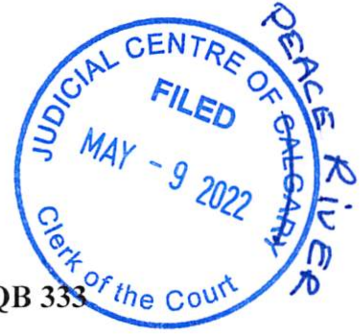

Court of Queen's Bench of Alberta

Citation: Paramount Resources Ltd v Grey Owl Engineering Ltd, 2022 ABQB 333

Date:
Docket: 1909 00014
Registry: Peace River

Between:

Paramount Resources Ltd

Plaintiff/Respondent/Applicant

\- and -

Grey Owl Engineering Ltd., Keith Osmond, WF Holdings Ltd., Chad Sletten, 2088752 Alberta Ltd. carrying on business as Custom Fiberglass Contractors Ltd., P.G.T. Holdings Ltd. carrying on business as Chief Pipeline Contractors Limited, and Crossfire Energy Services Inc.

Defendant/Applicant/Respondent

Memorandum of Decision
of the
Honourable Madam Justice S.L. Kachur

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[1] The Plaintiff, Paramount Resources Ltd. ("Paramount"), is a pipeline owner and operator. In early 2018, Paramount became aware of an environmental leak from its pipeline that it was required to remediate, allegedly at a cost of some $20 million. The Defendants were involved in the construction of the pipeline or the insertion of a fiberglass liner into the pipeline in 2004.

[2] On February 6, 2019, Paramount commenced an action against the Defendants for negligence related to alleged deficiencies in the construction of the pipeline. In particular, Paramount alleges that some or all of the Defendants failed to bury the pipeline deep enough

underground to avoid exposure to frost, as was necessary to prevent damage to the fiberglass material used in construction, and further that the Defendants failed to inform Paramount of this failure.

[3] The Defendants apply for summary dismissal of the negligence claim on the grounds that it was filed after the 10-year ultimate limitation date in section 3(1)(b) of the *Limitations Act*, RSA 2000, c L-12, and further that the claim warrants summary dismissal on the merits.

[4] Paramount denies that the 10-year drop-dead date in the *Limitations Act* has passed or, in the alternative, cross-applies for an extension to the limitation period under section 218 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("*EPEA*"). Paramount also opposes summary dismissal on the merits.

[5] For the reasons that follow, I grant Defendants' application and summarily dismiss Paramount's claim.

Factual Background

[6] In 2004, Paramount (under its previous name "Apache") undertook a project to convert its pipeline from a simple steel pipe to a "carrier" pipe. This involved inserting a fiberglass liner into the existing pipeline.

[7] The Defendants were involved in this project in various ways. Grey Owl Engineering and its project manager Keith Osmond (collectively "Grey Owl") acted as project manager and submitted the necessary regulatory application on behalf of Paramount. WF Holdings and its quality control supervisor Chad Sletten (collectively "WF") supplied and installed the fiberglass liner. 2088752 Alberta Ltd. and P.G.T. Holdings Ltd. assisted in the installation of the liner.

[8] The project was completed in 2004 and the pipeline operated for 11 years without incident until it was discontinued in 2015. In 2017, Paramount began taking steps to re-activate the pipeline. A successful hydro pressure test was completed in December 2017 and pipeline operation resumed, but in April 2018 two environmental leaks were found and the operation was discontinued.

[9] In order avoid damage that can be caused by water freezing inside the pipeline, the technical specifications of the fiberglass liner stipulate that it must be buried below the frost line. The evidence suggests an appropriate depth of between 1.5m-1.8m. Subsequent investigation revealed several places where the pipeline was not buried deep enough. In some places, it was as shallow as 0.4m.

[10] Paramount was forced to remediate the environmental damage, the cost of which has already been significant and is expected to rise further.

Issues

[11] The issues before me are:

1. Has the 10-year ultimate limitation period expired?
2. If so, should an extension be granted under section 218 of the *EPEA*?
3. If the action is not limitation-barred, should Paramount's action be summarily dismissed for lack of merit?

Has the 10-year drop-dead limitation period expired?

[12] The relevant passages from section 3 of the *Limitations Act* are:

> 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
>
> > ...
> >
> > (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.
>
> ...
>
> (3) For the purposes of subsections (1)(b) and (1.1)(b),
>
> > (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;
> >
> > ...
> >
> > (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever occurs first;

[13] Paramount argues the 10-year ultimate limitation clock only started running when the pipeline leak was discovered in April 2018. The basis for its argument is its interpretation of section 3(3)(e).

[14] Paramount says that the negligence claim is, at its heart, a claim for contribution and indemnity. Paramount has remediation obligations under the *EPEA* which it says result from negligent construction work done by the Defendants. It claims only for the remediation expenses, not for any other damage done to Paramount's pipeline or operations. Therefore, it is essentially making claim for contribution to its statutory remediation obligations.

[15] Once it has been established that this is a contribution claim, Paramount says section 3(3)(e) of the *Limitations Act* applies, and the 10-year limitation period thus began when Paramount became liable under the *EPEA* in April 2018.

[16] A similar interpretation of section 3(3)(e) was advanced in ***Addison & Leyen Ltd v Fraser Milner Casgrain LLP***, 2014 ABCA 230, though I note the decision mistakenly refers to it as section 3(3)(b) at para 14. An allegedly negligent tax opinion led to a statutory obligation to the Minister of National Revenue the plaintiff's tax filing was re-assessed. The plaintiffs brought a claim against the lawyers who had prepared the opinion, attempting to characterize it as a contribution claim for limitation purposes.

[17] While the Court of Appeal did not foreclose the possibility of section 3(3)(e) applying to equitable contribution claims, the panel rejected the characterization of the claim as one of contribution. The Court noted that equitable contribution has narrow application, at para 29:

> [29] While these cases provide diverse factual examples giving rise to a right of implied indemnity, courts have cautioned against the unprincipled expansion of these claims. In *R v Imperial Tobacco Canada Ltd*, the Supreme Court of Canada stated (at para 147):
>
> > Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.)

[18] The Court identified three major issues with the plaintiffs' argument, at paras 34, 39, and 40-43:

> [34] There are several problems with the appellants' approach. First, the common law of implied indemnity is rooted in the principles of restitution and unjust enrichment. An indemnity permits the reimbursement of damages paid by an innocent party to a third party on behalf of the true wrongdoer, where that wrongdoer should otherwise have been liable to pay. A right to reimbursement through an implied indemnity does not arise in every situation in which A becomes liable to C in connection with the negligence of B. That connection must be supported by a theory of legal or equitable liability between the third party and the party against whom the indemnity is sought (*Ryan v Dew Enterprises Ltd* at para 54).
>
> ...
>
> [39] Secondly, the appellants' approach does not distinguish between the availability of a claim for implied indemnity and a claim for damages in tort or contract. A common law right to damages for a wrong is not an implied contract that the defendant will indemnify the plaintiff in connection with the wrongdoing (*Birmingham* at 276; *Ryan v Dew Enterprises Ltd* at para 54).
>
> ...
>
> [40] An implied indemnity may arise where the wrongdoer's negligence causes damage to a third party for which the party seeking the indemnity is held liable. However, there must be a connection between the wrongdoer, the third party, and the damage.
>
> [41] For example, *in Edmonton (City) v Lovat Tunnel Equipment Inc*, 2000 ABQB 882, 279 AR 1, the court concluded that a right of indemnity could have been implied had the party who was not at fault (the seller of defective equipment) been held liable for damage suffered by the City of Edmonton as a result of using the defective equipment manufactured by the negligent party (at para 385). By contrast, where a plaintiff is liable for damages or expenses to a

> third party, and that liability is, at law, independent of the wrongdoer and his negligent act, no implied indemnity can follow. The plaintiff's common law right is only in damages.
>
> [42] In this case, the appellants have admittedly suffered losses as a result of relying on the respondents' tax opinion. The respondents' negligent act, however, had no impact on the Minister as the third party to which the tax liability was owed. That liability flowed from the Minister's assessment of the appellants for York's outstanding tax liability and the appellants' obligations under the *Income Tax Act.*
>
> [43] Finally, the policy implications of such an extension of the common law are significant. Anyone who gives advice could be considered to provide an implied indemnity to their clients, covering any loss incurred in relying on that advice. Under the *Limitations Act*, those professionals would be subject to indeterminate litigation under a never-ending limitations period. It is, of course, open to the parties to negotiate for and include a specific promise of indemnity in a retainer agreement. The agreement at issue in this case did not include a specific indemnity clause.
>
> [Emphasis added]

[19] A key point in ***Addison*** was that the negligent law firm could never have been liable directly to the Minister. On this issue, Paramount advances an interpretation of the *EPEA* to argue that the Defendants could have been directly liable to for the environmental damage.

[20] Section 107 is found at the beginning of Part 5 of the *EPEA*, which concerns the release of substances. The following is taken directly from Paramount's brief:

> 107(1) In this Part,
>
> ...
>
> (c) "person responsible for the contaminated site" means
>
> (i) a **person responsible for the substance** that is in, on or under the contaminated site,
>
> ...
>
> Section 1(tt) defines "person responsible", when used with reference to a substance or a thing containing a substance, as including "every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing". The Defendants had charge or responsibility for ensuring that the Pipeline installation was properly done and complied with the CSA. The Pipeline was used to transport the emulsion in Paramount's Zama field.
>
> [Emphasis in original]

[21] Paramount points to ***Lakeview Village Professional Centre Corporation v Suncor Energy Inc***, 2016 ABQB 288 as support for a broad interpretation of sections 218 and 107, that would include the Defendants as "persons responsible" under the *EPEA*.

[22] On the facts before me, I cannot accept Paramount's position. To suggest that "person responsible" includes everyone who was ever involved in construction of a pipeline is not, in my view, what the *EPEA* contemplates. I am not persuaded that, having been contracted to build a pipeline to carry a potentially polluting substance, the Defendants ever had "charge" of the substances transported within the pipeline. In my view, only Paramount ever had charge of the substances.

[23] Therefore, even if they had committed negligence that resulted in the leak, it has not been made clear that the Defendants could have been liable under the *EPEA*. They would certainly be liable in negligence to Paramount, but ***Addison*** is clear: that alone is not enough for equitable contribution.

[24] Absent clear legislative language or appellate guidance, I believe it would be an unwarranted expansion of equitable indemnity to allow it in this case. The policy concerns raised in ***Addison*** are also relevant here. I am greatly concerned about exposing contractors and subcontractors to limitless liability simply because their work carries environmental risk. Exceptions to limitation periods are few, and they should not be expanded lightly.

[25] I find that Paramount's claim is simple negligence, not contribution, and section 3(3)(e) therefore does not apply. The claim arose when the alleged negligent act occurred in 2004, per section 3(3)(a) of the *Limitations Act*, and the 10-year ultimate limitation period has passed.

[26] Therefore, subject to an extension under section 218 of the *EPEA*, I would summarily dismiss the claim on limitation grounds.

Should an extension be granted under section 218 of the *EPEA*?

[27] Section 218 reads:

> 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.

[28] As noted in Paramount's brief, applying section 218 requires a balancing of the competing policy objectives of the *Limitations Act* and the *EPEA*.

[29] The 10-year time limit in section 3(1)(b) of the *Limitations Act* favours finality. It is important that potential liabilities are eventually put to rest so that people can move forward without having to keep reserves in case an ancient claim rears its head. It is also a recognition of the practical problems that arise from lost records and faded memories, which only add to the difficulties associated with proof at trial: ***Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited,*** 2019 ABCA at para 12.

[30] By contrast, section 218 of the *EPEA* accords with the broader environmental objectives of the Act. It places primacy on the societal benefit of having a polluter to pay for cleanup, and recognizes the practical reality that environmental damage can sometimes go undetected for many years and place a substantial burden on innocent parties: ***Brookfield*** at para 13.

[31] Paramount correctly notes that the extension it requests is quite small in the context of the section 218 jurisprudence. The statement of claim was filed on February 6, 2019, approximately five years after the 10-year limitation period expired in 2014. Much longer extensions have been granted, see for example ***Wainwright Equipment Rentals Ltd. v Imperial Oil Limited***, 2003 ABQB 898.

[32] However, it is not the length of the requested extension but rather the facts of this case that distinguish Paramount's request from the jurisprudence on section 218 extensions.

[33] I have been offered no case law where a property owner has attempted, let alone succeeded, in using section 218 make claims against other alleged contributors. The section is aimed at ensuring that there is someone to pay for the cost of environmental damage that would otherwise be borne by society. Whether there is *anyone* to bear the cost is not at issue here, this dispute is about *who* will pay.

[34] This is also not a case of a long-undetected emission that became a problem for an innocent party many years later, as was the case in every decision on section 218 that was provided to me. According to Paramount, it conducted a flyover examination of the pipeline on April 3, 2018 and found nothing out of the ordinary, and then the leak was discovered on April 11. This would appear to indicate, to Paramount's credit, that the leak was detected after only a few days.

[35] If the leak truly was caused the Defendants' negligence, then dismissing the claim on the basis of the *Limitations Act* will result in unfairness. This is a necessary side effect of limitations legislation, counterbalanced by other policy considerations as discussed above. But section 218 does not exist as a remedy to the inherent unfairness that can result from claims being limitation-barred. Rather, the *EPEA* intervenes to balance this against the societal injustice that can result when polluters escape expensive environmental remediation bills which, by their very nature, often go undetected for long periods of time: ***Lakeview Village*** at para 7.

[36] In sum, it is not clear to me that granting an extension on these facts would accord whatsoever with the purposes of section 218. There was no long-undetected leak, and there is no question that a "person responsible" is available to pay. Absent these factors, and bearing in

mind that section 218 applications are about balancing the competing objectives of the *EPEA* and the *Limitations Act*, I can find no path to granting an extension.

[37] On this basis, I decline to grant an extension under section 218 of the *EPEA*. In the result, Paramount's claim against the Defendants is time-barred, and I grant the Defendants' application for summary dismissal.

If the action is not time-barred, should Paramount's action be summarily dismissed for lack of merit?

[38] My decisions on the issues above are sufficient to dispose of this application. However, in the event that I am wrong, I will briefly address the merits issue.

[39] Summary dismissal on the merits is appropriate where there is no genuine issue requiring trial, as explained in ***Hryniak v Mauldin***, 2014 SCC 7 at para 49:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[40] The key considerations of this test were articulated in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47:

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> > a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
> >
> > b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
> >
> > c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[41] The record before me leaves too much uncertainty to be resolved on a summary basis. There are credibility issues as to how much Paramount knew about the depth of the pipeline. The Defendants raise a potential intervening cause, namely the hydro pressure test conducted prior to the re-activation of the pipeline, which would require competing expert testimony to resolve.

[42] Some of the uncertainty is a result of the time that has passed. One of the Defendant's key witnesses has passed away. There appear to be documents missing which might have helped explain the issues, but they have been lost due to the passage of time. These problems further support my decision that the policy considerations of the *Limitations Act* indicate against an extension under the *EPEA*.

[43] If I am incorrect about the claim being limitation-barred, I would decline to grant summary dismissal on the merits.

Conclusion

[44] I grant the Defendants' application for summary dismissal. The Plaintiff's claim is dismissed. If the parties cannot agree on costs, they may write to me within 30 days of this decision.

Heard on the 14th and 15th days of October, 2021.
Dated at the City of Calgary, Alberta this 9th day of May, 2022.

S. L. Kachur
J.C.Q.B.A.

Appearances:

Raj Datt
for the Plaintiff, Paramount Resources Ltd.

Geoffrey Duckworth
for the Defendants, Grey Owl Engineering Ltd. and Keith Osmond

David M. Pick
for the Defendant, 2088752 Alberta Ltd. carrying on business as Custom Fibreglass Contractors Ltd.

Don Dear, Q.C.
for the Defendants, WF Holdings Ltd. and Chad Sletten

David M. Stults
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