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ARTICLE

Alberta Court of Appeal sets the guideline for Extending Limitation Period for Environmental Claims under the Environmental Protection and Enhancement Act

Introduction

In *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited*, 2019 ABCA 35 ("*Brookfield*"), the Alberta Court of Appeal unanimously confirmed the Court of Queen's Bench treatment of the test that applies when an application is made to extend a limitation period under Alberta's *Environmental Protection and Enhancement Act* RSA 2000 c.E-12 ("*EPEA*"). This decision overruled the approach proposed in *Lakeview Village Professional Centre Corp. v Suncor Energy Inc.* 2016 ABQB 288 and has significant implications for parties to environmental claims. While the law in this area has advanced in a short period of time, there is an issue of whether contractual limitation period can be extended under section 218.

Background

Brookfield Residential (Alberta) LP formerly known as Carma Developers LP("Brookfield") brought a claim in negligence for environmental liability against Imperial Oil Limited ("Imperial"). Brookfield had acquired a property that had been a well site drilled and operated by Imperial 60 years prior to the action.

Imperial brought an application for summary dismissal, on the basis that the claim was statute barred under the *Limitations Act* RSA 2000, c L-12. Brookfield cross applied for an extension of the limitation period under section 218 of the *EPEA*.

The Court of Queen's Bench Decision

The Court of Queen's Bench dismissed Brookfield's application to extend the limitations period pursuant to s.218 of the *EPEA* and granted Imperial Oil's summary dismissal application on the grounds of no merit to the claim given the ultimate limitation period expiry. The Court applied the section 218 factors: (a) when the adverse effect occurred, (b) whether the claimant exercised due diligence in discovering it, (c) whether there would be prejudice to the defendant's ability to defend the claim; and (d) any other criteria the court considers relevant.

The Court considered when the environmental damage occurred and determined that there was insufficient evidence to pinpoint when the damage had occurred. The Court found that Brookfield's expert's report contained instances of "mere speculation" and that the report "ignore[d] the years when the well was a flowing oil well and the years when it was used for salt water disposal." The Court found that Brookfield had exercised a reasonable amount of due diligence in ascertaining environmental damage. The Court, having found no additional criteria was required to be considered pursuant to 218(3) (d), turned to whether Imperial would be prejudiced by the action if allowed to proceed. The Court found that Imperial would suffer prejudice if the limitations period was extended for the following reasons.

First, the passage of a great deal of time meant that there would be a significant number of lost witnesses, lost documents, and lost records. Further, Imperial would not have the ability to sample and test the contamination themselves, and therefore the ability to test various causation sources. The inability for Imperial to defend itself was at the heart of the prejudice.

Second, the Court found that the standard of care appropriate at the time in question would be nearly impossible to establish. As a claim in negligence, the standard of care required of Imperial at the time would be critical to both litigants' cases. The Court held that "[e]volving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today."1The Court concluded that permitting an action to go ahead more than 60 years after the Defendant last was involved in the Well would be an abuse.

The Court of Appeal Decision

The Court of Appeal confirmed that section 218 applications under the *EPEA* are to be heard pre-trial. In doing so, the Court of Appeal rejected the approach proposed in *Lakeview Village Professional Centre Corp. v Suncor Energy Inc.* 2016 ABQB 288("*Lakeview*") and held that Lakeview should not be followed. The Court in *Lakeview* approached section 218 as a procedural matter, suggesting that in some cases it would be possible to extend the limitation period under s. 218 in a preliminary application, but in other cases it might be appropriate to defer the decision until trial when there will be a full evidentiary record. The Court of Appeal determined that the *Lakeview* approach is wrong for two reasons.

First, it is inconsistent with the wording of section 218 which provides that the limitations period may be extended "on application." Second, the approach is ultimately circular. Waiting until trial to decide a 218 application defeats the purpose and entire repose that the *Limitations Act* was intended to bring. It would deprive the defendant of the entire benefit of the limitations defence, which is avoiding the distractions, expense, and risks of litigation after the prescribed time has passed. The claim may proceed and be successful on its merits at trial, only to be defeated by the defendant's limitations defence. Yet, the defendant has undergone the entire effort and expense of trial.

In assessing the 10 years ultimate limitation period in this case, the Court of Appeal confirmed that limitation period does not recommence every time the cause of action or the property is transferred. More importantly, the Court differentiated between the damage to the land (continuing adverse effect) from the continuous breach of duty or course of conduct that that would start the limitation period running anew every day. The Court of Appeal further confirmed that the competing policy objectives of the *Limitations Act* and the EPEA must be weighed in assessing a section 218 extension application. The Court of Appeal confirmed that the ultimate decision on whether or not to extend the limitation period includes an element of discretion that should not be disturbed unless they are based on an error of principle, consider irrelevant factors, or are clearly unreasonable. In this case, the decision by the chambers judge not to extend the limitation period was amply supported by the record.

Implications

Since the addition of section 218 to EPEA in 1998, extension of limitation period for environmental claims did not attract attention until *Lakeview* in 2016 and *Brookfield* in 2017. Jurisprudence was sparse and there was no defined judicial guidance on the application of the statutory factors in exercising the discretion to extend limitation period. *Lakeview* was the first attempt to articulate an approach which did not work in *Brookfield*. The Alberta Court of Appeal has established the required guidance in this decision. It is noteworthy that in *Lakeview* there was no application by the defendants for summary judgment as in *Brookfield*, and this fact was irrelevant to the Court of Appeal's determination that extension of limitation period under EPEA must be decided pre-trial.

This decision provides more certainty for environmental damage litigants. Given that the main battle will now be fought at the front end, a potential effect is that section 218 applications will invariably be followed by cross-applications for summary dismissal. Further, parties have to put forward their best case at this early stage and the evidentiary requirement is significant. However, the application of the section 218 factors is fact driven, and ultimately, the success of each case will depend on its own facts.

While section 218 expressly addresses statutory limitation period, a question has arisen as to whether the Court can extend contractual limitation period under section 218. We will continue to monitor developments in this area and provide further updates.

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