In the Court of Appeal of Alberta

Citation: Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2019 ABCA 35

Date: 20190206
Docket: 1703-0111-AC
Registry: Edmonton

Between:

Brookfield Residential (Alberta) LP
formerly known as Carma Developers LP

Appellant
(Plaintiff)

- and -

Imperial Oil Limited

Respondent
(Defendant)

- and -

William Darling as Litigation Representative
for the Estate of Larry C.M. Darling,
Hoggan Engineering & Testing (1980) Ltd., and Ecomark Ltd.

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice R.A. Graesser
Dated the 28th day of March, 2017
Filed on the 28th day of March, 2017
(2017 ABQB 218, Docket: 1203 06749)

Memorandum of Judgment

The Court:

[1] The appellant appeals the summary dismissal of its action against Imperial Oil. The action was dismissed because it was commenced after the expiry of the limitation period: ***Brookfield Residential (Alberta) LP v Imperial Oil Ltd.***, 2017 ABQB 218, 53 Alta LR (6th) 288. The chambers judge dismissed a cross-application under s. 218 of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 to extend the limitation period.

Facts

[2] The appellant Brookfield Residential is the owner of a parcel of land in South Edmonton that it proposes to develop into a residential subdivision. Testing conducted in 2010 revealed that the land was contaminated with hydrocarbons and salt. The respondent Imperial Oil drilled an oil well on the lands in about 1949, which the appellant alleges is the source of the contamination.

[3] The relevant chronology is as follows:

1949	Imperial Oil drilled the well, constructed an associated waste disposal (sump) area, and commenced oil production;
1950-54	Imperial Oil sold the well to Bay Petroleum;
1957	Crude oil production ceased, and the well was used for salt water disposal;
1961	Tenneco (the then owner) contracted the defendant Darling to decommission and abandon the well;
1968	A Reclamation Certificate was issued under the new *Surface Reclamation Act*, SA 1963, c. 64;
2003-4	Carma Developers (predecessor of Brookfield Residential) contracted to purchase the land. A Phase I environmental assessment found nothing of concern, and no further testing was recommended;
2006	A Stantec Phase I environmental assessment located an abandoned water disposal well and recommended further testing for contamination;

2008 An Ecomark Phase II environmental assessment reported no unusual levels of hydrocarbons, and did not recommend further testing;

2010 Persistently strong hydrocarbon odors during grading operations led to further soil tests by Stantec, which revealed levels of hydrocarbons and salt requiring site remediation.

Brookfield Residential commenced this action in May 2012, seeking damages against several entities (including Imperial Oil) arising from the environmental contamination of the land.

[4] Imperial Oil brought an application for the summary dismissal of the claim against it on the basis that the limitation period had expired. Brookfield Properties responded by bringing a cross-application for an extension of the limitation period under s. 218 of the *Environmental Protection and Enhancement Act*:

> 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 under subsection (1) may be made before or after the expiry of the limitation period.
>
> (3) In considering an application under subsection (1), the judge shall consider the following factors, where information is available:
>
> (a) when the alleged adverse effect occurred;
>
> (b) 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;
>
> (c) whether extending the limitation period would prejudice the proposed defendant's ability to maintain a defence to the claim on the merits;
>
> (d) any other criteria the court considers to be relevant.

Since the statement of claim had clearly been issued well after the limitation period had expired, and well after the ten year ultimate limitation period in s. 3(1)(b) of the *Limitations Act*, RSA

2000, c. L-12, the appellant's case was entirely dependent on an extension of the limitation period.

[5] The chambers judge concluded that this was not an appropriate case to extend the limitation period:

> 101 ... While there is some doubt about when the alleged adverse effect occurred, there is sufficient evidence to conclude that it occurred sometime between 1949 and the Well abandonment in 1961. I find that Brookfield has exercised sufficient due diligence. However, I also find that Imperial will suffer significant prejudice if I were to extend the limitation period.
>
> 102 While the Legislature has given the Court the discretion to extend the limitation period for actions related to environmental contamination, it has provided a number of specific factors to consider, including prejudice to the Defendant. Keeping in mind that the purpose of balancing these interests is clearly to ensure that the system is not open to abuse, I find that permitting an action to go ahead more than 60 years after the Defendant last was involved in the Well would be an abuse . . .
>
> 108 While it may be tempting to hold those responsible for environmental contamination accountable for their deeds, that objective must be tempered with fairness and a recognition of sound bases for limitation periods.
>
> 109 This case does not meet the threshold for reaching back decades after the limitation period expired.

He therefore summarily dismissed the action against Imperial Oil. This appeal followed.

The Extension of the Limitation Period

[6] It is difficult on this record to tell when the limitation period expired. Under s. 51(f) of the previous *Limitation of Actions Act*, RSA 1980, c. L-15, it likely expired two years after the cause of action arose. The limitation period does not recommence every time the cause of action or the property is transferred: *Limitations Act*, s. 3(2). Further, while the damage to the land is continuous, that does not mean that there is a continuous breach of duty that would start the limitation period running anew every day: ***Wewaykum Indian Band v Canada***, 2002 SCC 79 at para. 135, [2002] 4 SCR 245; ***Champagne v Sidorsky***, 2018 ABCA 394 at para. 12. That approach would effectively mean that there is no limitation period in play with respect to damage to real property. The breach of duty occurred whenever the land was contaminated, and the limitation period started to run as soon as that contamination was reasonably discoverable.

[7] Assuming (as the appellant alleges) that Imperial Oil was responsible for the contamination because it occurred at the time that the well was drilled, it is clear that the ten year ultimate limitation period had expired. Unless the limitation period was extended under s. 218 of the *Environmental Protection and Enhancement Act* there was "no merit" to the claim, and it was properly summarily dismissed.

[8] Applications under s. 218 of the *Environmental Protection and Enhancement Act* are generally decided pre-trial: ***Jagar Industries Inc. v Canadian Occidental Petroleum Ltd.***, 2001 ABQB 182, 294 AR 355; ***Wainwright Equipment Rentals Ltd. v Imperial Oil Ltd.***, 2003 ABQB 898, 343 AR 191.

[9] An alternative approach was suggested in ***Lakeview Village Professional Centre Corp. v Suncor Energy Inc.***, 2016 ABQB 288, 39 Alta LR (6th) 193. ***Lakeview Village*** suggested at para. 19 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. The first problem with this approach is that it is inconsistent with the wording of s. 218, which provides that the limitation period can be extended "on application".

[10] The second problem with the ***Lakeview Village*** approach is that it is ultimately circular. Statutes of limitation are statutes of repose. They are designed to relieve the defendant of the distractions, expense, and risks of litigation after the prescribed time has passed. Sending a s. 218 application to trial defeats the whole purpose. It assumes that the trial would proceed on the merits. If the defendant wins on the merits, that concludes the matter, but the defendant has now been exposed to the expense and inconvenience of a trial. If the defendant loses on the merits, that is just a preliminary conclusion. One must then decide if the defendant lost because it was prejudiced by the passage of time and its inability to mount a full defence to the action. If it was so prejudiced, then there would be no basis for extending the limitation period. As a result, even though the defendant "lost" on the merits, it would now "win" on the limitation argument. But because the defendant has now been forced to go through a full trial on the merits, it has lost virtually all of the repose that the limitation statute was designed to bring. The ***Lakeview Village*** approach should accordingly not be followed; applications under s. 218 should be decided prior to trial.

[11] The *Environmental Protection and Enhancement Act* lists some factors that must be considered on an application to extend the limitation period: (a) when the adverse effect occurred, (b) whether the claimant exercised due diligence in discovering it, and (c) whether there would be prejudice to the defendant's ability to defend the claim. Section 218(3)(d) also permits consideration of any other criteria the court considers relevant. A decision to extend the limitation period should have regard to the policy considerations behind both the *Limitations Act* and the *Environmental Protection and Enhancement Act*.

[12] As noted, statutes of limitation are statutes of repose and finality. Actions must be commenced within set periods because:

(a) it is in the public interest that defendants be protected from ancient obligations, and that they be allowed to order their affairs going forward on the basis that those obligations will no longer be enforced;

(b) disputes should be resolved while evidence is still available, when the memories of witnesses are still fresh, and when (if necessary) pertinent expert evidence can be obtained;

(c) it is not unreasonable to require claimants to act in a timely manner, and to put defendants on notice of claims against them;

(d) claims should be adjudicated based on the standards of conduct and liability in place at the time, and not by applying the standards of today with hindsight.

These objectives are considered to be important elements of public policy: ***Canadian Imperial Bank of Commerce v Green***, 2015 SCC 60 at para. 207, [2015] 3 SCR 801; ***Canada (A. G.) v Lameman***, 2008 SCC 14 at para. 13, [2008] 1 SCR 372; ***Bowes v Edmonton (City)***, 2007 ABCA 347 at paras. 119-28, 86 Alta LR (4th) 47, 425 AR 123.

[13] The discretion to extend limitation periods found in the *Environmental Protection and Enhancement Act* reflects competing policy objectives:

(a) the objective of much environmental legislation is that the "polluter pays", and in some circumstances a polluter should not escape responsibility by the mere passage of time; and

(b) environmental contamination may be difficult to detect, meaning that the strict application of the "discoverability" rule to environmental claims may be unreasonable or unfair in some situations.

It is noteworthy that the *Environmental Protection and Enhancement Act* implicitly recognizes the policy objectives behind limitation statutes. It does not abolish limitation periods for environmental claims (as s. 3.1 of the *Limitations Act* does for sexual assaults), but merely provides a judicial discretion to extend them. A balancing is therefore required of the competing policy objectives in the two statutes.

[14] The chambers judge considered the factors mentioned in s. 218. He noted that the tortious act alleged against Imperial Oil likely occurred over sixty years ago. The action was commenced well after even the ten year ultimate limitation period. The chambers judge agreed that the claimant had acted with diligence in discovering the contamination. He concluded, however, that the passage of time would cause serious prejudice to Imperial Oil if the limitation period was extended. Imperial Oil retained only limited documentary evidence about the oil well, and it believed it may have turned over many key documents to its successors in title. It could not even identify the employees that were involved in the drilling and operation of the well. It was not an error of principle for the chambers judge to infer prejudice based on the passage of time, and to infer greater prejudice the greater the passage of time. That, after all, is the presumption behind statutes of limitation.

[15] A long passage of time makes it difficult to establish the proper standard of care. Setting the standard of care is contextual, relating to the time, place and level of knowledge and understanding of the industry. Modern standards of conduct should not, with hindsight, be applied to torts that occurred in another era: ***ter Neuzen v Korn***, [1995] 3 SCR 674 at para. 34; ***Nattrass v Weber***, 2010 ABCA 64 at paras. 28-9, 23 Alta LR (5th) 51, 477 AR 292. It might not be impossible to demonstrate the standard of care, despite the passage of decades, but it was not an error for the chambers judge to infer that attempting to do so in this case would prejudice Imperial Oil.

[16] Other relevant factors included the difficulty of locating expert witnesses who would be in a position to speak to industry standards in 1949: reasons at paras. 91-3, 103. Identifying exactly when the contamination occurred, what was the legal cause of it, and which defendant might have been responsible for it, presented difficult problems of proof. The fact that the Government of Alberta issued a reclamation certificate in 1968 inferred that industry standards of the day were met.

[17] The appellant argued that Imperial Oil passed up opportunities to review the test data prepared by Stantec, to do its own testing of the lands, and to participate in the remediation. Unless, however, Imperial Oil had a legal duty to do something about the contamination, it had no obligation to get involved.

[18] The findings of the chambers judge on issues like prejudice and due diligence are findings of fact that should not be disturbed on appeal unless they reflect palpable and overriding error. The ultimate decision on whether or not to extend the limitation period includes an element of discretion. Such discretionary decisions should not be disturbed unless they are based on an error of principle, they consider irrelevant factors, or they are clearly unreasonable. The decision by the chambers judge not to extend the limitation period is amply supported by this record.

Conclusion

[19] In conclusion, the appellant has failed to show any reviewable error, and the appeal is dismissed.

Appeal heard on September 7, 2018

Memorandum filed at Edmonton, Alberta
this 6th day of February, 2019

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Court of Appeal of Alberta

Watson J.A.

Slatter J.A.

Wakeling J.A.

Appearances:

D.J. Hannaford/D.A. Curcio Lister
for the Appellant

A.C. Bochinski/C.W. Brusnyk
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