Case Law Update: Alberta Court of Appeal Confirms that a Plaintiff May Lose the Right to Sue for Historic Contamination Because of the Passage of Time and Procedural Requirements

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On February 6, 2019, the Alberta Court of Appeal upheld the proclamation of the Alberta Court of Queen's Bench in Brookfield Residential (Alberta) LP (Carma Developers LP) ("Brookfield").[1] *The Court of Appeal found that the plaintiff was out of time to bring its claim forward and that an extension of the ultimate limitation period was not merited. The Court of Appeal provided further guidance about when an extension of an ultimate limitation period for historic environmental contamination may or may not be allowed.*

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.[2]

What occurs where a plaintiff discovers historic contamination that is greater than 10 years old? We previously reported based on the Alberta Court of Queen's Bench decisions in *Brookfield Residential* and *Lakeview Village*[3] that in this circumstance, section 218 of Alberta's *Environmental Protection and Enhancement Act* ("*EPEA*") allows a plaintiff to bring an application to the Court seeking an extension of the 10-year ultimate limitation period.[4]

So what has changed? The Alberta Court of Appeal has confirmed that the passage of significant time may be detrimental to a plaintiff's quest to extend the ultimate limitation period, and that while *EPEA* section 218 is available to a plaintiff to attempt to extend a limitation period, several factors, including procedural factors, may preclude the plaintiff from succeeding in its application.[5]

In *Brookfield*, the plaintiff discovered that its property was contaminated with petroleum hydrocarbons in 2010. The defendant had previously drilled an oil well on the property in 1949 and undertook remediation work in about 1961. A Reclamation Certificate under Alberta's old legislative regime was issued for the property in 1968.[6]

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1 *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Ltd*, 2019 ABCA 35 [*Brookfield ABCA*].
2 *Limitations Act*, RSA 2000, c L-12, s 3(1).
3 *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Ltd*, 2017 ABQB 218 [*Brookfield ABQB*]; *Lakeview Village Professional Centre Corporation v Suncor Energy Inc*, 2016 ABQB 288 [*Lakeview*].
4 *Environmental Protection and Enhancement Act*, RSA 2000, c E12, s 218 [*EPEA*].
5 *Brookfield ABCA* at paras 10, 15, 16.
6 *Brookfield ABCA* at paras 2-3.

The plaintiff brought an application asking the Court to extend the ultimate limitation period pursuant to *EPEA*, s. 218. The plaintiff argued before the Alberta Court of Queen's Bench that it exercised due diligence in discovering the contamination and that an extension of the limitation period would not prejudice the defendant. The Alberta Court of Queen's Bench accepted that the Plaintiff exercised sufficient due diligence,[7] but otherwise disagreed with the Plaintiff, citing "significant prejudice" to the defendant.[8]

The Court of Appeal upheld the Alberta Court of Queen's Bench decision that the defendant would suffer "significant prejudice" if the limitation period is extended.[9] However, that is not where the Court of Appeal ended its consideration. The Court of Appeal added the following considerations for the extension of the ultimate limitation period and use of *EPEA*, s. 218:

- a judge must balance the policy objective of protecting defendants from ancient obligations against fairness concerns with environmental contamination.[10]

- a long passage of time creates significant prejudice for a defendant because it makes it difficult to establish the proper industry standards.[11] The Court of Appeal held that it cannot adjudicate historic claims against today's standard of care.[12] Further, the Court of Appeal confirmed that the defendant would have a difficult time in locating an expert to speak to the industry standards in place at the time the contamination occurred.[13]

- a plaintiff cannot wait until trial to seek an extension under *EPEA*, s. 218. The Court of Appeal held that a plaintiff must seek the extension to the limitation period in a separate pre-trial application.[14] The Court of Appeal found that to wait until trial to bring the *EPEA*, s. 218 application defeats the purpose of providing finality to defendants where the 10-year ultimate limitation period has expired, requiring them to proceed with all the litigation steps and costs to get to trial before a determination on the limitation period is made.[15]

Brookfield presents an interesting intersection between the polluter pays principle adopted by the Supreme Court of Canada and the principle of finality intended by Alberta's *Limitations Act*. The Alberta Court of Appeal's decision in Brookfield suggests that the concept of polluter pays is not absolute; rather, reaching back in time to seek recourse against a polluter will be balanced against the prejudice to the polluter.

What remains clear is that any *EPEA*, s. 218 application needs to be brought prior to trial. Given the highly fact-specific nature of environmental claims and their discovery, whether the limitations period will be extended is highly dependent on the evidence the parties will put before the Court.

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7 *Brookfield ABQB* at para 67.
8 *Brookfield ABQB* at para 109.
9 *Brookfield ABCA* at para 14.
10 *Brookfield ABCA* at paras 12-13.
11 *Brookfield ABCA* at para 15.
12 *Brookfield ABCA* at para 12.
13 *Brookfield ABCA* at para 16.
14 *Brookfield ABCA* at para 11.
15 *Brookfield ABCA* at para 10.

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