 6, 2018.

The Plaintiff also argued that under section [5\(1\)\(a\)\(iv\)](#) of the [Act](#), it was not appropriate to commence his action against the Defendant until the latter date because he had been pursuing another resolution process regarding the costs issue.

The court rejected all of the Plaintiff's arguments, finding that the Plaintiff was actually aware of the ex-spouse's claim for costs by June 2016 and by April 2017.

With respect to section [5\(1\)\(a\)\(iv\)](#), the court found that it was perfectly appropriate for the Plaintiff, in the circumstances, to have commenced proceedings against the Defendant when he had first warned the Defendant about a claim for professional negligence and that the outcome of the matrimonial proceedings did not suspend the running of the limitation period.

Although a limitation period can be suspended where there are unresolved parallel proceedings involving a Plaintiff that form the basis of a professional negligence claim, the Plaintiff in this



case knew by November 2016 that his ex-spouse would be seeking a substantial award of costs against him in the matrimonial proceedings. In correspondence to the Defendant in June and July 2016, the Plaintiff had warned the Defendant that the Plaintiff intended to hold the Defendant for his legal fees incurred to correct the Defendant's alleged errors and for any costs payable to his ex-spouse because of the Defendant's negligence. Accordingly, it was legally appropriate for the Plaintiff to have commenced his action against the Defendant even for the legal costs he was ordered to pay his ex-spouse well before July 6, 2018.

Representation by Gardiner Roberts LLP

The Defendant lawyer was represented by Alexander Melfi, a partner in the dispute resolution group at Gardiner Roberts LLP.

He was assisted in the drafting of the legal argument by Christine Tassopoulos. Ms. Tassopoulos is a junior associate at Gardiner Roberts LLP.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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