Alberta Update: When Does a Plaintiff Lose the Right to Sue for Historic Contamination?

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December 22, 2017

In Alberta, there is an ultimate limitation period of 10 years from the date the claim arose regardless of when a plaintiff knew or ought to have known about the claim.[1] But what happens where a plaintiff discovers historic environmental contamination that is more than 10 years old? Is the right to sue lost? This question was recently considered by Alberta's Court of Queen's Bench in *Lakeview Village Professional Centre Corporation v Suncor Energy Inc.*[2] and *Brookfield Residential (Alberta) LP v Imperial Oil.*[3]

In *Lakeview Village*, the Court was tasked with interpreting a seldom used provision in Alberta's *Environmental Protection and Enhancement Act* ("EPEA") [4] that allows a plaintiff to seek an extension of the limitation period. Section 218 of the EPEA states: [5]

1 A judge of the Court of Queen's Bench may, on application, extend a limitation period provided by a law in force in Alberta for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment.

2 An application under subsection (1) may be made before or after the expiry of the limitation period.

3 In considering an application under subsection (1), the judge shall consider the following factors, where information is available:

a) when the alleged adverse effect occurred

b) whether the alleged adverse effect ought to have been discovered by the claimant had the claimant exercised due diligence in ascertaining the presence of the alleged adverse effect, and whether the claimant exercised such due diligence

c) whether extending the limitation period would prejudice the proposed defendant's ability to maintain a defence to the claim on the merits, and

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1 *Limitations Act*, RSA 2000, c L-12, s 3(1).
2 2016 ABQB 288 [Lakeview Village].
3 2017 ABQB 218 [Brookfield].
4 RSA 2000, c E-12.
5 *Ibid*, s 218.

d) any other criteria the court considers to be relevant.

Before deciding on the merits of the application, the Court provided guidance on the procedure to be followed where an application is made under Section 218 of the EPEA.

The Court stated that a plaintiff can meet the test in Section 218 of the EPEA in two ways, namely, it may:

1 Provide sufficient evidence to support the factors listed in subsection 3, or

2 If there is not enough evidence to make that determination, or if there is sufficient evidence but an issue for trial could be determined prematurely, the plaintiff may show "a good arguable case" for an extension that will be subject to final determination at trial.[6]

The Court looked to the only two cases that to that point had considered Section 218 of the EPEA – *Wainwright Equipment Rentals Ltd. v Imperial Oil Ltd*.[7] and *Jager Industries Inc. v Canadian Occidental Petroleum Ltd*.[8] In *Wainwright*, on a balance of probabilities, the Court had sufficient evidence to extend the limitation period. In *Jager*, the Court did not have sufficient evidence about the plaintiff's actions and responsibilities to balance the considerations under section 218 of the EPEA and did not grant an extension of the limitation period.

In *Lakeview Village*, the Court found that the plaintiff fulfilled the second part of the test and demonstrated "a good arguable case" on the Section 218 factors.[9] The Court granted an extension of the limitation period subject to final determination at trial.[10]

In support of its finding, the Court held the following.

- Despite discovering contamination 27 years after the suspected source of contamination ceased operating at the property, 27 years was "not so long ago that it would be unfair to allow the action to proceed".[11]

- The plaintiff required that the vendor provide information regarding the environmental subsurface condition of the property before the plaintiff purchased. The vendor's environmental consultant conducted a subsurface investigation and concluded that there was no evidence of significant contamination and no further

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6 Lakeview Village, *supra* note 2 at para 19.
7 2003 ABQB 898.
8 2001 ABQB 182.
9 Lakeview Village, *supra* note 2 at para 56.
10 *Ibid*.
11 *Ibid* at para 40.

investigation was warranted at the property.[12] The Court held that it would be "too onerous to expect a prospective purchaser to do more".[13]

- The defendants did not present any evidence that an extension to the limitation period would prejudice their ability to maintain a defence.[14]

Lakeview Village is the first case to identify and distinguish the two ways in which a plaintiff can meet the test set out in section 218 of the EPEA where a plaintiff finds historic contamination more than a decade old.

While *Lakeview Village* has not been fully determined at trial, its discussion of section 218 of the EPEA has already been judicially considered in *Brookfield Residential (Alberta) LP v Imperial Oil*.[15]

In *Brookfield*, the defendant brought a summary dismissal application asserting a limitations defence. The plaintiff brought a cross-application to extend the applicable limitation period under section 218 of the EPEA. The Alberta Court of Queen's Bench reviewed *Lakeview Village* and held that the ability to defer the limitations issue to a final determination at trial may be appropriate where there is a stand-alone section 218 application (as there was in *Lakeview Village*); however, where there is a cross-application for summary dismissal, the parties are required to put their best foot forward.[16]

The parties in *Lakeview Village* focused their submissions on factors listed in subsections 218(3)(a) and 218(3)(b) of the EPEA. The defendants in *Lakeview Village* did not allege prejudice under subsection 218(3)(c) if the limitation period was extended.[17] In contrast, the defendant in *Brookfield* focused its submissions on the prejudice it would suffer if the plaintiff's cross-application to extend the applicable limitation period was granted.

The Court agreed with the defendant in *Brookfield*. The Court found that the defendant has established that it will suffer "significant prejudice" if the limitation period is extended.[18] In support of its finding, the Court held the following:

- Permitting an action to proceed against a defendant after the defendant was last involved with the potential contaminating activity over 60 years ago would be an abuse of the discretion to extend the limitation period[19]

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12 *Ibid* at para 41.
13 *Ibid* at para 50.
14 *Ibid* at para 52.
15 Brookfield, *supra* note 3.
16 *Ibid* at para 49.
17 *Ibid* at para 98.
18 *Ibid* at paras 100 and 101.
19 *Ibid* at para 102.

- Calling expert evidence required to establish the applicable standard of care 60 years later would be "impossible",[20] and

- While it is possible that the prevailing practices at the time of the alleged contamination may have been negligent, the defendant complied with the then applicable legislative regime, which had a "fundamentally different approach to environmental protection".[21]

Where do *Lakeview Village* and *Brookfield* leave us today? We now have a well-defined framework about the legal test a plaintiff must meet on a stand-alone section 218 application or a section 218 cross-application to a summary dismissal application. While the facts and corresponding outcomes in *Lakeview Village* and *Brookfield* are illustrative, it is clear that the determination of any section 218 EPEA application will be highly fact-specific and will depend on the evidence the parties bring before the Court.

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Document #: 1299080

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[20] *Ibid* at para 103.
[21] *Ibid* at paras 105-107.