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Solving the Cause and Time Dilemma for Limitation Period in Contaminated Site Claims

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Agenda

- 1. *The Applicable Legislation.***
- 2. *Lakeview Village Professional Centre Corporation v. Suncor Energy Inc., 2016 ABQB 288 (“Lakeview”).***
- 3. *Brookfield Residential (Alberta) LP v. Imperial Oil Ltd., 2017 ABQB 218 (“Brookfield”).***
- 4. *Implications for Environmental Site Assessments.***

Applicable Legislation

- *Limitations Act*, RSA 2000, c L-12, Section 3

If a claimant does not seek a remedial order within:

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known that the injury:

(i) for which the claimant seeks a remedial order had occurred; (ii) was attributable to conduct of the defendant, and (iii) warrants bringing a proceeding;
OR

(b) 10 years after the claim arose whichever period expires first.

Applicable Legislation

- *Environmental Protection and Enhancement Act, RSA 2000, c E-12 (EPEA).*
- EPEA regulatory mechanisms/tools to address contaminated sites:
 - Part 5 – Division 1 (Releases of Substances Generally)
 - Part 5 – Division 2 (Contaminated Sites Designation)
 - Part 6 (Conservation and Reclamation - decommission & decontamination)
- Liability based on concept of “Polluter Pay.”
- Joint & several except Div. 2 permitting cost apportionment.
 - Regulatory (EPOs for clean-up) and Civil Action (Contract/Tort).
 - Persons responsible - Div. 1: (i) owner and previous owner of substance; (ii) every person who has or has had charge, management or control of the substance; (iii) successor, assignee, executor, administrator, receiver, receiver-manager or trustee of both groups; (iv) principal or agent of all groups.

Test for Persons responsible: Relationship to the substance/release

Applicable Legislation

- EPEA, Section 218

(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 may be made before or after the expiry of the limitation period.

(3) the judge shall consider the following factors, where information is available:

(i) when the alleged adverse effect occurred;

Applicable Legislation

(ii) 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;

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

(iv) any other criteria the court considers to be relevant.

Case Law

- Section 218 was added in EPEA in 1998.
- Only 5 cases in Alberta have considered or applied this section:
- *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*, 2001 ABQB 182 (Alta. Q.B.) (**dismissed**);
- *Wainwright Equipment Rentals Ltd. v. Imperial Oil Ltd.*, 2003 ABQB 898 (Alta. Q.B.) (**granted**);
- *Floate v. Gas Plus Inc.*, 2015 ABQB 725 (Alta. Q.B.) (**N/A**)
- Lakeview (**procedural issue**); and
- Brookfield (**substantive issue**).

Case Law

- Purpose of section 218 is to:
- “extend the period during which the civil proceedings can be initiated for damages to the environment. We think this is sensible for some harmful effects may not be evident for several years. We're seeing that occur on occasion. The amendment sets out the conditions that the judge must consider when deciding whether to extend the limitation period, so the system should not be open to abuse.”
 - Alberta, Legislative Assembly, Hansard, 24th Leg, 2nd Sess, (April 6, 1998) at 1385).

Lakeview – 2016 ABQB

- **Facts:** Gulf Oil (now Suncor Energy Inc.) had owned the lands and operated the gas station from **1969 to the mid-1980s**.
- In May **1988**, Commonwealth Business Management Ltd. (Commonwealth) purchased the lands from Suncor.
- Lakeview purchased the land in **1998** from Commonwealth.
- As a condition of its offer, Lakeview had asked Commonwealth to provide information about the environmental state of the lands.
- At this time the gas station was gone and the underground storage tanks had been removed. Commonwealth commissioned a Phase II Environmental Assessment from a professional environmental consultant.

Lakeview – 2016 ABQB

- **Facts (cont'd):**” Consultant concluded that there was “no evidence of significant contamination on the subject property and ***no further investigation is warranted at this time.***”
- In 2013, Lakeview sought to sell the lands to Majestic Realty, prompting another environmental assessment.
- This time, a Phase I and Phase II Environmental Assessment found hydrocarbon contamination at a level requiring remediation.
- Lakeview began remediation of the lands, spent over \$400,000, and commenced an action against **former owners of the lands, including Suncor and Commonwealth.**
- Lakeview applied for an extension of limitation period under section 218.

Lakeview – 2016 ABQB

- **Decision:** determined the procedure that applies to limitation extension application:
- Entirely a discretionary remedy considering the 4 factors: (i) **when the adverse effect occurred (timing)**; (ii) whether the adverse effect ought to have been discovered by the claimant through the exercise of **due diligence**; (iii) whether the defendant will be **prejudiced** from maintaining a defence to the claim on the merits; and (iv) any other relevant criteria.
- Only way the Plaintiff to know whether to spend its resources pursuing this action.
- Preliminary or Conclusive determination? **Sufficiency of evidence on a balance of probabilities is critical.**
- To justify moving to trial under s 218, the plaintiff must meet a certain threshold on the s 218 factors: a good arguable case

Lakeview – 2016 ABQB

- **Decision (cont'd)**: following two-step approach:
- (i) Is there **sufficient evidence** on the s 218 factors to grant an extension of the limitation period?
- If evidence is insufficient or if an issue for trial could be determined prematurely, **has the claimant shown a good arguable case for an extension?**
- If so, the claimant is entitled to an extension of the limitation period **subject to a final determination of the issue at trial.**
- The Court found no conclusive evidence of **timing** of contamination (and who is responsible).
- Lakeview similarly made inquiries and reasonably relied on the Consultant's Report. It would be too onerous to expect a prospective purchaser to do more. **Due diligence** was met.

Lakeview – 2016 ABQB

- **Decision (cont'd)**: Neither Suncor nor Commonwealth presented any evidence that an extension to the limitation period would **prejudice** their ability to maintain a defence on the merits.
- Commonwealth did not persuade the Court that the scope of s. 218 is **limited to parties that cause or contribute to the contamination of lands**. The wording of the section is broad. Its opening paragraph refers to civil proceedings "**where the basis for the proceeding is an alleged adverse effect**".
- **Granted**: Limitation period was extended based on a good arguable case, **subject to a final determination of the issue at trial**, with Suncor and Commonwealth as Defendants.

Brookfield – 2017 ABQB

- **Facts:** similar facts. Brookfield sued Imperial Oil Limited and others for contaminated soil on property it's predecessor, Carma Developers Ltd. (Carma) purchased from the other Defendants in 2003.
- Not disputed that the property has been contaminated by substances associated oil wells drilled by Imperial in **1949**.
- As part of its due diligence, Carma retained Hoggan Engineering and Testing (1980) Ltd. (also a Defendant in this action) to conduct a Phase I Environmental Site Assessment in 2003 which concluded that the overall potential for environmental contamination at this site is considered to be low, and no further investigation is considered to be necessary.
- In 2006, Brookfield commissioned another Phase 1 ESA, to support the development of the neighborhood plan, which discovered the wells.

Brookfield – 2017 ABQB

- **Facts (cont'd)**: Brookfield commissioned Phase II ESA in 2008 but the smell of hydrocarbons became obvious in 2010, that led to further investigations by Stantec which revealed the contamination and the adverse effects.
- Brookfield remediated the site for residential development and sued.
- Imperial brought a **summary dismissal application**, asserting a limitations defence under the *Limitations Act* and also claimed it owed no duty of care to Brookfield (defence to negligence).
- Brookfield **cross-applied under s 218 of EPEA** asserting that the adverse effect occurred while Imperial had an interest in the lands.

Brookfield – 2017 ABQB

- **Decision**: The Lakeview approach may be appropriate where there is a stand-alone s. 218 application, but where there is the cross-application for summary dismissal, and the parties are required to put their "best foot forward" (on a balance of probabilities).
- There is insufficient evidence to determine when the adverse effect occurred (**timing**).
- It was reasonable for Brookfield to rely on the Report's recommendation that no further investigation was necessary, when it decided to purchase the property (**Due diligence**).
- Imperial gave evidence of **prejudice**: the lapse of time, lists the loss of key witnesses, key documents and records, loss of ability to test and analyze the contaminated earth itself, *virtual impossibility to obtain expert witnesses on the standard of care 40 years ago, and the loss of the ability to assess causation between various potential sources of contamination.*

Brookfield – 2017 ABQB

- **Decision (cont'd): the Court found the prejudice factor to be the most determinative.** Events that occurred more than 60 years before action was commenced.
- Using the framework established in Lakeview, there is sufficient evidence on which to balance the section 218 factors.
- The Plaintiff has sued in negligence, requiring evidence of standard of care, among other things. Calling the expert evidence required to establish the standard of care 60 years later would be, in the words of our Court of Appeal, "impossible".
- **Additional factors:** might include an element of **deceit**, concealment, evidence of gross negligence or recklessness might also be persuasive.
- This case does not meet the threshold for reaching back decades after the limitation period expired. **Denied.**

Implications

- Purchasers and sellers of real property rely on environmental reports and recommendations at the time of their transaction. (Due diligence factor in s. 218).
- Lakeview: **1998** Phase II Environmental Assessment Report concluded “***no evidence of significant contamination on the subject property and no further investigation is warranted at this time.***” Is this enough?
- **2013** Phase I and Phase II found hydrocarbon contamination at a level requiring remediation. Why? Remediation Standards may have changed.
- What is a better approach to shield clients from future exposure to regulatory changes?

Implications

- Causation and timing of contamination = who may be responsible.
- Environmental reports is the only way a Plaintiff will know whether to spend significant resources pursuing a claim.
- The threshold for s 218 claim is “a good arguable case” but may not be enough in a summary judgement context.
- Sufficiency of evidence timing, ***on a balance of probabilities***, is critical.
- Is your Phase II Environmental Assessment able to determine that for s. 218 parties?

Thank you and Questions?

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