Court of Appeal clarifies limitation periods for third party claims

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On Feb. 4, 2021, the Court of Appeal for Ontario released its decision in *Albert Bloom Limited v. London Transit Commission*, 2021 ONCA 74. This decision clarifies the approach to limitations disputes with respect to third party claims; in particular, the analysis of when a defendant is deemed to develop actual knowledge of a potential claim against a third party and how continuing torts are to be treated in the context of third party claims.

Background

The plaintiff, a private property owner, sued the London Transit Commission (LTC) on May 22, 2013, alleging that its property had been contaminated by Trichloroethylene that had flowed from adjacent lots owned by LTC. LTC defended the claim in January 2014, yet continued to resist demands by the plaintiff to investigate its property until the end of that year. After completing the testing and determining that Eaton, a previous landowner, had operated a sludge pit on the property before 1973, LTC brought a third party claim against Eaton on March 16, 2016.

Eaton brought a motion for summary judgment, arguing that all of LTC's claims against it had been discoverable as of May 22, 2013 and had therefore expired two years later, pursuant to the *Limitations Act*. The motion judge agreed and dismissed the third party claim in its entirety.

The Court of Appeal decision

The Court dismissed the appeal, dealing with each of LTC's submissions in turn.

With respect to the claim for contribution and indemnity, the Court began by noting that LTC bore the onus of demonstrating that its claim against Eaton was not discoverable on the day it was served with the Statement of Claim. The Court rejected LTC's submission that there is a general rule that sub-surface testing is required to establish actual knowledge of prior contamination in environmental contamination cases. A paragraph in LTC's Statement of Defence which blamed any contamination on a previous owner of its property also did not assist LTC's submissions in this regard. The

Court found that LTC had not met its onus to prove this was a mere “boilerplate”, pleading that did not indicate actual knowledge. The Court also held LTC had constructive knowledge of its third party claim more than two years before it was commenced, as it did not act with due diligence when it ignored the plaintiff’s demands for further investigation.

The Court also dismissed LTC’s alternative argument that because the claim against it was based on a continuing tort, its third party claim was similarly based on continuous conduct such that the limitation period had not expired. The Court explained Eaton’s involvement with the property had ended in 1973 and for a claim to be continuing in a limitations sense, the legal injury itself must continue, not just the ill effects of the prior legal injury.

Commentary

This decision highlights the importance of due diligence when responding to new claims ensuring that limitation periods for third party claims are not missed. Environmental lawsuits raise distinct factual issues, but the underlying legal principles remain the same for all claims for contribution and indemnity. The decision also reminds litigants that pleading choices which may seem harmless when made can have unintended effects on a party’s legal rights at a later stage.

By

Aidan Fishman, Natalie D. Kolos

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
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Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

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1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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