

## Extending Limitation Periods for Environmental Actions

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Case Commented On: *Lakeview Village Professional Centre Corporation v Suncor Energy Inc*, [2016 ABQB 288 \(CanLII\)](#)

The nature of environmental contamination often requires the bending of usual legal rules. Because contamination can take years to develop or be discovered, the application of traditional limitation periods to actions for the recovery of damages from environmental contamination could result in unfairness. It could also mean the ultimate costs of clean-up would fall to the public purse if no financially viable party is liable for the clean-up. Alberta has modified its statutory limitation periods to address this problem. Section 218 of the *Environmental Protection and Enhancement Act*, [RSA 2000, c. E-12 \(EPEA\)](#) allows a court to extend a limitation period “where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment.” After years on the books, this is the first case to clarify the procedure courts should follow under section 218 of the *EPEA*.

### Facts

The plaintiff, Lakeview Village Professional Centre Corporation (Lakeview), purchased land in the Lakeview subdivision of Calgary in 1998. The land consisted of a commercial building, two parking lots and a surrounding landscaped area. At the time of purchase, Lakeview was aware that there had been a former gas station on the site. (at para 1) 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) had purchased the lands from Suncor.

As a condition of its offer, Lakeview had asked Commonwealth to provide information about the environmental state of the lands. By this time, the gas station was gone and the underground storage tanks had been removed. Commonwealth commissioned a Phase II Environmental Assessment Report from a professional environmental consultant who concluded that there was “no evidence of significant contamination on the subject property and no further investigation is warranted at this time.” (at para 27)

Several years later in 2013, Lakeview received an offer to purchase the lands, prompting another environmental assessment. This time, a Phase I and Phase II Environmental Assessment found hydrocarbon contamination at a level requiring remediation. Lakeview commissioned a Phase III Environmental Assessment and began remediation of the lands. This included the removal of contaminated soil and buried concrete and metal piping, and backfilling the site with clean soil. To date, Lakeview had spent over \$400,000 for the remediation and further costs were likely (at para 29).

To recoup some or all of these costs, Lakeview commenced an action against former owners of the lands, including Suncor and Commonwealth. As noted by Justice Sheilah Martin,

“[n]ormally, the Plaintiff’s action would be out of time under the *Limitations Act*, as these events occurred well past the 10-year ultimate limitation period.” (at para 3). Relying on section 218 of the *EPEA*, Lakeview applied for an extension.

Section 218 reads as follows:

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.

In reviewing Hansard evidence, Justice Martin concluded that the purpose of section 218 is to extend the period in which civil proceedings can be initiated for damages to the environment, “recognizing that harmful effects of contamination may not be evident for several years” (at para 7). The factors set out in subsection 218(3), which a judge must consider when deciding whether to extend the limitation period, were adopted so as to ensure that the system for extending limitation periods is not “open to abuse” (at para 7).

### **What is the Procedure for Applications under Section 218 of the *EPEA*?**

Justice Martin began her analysis by noting that applications under section 218 of the *EPEA* are fairly novel. Two cases where section 218 was previously considered did not set forth details about the proper approach. In particular, she queried whether the proper procedure required the court to decide conclusively that the limitation period is or is not extended, or whether the court is to make a preliminary determination only, allowing the plaintiff to go to trial where the limitation argument might be raised again. She noted that in some cases, the plaintiff might present sufficient evidence to satisfy a court to extend the limitation period at a preliminary stage on a balance of probabilities. But in other cases, at this preliminary stage, the evidence may be underdeveloped. There may not be, for example, sufficient evidence that an adverse effect occurred, or when it occurred (at paras 13-14). Such evidence would require expert evidence which may not yet be available.

Moreover, in her view, a conclusive section 218 finding might prematurely determine an issue that is best left for trial. A finding in regard to the subsection 218(3) factors may be inevitably “intertwined with merit-based considerations” (at para 15). For example, Justice Martin noted that a court concluding that a party exercised due diligence in ascertaining an adverse effect may influence findings on the degree of liability for contamination (at para 15).

This prematurity concern, to her mind, requires a court to not necessarily conclusively decide the merits of the limitation issue in an application under section 218. At the same time, however, a plaintiff has a “legitimate interest” (at para 20) in knowing whether to spend further resources on its claim. As a compromise position, Justice Martin concluded that a plaintiff under section 218 must show “a good arguable case” (at para 18) that is grounded in some evidence for an extension of the limitation period.

Justice Martin set forth the following two-step approach for judges to use in section 218 applications:

- (1) Is there sufficient evidence on the s 218 factors to grant an extension of the limitation period?
- (2) If there is not enough evidence to make that determination, or if there is sufficient evidence but 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. (at para 19)

### **Should the Limitation Period Be Extended in This Case?**

Applying this approach to the facts in this case, Justice Martin analyzed the factors set out in subsection 218(3) based on the information available to her. There was some information about when the alleged adverse effect had occurred, placing the contamination on a time frame from 1969 to the mid-1980s at least, and potentially as late as 2013. Justice Martin concluded that this time frame was not “so long ago that it would be unfair to allow the action to proceed against either party” (at para 40).

With respect to the factor of whether the claimant had exercised due diligence in ascertaining the presence of the alleged adverse effect, Justice Martin concluded, on a preliminary basis only, that there was enough evidence before her to conclude that Lakeview had done so. Prior to purchasing the lands, Lakeview was concerned about potential contamination from the gas station, had required Commonwealth to provide information on the environmental status of the property as a condition of the purchase, and had justifiably relied on the Phase II Report prepared by professional environmental consultants. But Justice Martin emphasized that her due diligence findings were preliminary only, and that further evidence could be adduced at trial that could change

this analysis. Moreover, as she stated, the “findings on due diligence may affect the liability analysis that will eventually unfold on the merits” (at para 51).

With respect to prejudice, 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 (at para 52). It seems there were no other relevant criteria that Justice Martin had to take into account. She rejected an argument by Commonwealth that the scope of section 218 should be limited to parties who have caused or contributed to the contamination of the lands (at para 53). The opening words of section 218 do not support such a restrictive interpretation given that they refer to civil proceedings “where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment” Depending on the cause of action, this may or may not impose liability only on those who caused or contributed to the adverse effect.

Thus, based on the evidence before her, Justice Martin concluded that this was the type of case contemplated by section 218. The harmful effects of contamination were not evident for several years, due diligence was shown, and there was no prejudice to the defendants. Nonetheless, she concluded that because there were some merit-based implications on due diligence in particular, an outright extension in this case would not be appropriate. She granted Lakeview an extension of the limitation period subject to a final determination of the issue at trial (at para 56).

## **Commentary**

At first blush, Justice Martin’s conclusion that a ruling under section 218 should only be made on a preliminary basis where an issue for trial might be predetermined seems odd given the language of section 218. Section 218 certainly suggests that a judge can and perhaps should make a final determination on the limitation issue on the application.

Moreover, the single rationale she gives for her conclusion that only a preliminary ruling on Lakeview’s due diligence for the purposes of section 218 should be made is questionable. On at least two occasions, Justice Martin states that a final determination on this issue would not be appropriate “because due diligence is a consideration when determining liability under s 129 of the *Act*” (at para 15) and “[d]etermining the issue could be problematic if new facts emerge at trial that affect the due diligence analysis.” (at para 15) With respect, section 129 of the *EPEA* authorizes the director (of Alberta Environment and Parks) to issue an environmental protection order against a person who is responsible for a contaminated site (as defined in the *EPEA*). It does not necessarily set out the considerations that would be considered in a law suit by Lakeview in, for example, tort or contract law against the former owners of the site. Section 129 has been specifically designed to cast a broader net of potentially liable persons for purposes of government-issued environmental protection orders than might be available under a civil suit based on common law causes of action.

Still, Justice Martin’s point that a final determination on some of the factors under subsection 218(3) might predetermine aspects of the civil claim is well-founded. A more complete evidentiary picture might emerge at trial that might influence the factors listed in that subsection. Thus, her approach strikes an appropriate balance between not deciding anything and deciding too much at this stage in the proceedings. A ruling on whether the plaintiff has established a “good and arguable” case for a limitation extension gives the plaintiff the ability to proceed with the action, while at the same time recognizing that the ruling has been made without a full trial of the action.

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