March 15, 2019

The Discoverability Principle Applies—No Seriously, For Real This Time—to Contract Claims in Alberta

By: Kyle Gardiner

Case Commented On: *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (CanLII)

Last month, the Alberta Court of Appeal delivered its long-awaited decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (CanLII) (*Weir-Jones*). The decision has been much anticipated largely because it clarified the correct standard of proof for summary judgment applications in Alberta (a balance of probabilities). As a bonus, the decision also provided clarification on another topic in which confusing and contradictory lines of authority had emerged in Alberta: the question of whether the discoverability principle applies when determining limitation periods applicable to breaches of contract in Alberta. Does a plaintiff's limitation period for a breach of contract claim commence when the breach occurred, or when the plaintiff ought to have discovered that it had a claim?

This blog post will discuss the current state of limitations law relating to breach of contract cases in Alberta. It will examine the decisions at both levels of court in *Weir-Jones* and discuss some of the cases that preceded them, tracing the discoverability principle through Alberta's successive limitations statutes to explain what went wrong with limitations jurisprudence in Alberta and why clarification was much needed.

Facts and Judicial History

In *Weir-Jones*, the applicant (Purolator) applied for summary dismissal of the action brought by Weir-Jones Technical Services Inc. (Weir-Jones) on the basis that it did not commence its action within the applicable two year limitation period pursuant to section 3(1)(a) of the *Limitations Act*, RSA 2000, c L-12.

Weir-Jones provided services to Purolator pursuant to an agreement commencing in January, 2008. Shortly thereafter, Weir-Jones believed that Purolator had breached its contractual commitments, and it stated its complaints to Purolator in a November 3, 2008 letter. Weir-Jones sent a letter terminating the Agreement in August 2009. The Statement of Claim in the action was filed on July 22, 2011.

At the Court of Queen's Bench (*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2017 ABQB 491 (CanLII) (Chambers Decision)), the Court concluded that Weir-Jones' claim was statute barred, finding that "the applicable authorities confirm that the limitation period for a breach of contract commences on the date of the breach" (para 38).

Weir-Jones appealed, arguing that the limitation period had not expired, and that in any event there was an implied standstill agreement in place suspending commencement of the limitation period while settlement discussions took place.

The Discoverability Principle

The discoverability principle is a rule, now codified, that a plaintiff's limitation period in an action begins to run when the circumstances surrounding its claim could have been discovered through the exercise of reasonable diligence—not necessarily when the plaintiff had actual knowledge of its claim.

The discoverability principle was first codified in the *Limitations Act*, SA 1996, c L-15.1, which came into force on March 1, 1999. Prior to this, the *Limitation of Actions Act*, RSA 1980, c L-15 (the Old Act) distinguished actions "for the recovery of money. . .on a simple contract" and stated that the (six year) limitation period for those claims commenced when "the cause of action arose" (s 4(1)(c)). Prior to the Alberta Court of Appeal's decision in *Weir*-Jones, the jurisprudence in Alberta was in conflict (although limitations statutes were clear) on the question of whether the discoverability principle applied to actions in breach of contract in Alberta. The alternative starting point sometimes chosen by courts in Alberta (and as previous legislation held) is the date the "cause of action arose"—in contract claims, the date of the breach. The Court of Appeal in *Weir-Jones* explained that the discoverability principle has applied to contractual breaches since the legislation was amended in 1999 (at para 52). Case law has been slow to catch up to this fact.

The discoverability principle as codified in the current version of Alberta's *Limitations Act* states:

> **3(1)** Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, 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
>
> i. that the injury for which the claimant seeks a remedial order had occurred,
> ii. that the injury was attributable to conduct of the defendant, and
> iii. that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim. (emphasis added)

Given that the *Limitations Act* has not distinguished claims in contract specifically since the 1999 amendments, it is surprising that Alberta decisions after 1999 have continued to find that the discoverability principle does not apply to breaches of contract in Alberta. What explains this divergence in the case law?

The Chambers Decision

At the Court of Queen's Bench in *Weir-Jones*, Justice Donna Shelley cited (at para 29) the Alberta Court of Appeal in *Luscar Ltd v Pembina Resources Limited*, 1994 ABCA 356 (CanLII) (*Luscar*) confirming that the discoverability principle did not apply to contract actions and that the limitation period under a contract commenced from the date of the breach.

In addition to *Luscar*, Justice Shelley's decision relied on the decisions of *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 (CanLII) (*Papaschase*) and *Fidelity Trust Company v Weiler*, 1988 ABCA 267 (CanLII) (*Fidelity*) in concluding that the discoverability principle does not apply to breaches of contract in Alberta.

In each of those cases, the court was applying the Old Act. In *Luscar*, the Court was applying the Old Act to contracts entered into in the 1970s, in an action commenced in 1986. In *Fidelity*, the Court applied the Old Act to a counterclaim filed in November, 1985 where the contract at issue was executed in June, 1979. In *Papaschase*, the breach (of Treaty 6) actually occurred in the 1880s. As reviewed above, the Old Act that was applied in those cases drew a distinction between claims for breach of contract and other claims, while the Act in force now (and at the relevant time in *Weir-Jones*) does not.

The Chambers Decision in *Weir-Jones* is confusing because while Justice Shelley held that the discoverability principle did not apply, elements of the discoverability doctrine were nevertheless imported into the analysis (see the Chambers Decision at para 36). After stating that the discoverability principle did not apply, Justice Shelley still concluded that the Statement of Claim was filed more than two years after Weir-Jones knew of the alleged breaches (para 37), and summarily dismissed the plaintiff's action. At paragraph 38, the Court held:

> The limitation period commenced when the breaches occurred and the Respondent was aware that the breaches had occurred months before July 22, 2009. I do not accept the Respondent's argument that the limitation period did not commence until the Agreement was terminated and the last of the work completed under it. The applicable authorities confirm that the limitation period for a breach of contract commences on the date of the breach. (emphasis added)

Application of the former doctrine exempting breaches of contract from the discoverability principle was inappropriate given the current *Limitations Act*. In finding that the limitation period commenced "when the breaches occurred" (para 38), Justice Shelly concluded that the applicable limitation period commenced long before the contract for services in that case came to an end and more importantly, long before the proper commencement of the limitation period, being the time when the plaintiffs ought to have discovered their claim.

As it turned out, there was no doubt that Weir-Jones was aware of its claim more than two years before it commenced action. This awareness was explicitly acknowledged in the appellant's factum: “The appellant states that it first became aware of a claim against the Respondents in February 19, 2009, after obtaining a legal opinion from his legal counsel” as referred to by the Court of Appeal (at para 55).

The confusion in the Chambers Decision has deep roots, because even the cases decided under the Old Act were not themselves consistent. In *Luscar*, despite the fact that the discoverability principle had not been codified in the Old Act in force at the time (and the limitation period therefore was to commence when the cause of action—the breach—arose), the Alberta Court of Appeal nevertheless imported the discoverability principle into its analysis. It pointed out that the plaintiffs "had access to the facts required to determine that they had a cause of action," and "the fact they did not so determine is not a burden which the appellant must bear" (para 138).

Interestingly, at trial in *Luscar* (*Luscar Ltd v Pembina Resources Ltd*, 1991 CanLII 5974 (AB QB) (*Luscar* ABQB)), Justice Egbert opined on the issue of whether or not the discoverability principle should apply (at paras 113 & 114):

> Since the decision of the Supreme Court of Canada in *Central & Eastern Trust* was delivered, the courts in Ontario, British Columbia, New Brunswick, Newfoundland, Alberta and the Federal Court of Canada have applied the discoverability rule to claims in contract. In Saskatchewan, Nova Scotia, Manitoba and Prince Edward Island, apparently this question has not yet come before the courts for consideration.
> . . .
> The sole exception to this trend comes from the Alberta Court of Appeal. (emphasis added)

The Alberta Court of Appeal decision to which Justice Egbert refers is the decision in *Fidelity*, where Justice Harradence considered the SCC decision of *Central Trust Co v. Rafuse*, 1986 CanLII 29 (SCC) (*Central Trust*) but held, "[m]y understanding of the *Central Trust* case, however, is that the discoverability rule as set out by the Supreme Court of Canada was not meant to apply to actions in contract" (*Fidelity* at para 25; emphasis added). Justice Harradence also noted (at para 28) that at the time, some provincial legislatures had already "adopted limited statutory forms of the discoverability rule" and remarked that "it is open to the Legislature of this province, if it wishes to do so, to choose a similar course." Justice Harradence then concluded (at para 28):

> Given the present jurisprudence of the Supreme Court of Canada, while bearing in mind the underlying policy arguments, I have come to the conclusion that the discoverability rule does not apply to actions in contract in Alberta (emphasis added).

Noting Justice Harradence's distinction of *Rafuse*, Justice Egbert held "reluctantly" that he was bound by the Alberta Court of Appeal (*Luscar* ABQB at para 115):

> With the greatest respect, I am of the opinion that that is not what the Supreme Court said and that a cause of action, in either contract or tort, or, for that matter, any other cause,

> does not arise and the limitation period does not commence to run until the injured party is aware of his rights or, through reasonable diligence, should be deemed to be aware of them. However, I am bound by the Alberta Court of Appeal and must, therefore, reluctantly hold that the discoverability test set down in *Central & Eastern Trust* and *Kamloops* does not apply in Alberta to actions for breach of contract. (emphasis added)

By seeing the justice in the discoverability principle (but nevertheless being bound from applying it), Justice Egbert was, in a sense, ahead of his time.

Assistance From the Alberta Law Reform Institute

To make sense of the application of the discoverability principle in the cases preceding *Weir-Jones*, it is helpful look to the Alberta Law Reform Institute's (ALRI) oft-cited *Limitations Report No 55* (December 1989), which was the basis for Alberta's current *Limitations Act*, and which has been cited by the Court of Appeal multiple times in its attempts to clarify the law in this area (see e.g. *Bowes v Edmonton (City of)*, 2007 ABCA 347 (CanLII) at para 139, and *Sawchuk v Bourne*, 2005 ABCA 382 (CanLII) at para 16). Passages from the Report addressing section 3(1)(a) are telling. At page 33, the report states:

> The discovery limitation period will begin when the claimant either discovered, or ought to have discovered, specified knowledge about his claim, and will extend for 2 years. We believe that, for the great majority of claims, this period will expire first. Because this period will depend on a discovery rule, the problems associated with accrual rules will be tremendously reduced (emphasis added).

The "accrual rules" discussed by the ALRI are the rules stating that the limitation period for a claim in contract commences when the contract is breached—when the cause of action arises, or "accrues." Accrual rules cause problems because ascertaining exactly when a contract was breached (if it was breached at all) can be difficult. More issues arise for the many claims which can be brought in both contract and tort. With different limitation periods for each, the Old Act could influence how a plaintiff chose to plead its claim. This effect was undesirable, and it was one issue that the ALRI sought to avoid when making recommendations for a revised *Limitations Act* (see *Report No 55* at 21).

In offering its support for a 2 year discovery period, the ALRI stated (at 34) that the principle is "claimant oriented," as it is "designed to adjust to the circumstances of a particular claimant and to give him a reasonable period of time to bring a specific claim." The ALRI explained that the rule "incorporates a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances, he ought to have known" (at 34). Most importantly, it clarified that the discoverability principle should be "applicable to all claims governed by the new Alberta Act" (page 34). The ALRI explained:

> Another extremely important reason is that the new Alberta Act should be as simple and comprehensible as reasonably possible. If only some claims were subject to a discovery rule, these claims would have to be defined. This would present categorization problems in drafting the legislation, and characterization problems for lawyers and the courts in

> applying it. In addition, the claims which are not subject to a discovery rule would have to be governed by fixed limitation periods beginning with the accrual of the particular claim. (emphasis added)

The different types of claims discussed by the ALRI that would be in need of categorization (if application of the discovery rule were to be parsed) are no longer so defined. The Old Act drew distinctions between a number of claims including, for example, actions in contract (s 4(1)(c)), actions in fraudulent misrepresentation (s 4(1)(d)), and actions in defamation (s 51(a)). As Justice Côté put it in *Bowes* (at para 134), "old limitations legislation was divided into many arbitrary or historical pigeonholes, with different limitation periods for different causes of action."

The current Act simply defines a "claim" at section 1(a) as "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order." While the Act does make specific mention of claimants recovering contribution under section 3(1)(c) of the *Tort-Feasors Act*, RSA 2000, c T-5, no specific mention or separation of claimants under contract law is made. In its comments on section 3(1)(a) and the broad application of the discoverability principle, the ALRI further stated (at page 64) that:

> The principal reason for the broad application of the rule is based on justice. . .[T]here have also been undiscovered claims based on personal injury, property damage and other economic loss caused by intentional conduct, whether tortious or in breach of contract. If the primary concern is the claim which the claimant could not reasonably have discovered, a statute ought not to discriminate simply because there will be more claims in one possible category than another (emphasis added).

If there were any doubt as to the application of the discoverability principle in Alberta contract claims, reference to the ALRI's discussion of the principle in Report No 55 adequately clarifies its application. Claims for breaches of contract are not immune from the discoverability rule. Of course, there has been plenty of case law, recently corrected by the Alberta Court of Appeal in *Weir-Jones*, that held otherwise.

The Divergent Case Law Preceding *Weir-Jones*

The muddled analysis of the proper commencement of a limitation period in the Chambers Decision of *Weir-Jones* is not unique to that decision. In the post-1999 decision of *Atir Enterprises Ltd v Briault*, 2008 ABQB 520 (CanLII) (*Atir*), the applicants argued that the respondents' claim was limitation barred under the current *Limitations Act*. The Court held that "the limitation on a contract runs from the date of the breach and not from the date the breach is discovered" (para 46), citing the 1988 case of *Fidelity*.

And in the post-1999 case of *Strohschein v Alford*, 2015 ABPC 243 (CanLII) (*Alford*) (at para 19) the Court applied both doctrines, referring to *National Motor Coach Systems Ltd v Sunshine Coast Ltd*, 2006 ABQB 466 (CanLII), and Master Laycock's conclusion that "in a breach of contract case, proceedings are authorized or justified, i.e. “warranted”, from the date of the

breach." However, in the very next paragraph (para 20), the Court proceeded to properly apply the discoverability principle:

> In the context of unpaid invoices the case law holds that the two year limitation typically starts from when the plaintiff knew or ought to have known the invoice was due and unpaid. The unpaid invoice constitutes the "injury" referred to in Section 3(a) (i) and (ii) of the *Act* (emphasis added).

In both *Atir* and *Alford*, the current *Limitations Act* applied.

The Alberta Court of Appeal has tried several times to clarify the law in this area. Following the decision of *Luscar* and the subsequent re-working of the *Limitations Act* to, among other things, bring breach of contract claims within the discoverability doctrine, the Alberta Court of Appeal would offer clarification on the changing limitation landscape in *Sawchuk v Bourne*, 2005 ABCA 382 (CanLII) (at para 16):

> Section 3 of the Act is broad and comprehensive and the claim of [the Plaintiff] falls within the scope of a "remedial order" and "injury" as defined in s.1. The Alberta Law Reform Institute has stated that the legislated discovery provisions are to be applied to all claims which fall under the Act: Limitations, Report 55 (December 1989) at 34. The broad scope of the Act as described in s. 2(3) and (4) is intended to reduce the confusion, complexity and characterization of limitation periods (emphasis added, citations omitted).

In 2005, the Alberta Court of Appeal again clarified what the proper test was. In *James H Meek, Jr Trust v San Juan Resources Inc*, 2005 ABCA 448 (CanLII), finding that the trial judge mistakenly applied the common law test for discoverability from *Mahan v Hindes*, 2001 ABQB 831 (CanLII), the Court of Appeal again clarified that "[t]he common law discovery principles have been ousted by statute and it is the factors in s. 3(1)(a) which apply." The Court explained the test (at para 21):

> The test for "ought to have known" is that of "reasonable diligence" analyzed in the light of the three s. 3(1)(a) factors . . . Accordingly, the facts that the trial judge found must be reviewed in the light of the correct test (i.e. the s. 3(1)(a) factors) to determine when the Meeks ought to have known of their claim.

And amidst more limitation litigation, in *Bowes v Edmonton (City of)*, 2007 ABCA 347 (CanLII), Justice Côté explained the genesis of the codified discoverability principle (at para 139), citing the work of the Alberta Law Reform Institute:

> Alberta's Legislature did not rush into this topic. First, the Institute of Law Research and Reform (as it was then called) studied the topic carefully, and issued several reports (including draft legislation). The Alberta government took time to study them, and then it proposed legislation. The resulting *Limitations Act* was passed in 1996, but it only came into force by later proclamation in 1999. That is the legislation litigated here. It adopts the two different limitation periods: two years for discoverability, and a 10-year unconditional ultimate limitation.

Clarity at the Court of Appeal

In *Weir-Jones*, the Court of Appeal convened in a rare five-judge panel to address the primary question of the appropriate standard of proof in summary judgment applications (see especially the concurring reasons of Justice Wakeling), but it also clarified that the limitation period for breaches of contract starts to run when the claim is discoverable. The proper analysis is based on the three part test set out in the *Limitations Act*: "a reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding for a remedial order" (para 50). As noted in the majority decision of Justice Slatter, section 3(1)(a)(iii) of the *Limitations Act* requires knowledge of an injury warranting a proceeding, but "discoverability does not require perfect knowledge or certainty that the claim will succeed" (para 58). In many cases arising from breach of contract, the three part test under the *Limitations Act* "may in fact be met at the time of the breach of contract, but that is not invariably so" (para 52). This interpretation is consistent with the Court's previous pronouncements (see, for example, *Daniels v. Mitchell*, 2005 ABCA 271 (CanLII) at para 30, endorsed by the Supreme Court of Canada in *Yugraneft Corp. v. Rexx Management Corp*., 2010 SCC 19 (CanLII) at para 36) that "a main purpose of the [*Limitations Act*] was the simplification of limitations law, by the imposition of one period (two years) for nearly all causes of action."

The Court of Appeal confirmed that since the current *Limitations Act* provides the test for the commencement of the limitation period, alternative starting points (such as the date of the breach, the date the last services are provided under a service contract, the date the economic loss emerges, the date of acceptance of repudiation, or termination of the contract) do not presumptively apply, unless a proposed alternative date happens to coincide with the test in the *Act* (para 53). The Court explained the error in the Chambers Judge's application of case law decided under the Old Act (at para 52), and noted that "the incorrect assumption about when the limitation period commences for breach of contract claims did not affect the outcome of the case" (at para 63). The Court of Appeal found that the limitation period commenced when Weir-Jones discovered, or "was aware" that it had a claim against Purolator (at para 55). Because the Chambers Judge found that the limitation date was not extended by settlement discussions between the parties by way of a standstill agreement (at para 41), the appellant was out of time in any event.

When it comes to claims for breach of contract, application of the discoverability principle is preferable because its reasoning follows the lines of one particular maxim of equity: that equity aids the vigilant, not the indolent. In other words, a party must act swiftly to preserve its rights; delay defeats equity.

Fortunately, the attention garnered by this five-judge decision should—for the bar, and the bench—bring swift resolution to any remaining questions of whether and when the discoverability principle applies. The answer, as given by the legislature in 1999, is that the discoverability principle applies to all claims for which section 3 of the *Limitations Act* may be pleaded as a defence. Breaches of contract are no exception.

This post may be cited as: Kyle Gardiner, “The Discoverability Principle Applies—No Seriously, For Real This Time—to Contract Claims in Alberta” (March 15, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/03/Blog_KG_Discoverability_March2019.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg