JUST THE FACTS PLEASE! A DISCUSSION OF LIMITATION PERIODS FOR ENVIRONMENTAL CLAIMS

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From having their own special limitation period exception to the distinct risks associated with continuing environmental torts, environmental claims are in a class of their own. The uniqueness of environmental claims arises in part from the fact that the subject matter of the loss or damage is often literally hidden beneath the surface of the land and requires expert investigation to not only discover the contaminants but to delineate them, determine their source and assess the extent of their impacts. This means that environmental contamination and consequential impacts may be discovered years, if not decades, after the initial contaminating incident. This circumstance is further complicated by the fact that often the responsible parties are long gone by the time a party realizes they have suffered damage.

While all claims are subject to limitation periods of some kind providing a deadline by which a party must commence a legal proceeding, the uniqueness of environmental claims requires special consideration and discussion. This Bulletin considers how limitation periods apply to environmental claims in Ontario and how to reduce the risk of missing one.

Limitation Periods in Ontario

The Ontario *Limitations Act, 2002* (the "***Limitations Act***") provides a basic two year limitation period to commence a legal proceeding after a claim is "discovered" (see more on this key term below) and a fifteen year ultimate limitation period from the day on which the act or omission on which the claim is based took place.[1] However, there are several exceptions to the ultimate limitation period.

One of these exceptions is found in section 17 of the Limitations Act, which provides that "there is no limitation period in respect of an environmental claim that has not been discovered".[2] Why does this exception exist? It is very common for contamination to remain hidden below the surface before it is discovered years (even decades) later. The legislature determined that it would be unfair for parties impacted by such hidden contamination to be unable to recover their losses from the party who caused them harm because they did not know about or could not find the contamination (or its source) for over 15 years. As a result, recently discovered "legacy" contamination from decades prior is often the subject of environmental proceedings.

While environmental claims will not be automatically statute-barred if the contaminating incident or events occurred over 15 years earlier, thanks to section 17 the two year basic limitation period will start to run when a claim is discovered.

Discoverability

Section 5 of the *Limitations Act* sets out the test for determining when a claim is discovered. Specifically, a claim is discovered on the earlier of:

a. the day on which the person with the claim first knew: (i) that the injury, loss or damage occurred; (ii) that the injury, loss or damage was caused or contributed by or contributed to by an act or omission; (iii) that the act or omission was that of the person against whom the claim is made; and (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; OR
b. the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).[3]

Accordingly, the determination as to the discoverability of a claim is not just based on when the injured party first knew of the claim but when they *reasonably ought to have known* of the claim. There is no bright-line test that establishes when a party had actual knowledge of a claim. Instead, the determination is case-specific and requires consideration of the totality of the relevant factual circumstances.[4]

Note that, in contrast, discovery of a new cause of action or of different or greater damages arising from the same factual circumstances do not result in a new discovery date under the *Limitations Act*.[5]

Triggering of due diligence obligations

Interestingly, even where a party does not have knowledge or reasonably ought to have known of a claim sufficient to meet the discoverability test in section 5 of the *Limitations Act*, there are circumstances that may trigger a *positive obligation* to investigate a potential claim or otherwise risk the expiry of the limitation period. This was the case in *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited)* (“***Crombie***”),[6] discussed below.

Knowledge of possible environmental contamination or suspicions of contamination can give rise to a due diligence obligation to investigate and confirm whether such contamination exists and therefore whether an environmental claim exists. A party with such suspicions cannot ignore the issue and sit on their hands until they are ready to commence a legal proceeding. If they do, they may find that the proceeding is now statute-

barred. This due diligence has been described by the courts as follows: "to systematically gather information, explore, probe, research, inspect, interview, inquire, study, appraise, and analyse". That said, the nature and extent of the required action will depend on all the factual circumstances of the specific case.[7]

While investigation of a suspected claim is required in order to protect the right to sue, a potential claimant should not wait to identify the only source of the contaminant before commencing a proceeding. The limitations clock starts to run when a party has or ought to have identified something as a possible contributing source of the contaminant at issue.[8] This is why when a source property of migrating contamination has been identified, everyone in the chain of title who owned or occupied that property at any point in time should be named as a defendant – the court has held that exercising a title search of a potential source property is an expected due diligence step by a reasonable person.[9]

The Ontario Court of Appeal has confirmed that while hiring professional advisors such as lawyers and environmental consultants is an important step in investigating a potential environmental claim, the due diligence obligation imposes a heavier burden. The policy behind the Court's conclusion is that there is otherwise a risk that a potential claimant would hire a lawyer or expert for the sole purpose of insulating themselves from the running of the limitation period without doing any actual investigations. For this reason, the court will consider the particulars of the information and advice provided to and by the consultants as part of the analysis as to whether a plaintiff's actions were reasonable in the circumstances and sufficient to discharge their due diligence obligations.[10]

The Supreme Court of Canada has relied on Crombie, among other cases, in providing helpful guidance on when a limitation period starts to run. A "plausible inference of liability" is enough to make a claim discoverable, thereby ensuring that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation but not so high as to require certainty of liability or "perfect knowledge".[11] Rather than toe the line between suspicion and perfect knowledge, a party should act with prudence in investigating and prosecuting an environmental claim. There is no need to wait until the two year period is almost up before commencing a legal proceeding even if it appears the claimant has time – there is always a risk that a different interpretation of the facts by the court could lead to a finding that the limitation period has passed.

Third Party Claims

Section 18 of the *Limitations Act* provides that the basic two year limitation period also applies for claims for contribution and indemnity from the date a party is served with a claim.[12] This means that if a defendant seeks contribution or indemnity or to shift the blame for the alleged wrongdoing to, a third party, they must

commence the third party action within two years of being served with the main claim.

Note that section 18 does not create an *absolute* two year limitation period for claims for contribution and indemnity from third parties. Rather, section 5(2), which provides that "a person with a claim shall be presumed to have known of the matters referred to in clause [5](1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved",[13] works together with section 18 to establish a presumptive two year limitation period, which can be rebutted by the discoverability principles in section 5(1) of the *Limitations Act* (discussed above).[14]

While not impossible, this is a particularly hard presumption to rebut because the service of the main claim triggers a due diligence obligation requiring the recipient to investigate any third party claims and commence its third party action within the two year time period. Thus only when the third party claim was not reasonably discoverable despite those investigations will the presumption be rebutted.

Cases Considering Discoverability Principle

An illustration of how the discoverability principle and a claimant's due diligence obligations operate in environmental cases can be found in the cases of *Crombie*[15] and *Albert Bloom Ltd v London Transit Commission* ("***Bloom***").[16]

In *Crombie*, the plaintiff had information from a Phase I Environmental Site Assessment ("**ESA**") that while there was potential contamination at the property it was purchasing, it was not a significant concern. The the plaintiff instructed its environmental consultant to conduct a Phase II ESA to confirm the presence of actual contamination, which confirmed that much more significant contamination than originally reported was present at the property. Taking into account the specific factual circumstances of the plaintiff's purchase and due diligence efforts, the Court found that the plaintiff only discovered its claim against the source property owners/operators upon receipt of this Phase II ESA information from its consultant rather than when it received the Phase I ESA.[17]

By comparison, in *Bloom*, the defendant London Transit sought to bring a third party claim for contribution and indemnity against the former owner of its property over two years after having been served with the main action. The Court found that not only did London Transit have actual knowledge of the third party claim based on information it had received by the time it was served and the pleadings in its own Statement of Defence, but that it did not investigate its claim with the required due diligence prior to the expiry of the limitation period and instead chose to be willfully blind to its potential claim.[18]

The key distinction between the findings in *Crombie* and *Bloom* is the fact-specific determination by the court as to at what point in time information received by or known to the plaintiff (or third party plaintiff) constituted discovery of their respective claims.

Continuing Contamination

Unique to environmental claims is the possibility of continuing contamination caused by the ongoing migration of contaminants across property boundaries. A party with knowledge of migrating contamination off-site of their property will be liable for failing to take active steps to stop future migration and remediate its impact. Here, liability and the running of the limitation period will again depend on the specific factual circumstances of the case. The three cases of *Sorbam Investments Ltd. v Litwack* ("***Sorbam***")[19] *Bloom* and MTD v. 1361821 & Sandal[20] exemplify this point.

In *Sorbam*, the Court found the current owner of the source property liable to the plaintiff on the basis that despite knowledge of the continued migration of contaminants onto the plaintiff property, it took no meaningful steps to address the situation causing the plaintiff to incur additional harm. An important point to know about *Sorbam* is that the current owner of the source property bought the property long *after* the contaminating incident had occurred and the migration had started.[21]

London Transit also argued on appeal in *Bloom* that the limitations clock had not run out on its claim against the previous owner because a new cause of action arose each day that the tort continued, being the migration of contamination from the London Transit property to the plaintiff property. In dismissing London Transit's argument, the Court held that for a claim to be continuing, the legal injury or act itself must continue, not merely the ill effect, and that the former owner's activities had ended decades earlier.[22] In contrast, the plaintiff had a claim against London Transit as the current owner of the source property with knowledge of the continuing migration of contaminants onto the plaintiff property.

In *MTD v. 1361821 & Sandal*, the Court found the defendants liable for having known about the contamination migrating from their property onto the plaintiff property, allowing it to continue for 20 years, and failing to take steps to address it within a reasonable period of time. Notably, the Court dismissed the defence that the plaintiff's limitation period had expired on the basis that the migration constituted a continuing tort because the defendant "continues to allow contaminated groundwater to impact [the plaintiff's] lands", thus distinguishing this case from *Bloom*.[23]

Key Takeaways

Rather than wait for a court to assess the specific factual circumstances of an environmental claim and

whether the applicable limitation period has expired, it is best to take a conservative approach when an environmental issue arises to both preserve a potential limitation period and to limit risk exposure.

There is a positive due diligence obligation on parties with any suspected or known environmental issues to investigate their potential claim. While these investigations do not always need to be done on an urgent basis, a party should not be idle and must instead continue to move it forward until they can determine whether they do or do not have a potential claim. Not fully appreciating the risk or impact of an environmental issue or applicable limitation periods will not prevent a party from being held responsible for the associated consequences. Taking a proactive approach to fully understanding these issues is the best way to prevent, mitigate or preserve environmental claims.

Appropriately qualified legal and engineering experts should also be hired early on to assist with or conduct these investigations. In most instances, the average party is not able to fully investigate an environmental claim on their own, which may involve sampling and analysis of contaminant migratory pathways and require environmental engineering expertise. Retaining an environmental lawyer at an earlier stage in the investigation can ensure that a party understands how to discharge their due diligence obligations and when a limitation period starts to run. A lawyer involved at an earlier stage in the investigation or discovery of an environmental claim will be better ready to commence a legal proceeding on shorter notice, negotiate limitation period tolling (i.e., suspension) agreements with potential defendants, and assist a party in taking a more conservation approach to ensure the limitation period is preserved.

[1] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, ss 4, 15(2) [Limitations Act].
[2] *Limitations Act*, s 17.
[3] *Limitations Act*, s 5.
[4] *Albert Bloom Ltd v London Transit Commission*, 2021 ONCA 74 at para 31 [Bloom CA Decision], aff'ing *Albert Bloom Ltd v London Transit Commission*, 2020 ONSC 1413 [*Bloom* SCJ Decision].
[5] Bloom SCJ Decision at paras 82-83; *Farmers Oil and Gas Inc v Ontario (Natural Resources)*, 2016 ONSC 6359 at para 22; *Klassen v Beausoleil*, 2019 ONCA 407 at paras 24-30; Rausch v Pickering (City), 2013 ONCA 740 at paras 99-103; *Rabb Construction Ltd v MacEwen Petroleum Inc*, 2018 ONCA 170.
[6] *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16 [*Crombie*]
[7] Bloom SCJ Decision at para 55.
[8] *Albert Bloom Ltd v London Transit Commission*, 2021 ONSC 6674 at para 70 (related to the main *Bloom* case, this is the decision on a summary judgment motion brought by the third parties).
[9] Bloom - Eaton & City SJ Motion at para 80.
[10] Bloom CA Decision at para 40; see also *Mladenov Group Enterprises Inc v Beak International Inc*, 2009

ONCA 314.
[11] Grant Thornton LLP v. New Brunswick, 2021 SCC 31 at paras 44-47.
[12] *Limitations Act*, s 18.
[13] *Limitations Act*, s 5(2).
[14] Bloom SCJ Decision at para 50.
[15] *Crombie*.
[16] Bloom SCJ Decision at para 55.
[17] *Crombie*.
[18] Bloom SCJ Decision at para 53-57, 73, aff'd in Bloom CA Decision at paras 26-31, citing *Crombie* at paras 39-44.
[19] *Sorbam Investments Ltd. v Litwack*, 2021 ONSC 5226 [*Sorbam*] aff'd on appeal 2022 ONCA 551.
[20] *MTD v 1361821 & Sandal*, 2022 ONSC 2995 [*Sandal*].
[21] *Sorbam* at paras 134-139, 154-155.
[22] Bloom SCJ Decision at paras 80-84.
[23] *Sandal* at paras 158-160, 183-187.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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