Notice of claim may begin limitation period for third party environmental contamination claims

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Summary

In March 2020, the Ontario Superior Court of Justice (the Court) released its decision in *London Transit Commission v Eaton Industries (Canada) Company*, 2020 ONSC 1413. At issue in this decision was whether the defendant's third party claim against the successor to the prior owner of the property was statute-barred under the Ontario *Limitations Act, 2002*, SO 2002, c 24 (the *Limitations Act*). The defendant issued the third party claim almost three years after being served with the plaintiff's original claim. The third party brought a motion for summary judgment, arguing that the third party claim was statute-barred pursuant to the *Limitations Act*. The defendant argued that it did not have knowledge of the potential third party claim when the plaintiff served the statement of claim, as its initial environmental consultant concluded that its property was *not* the cause of the alleged contamination. Justice Mitchell ultimately found that the defendant had actual and implied knowledge of the matters underlying the third party claim at the time the plaintiff served its statement of claim on the defendant, and granted the third party's motion for summary judgment dismissing the third party claim. The decision is currently under appeal to the Ontario Court of Appeal.

In 2018, the Ontario Court of Appeal's decision in *Mega International Commercial Bank (Canada) v. Yung* confirmed that in appropriate cases, discoverability would be the trigger for commencement of a third party claim and the service of a statement of claim would not start the limitations clock. However, the present decision serves as a reminder that parties should consider potential third party claims immediately upon being served with a statement of claim relating to environmental contamination. Knowledge of a lawsuit about environmental contamination and possession of an environmental report relating to such contamination may put a party on sufficient notice to investigate sources of contamination that could trigger third party claims.

Background

The factual background was not in dispute. Eaton Industries (Canada) Company (Eaton) was the successor to Eaton Automotive Products Ltd. (EAPL). EAPL owned certain property (the LTC Property) from 1949-1973, and carried on automotive

manufacturing operations at the LTC Property during this time. The defendant in the main action, London Transit Commission (LTC), acquired the LTC Property in 1973. The plaintiff in the main action, Albert Bloom Limited (Bloom), was the owner of property (the Plaintiff Property) neighbouring the LTC Property. The LTC Property was located to the east of the Plaintiff Property. Another defendant in the main action, Ramsden Industries Limited (Ramsden), owned the property to the southwest of the Plaintiff Property.

Bloom discovered in 2011 that the contaminant TCE was present at the Plaintiff Property and further investigated the alleged contaminant. On February 3, 2012, Bloom advised the LTC of its claim that the LTC Property caused environmental contamination on the Plaintiff Property, and provided the LTC with five environmental reports in support thereof. On November 30, 2012, Bloom issued a notice of action against the LTC and Ramsden. On May 22, 2013, Bloom served its statement of claim and notice of action to the LTC. At this time, Bloom also provided the LTC with a further environmental report to support the claim.

In January 2014, the LTC served its statement of defence, counterclaim and cross-claim. In the statement of defence, the LTC suggested that if the LTC Property contributed to the alleged contamination of the Plaintiff Property, then the prior owner of the LTC Property caused such contamination. However, the LTC did not issue its third party claim at this time. The Court noted that, at the time, it was publicly available information that EAPL used the LTC Property to manufacture automotive parts.

On March 16, 2016, the LTC commenced the third party claim against Eaton, alleging that EAPL contaminated the LTC Property between 1949 and 1973. Eaton then commenced the motion for summary judgment, claiming that the LTC's third party claim was statute-barred by the *Limitations Act*.

Decision

In her decision, Justice Mitchell explained the purpose of limitation periods generally, and outlined the relevant provisions of the Ontario *Limitations Act*. Justice Mitchell noted that there are additional considerations where a claim is a third party claim. Specifically, section 18 of the *Limitations Act* states that the date on which a party is served with the original claim, pursuant to which it seeks contribution and indemnity, is the relevant date for the purposes of the limitation period. This date starts the two-year limitation period for claims of contribution and indemnity. Justice Mitchell found that the LTC had actual knowledge of the matters underlying a third party claim by no later than May 22, 2013.

As the limitation period for the third party claim was presumed to have commenced on May 22, 2013, the claim was presumptively statute-barred, but could be rebutted if the LTC could prove it did not know, or ought not to have known, of the matters on which its third party claim was based. The LTC argued that it did not have actual or implied knowledge that the cause of the alleged contamination of the Plaintiff Property was the LTC Property.

Justice Mitchell disagreed and found that, among other things, the LTC had numerous environmental reports that identified the LTC Property as a possible contaminant and thus had actual knowledge with respect to a claim against Eaton by no later than May 22, 2013. Further, Justice Mitchell held that the LTC did not act with due diligence in

addressing the issues of environmental contamination and should have begun an investigation sooner. What investigation will be required to meet this standard will depend on the facts of each case.

Justice Mitchell therefore held that the LTC failed to act reasonably and diligently to discover its potential claim against Eaton, and stated that "it was not open to the LTC to simply ignore the abundance of information provided to it suggesting a predecessor in title to the LTC contaminated the LTC Property," even though its own consultant was alleged to have provided advice to the contrary. Significantly, however, that advice was not filed and not available to the motions judge.

Accordingly, as all of the LTC's claims arose from the same alleged tortious conduct, all of the LTC's claims against Eaton were statute-barred. Justice Mitchell granted Eaton's motion for summary judgment and dismissed the LTC's third party claim.

Implications

Ontario's *Limitations Act* creates a presumed start date for the running of limitation period as two years following the date on which it is discovered. That start date can be rebutted if the party seeking to bring a claim for contribution and indemnity proves that the later claim was not discovered or capable of being discovered with the exercise of due diligence until some later date. This case demonstrates that the onus to rebut the presumption may be quite high and a party seeking to extend the limitation period should be prepared to disclose all evidence it relied on its decision making process. It should also be noted that section 17 of Ontario's *Limitations Act* provides that there is no limitation period in respect of an environmental claim that has not been discovered.

Similarly, the Alberta *Limitations Act*, RSA 2000, c L-12 also provides that a claim is statute-barred if an action is not commenced within two years following the date on which it is discovered. However, the Alberta *Environmental Protection and Enhancement Act*, RSA 2000, c E-12,provides judges with discretion to grant an extension of a limitation period in environmental contamination cases. Last year, the Alberta Court of Appeal confirmed the test that applies when a party makes an application to extend a limitation period for environmental contamination cases. BLG has previously discussed that decision.

Both Ontario's and Alberta's approaches emphasize the party's knowledge of the facts underlying an action. An affected party may not discover the harmful impact of environmental contamination for years after the initial, or ongoing, release of the impugned substance. Thus, the enforcement of traditional limitation periods may lead to unfairness if a party is precluded from commencing an action even where that party could not have known of the harmful effects of the contamination.

However, if a party is served with a statement of claim or with environmental reports relating to alleged environmental contamination, this may constitute knowledge of a potential third party claim. Accordingly, the party should begin investigating the alleged contamination or risk the claim being statute-barred by a limitation period. These issues of discoverability and relevant limitation periods in environmental claims are nuanced and BLG will continue to monitor developments in this area.

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