

When is Your Time Up? Limitation Periods in Contaminated Lands Lawsuits

Kinji Bouchier, K.C., Matthew Bernier, Rachel Donnelly

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Environmental laws across Canada permit property owners and tenants to recover compensation from those who caused or contributed to contamination at the claimant's property or caused some other type of loss. At common law, claimants may pursue their claims in negligence, nuisance, trespass, strict liability, and other causes of action like the rule in *Rylands v. Fletcher*. Some provinces also permit recovery under special causes of action created by statute, including BC's cost recovery for remediation under the *Environmental Management Act*, or Ontario's statutory right of damage under the *Environmental Protection Act*.

Claimants and defendants should be aware that a claimant cannot sit on an environmental claim forever. Environmental claims remain subject to the rules around commencing a claim within the times set out under applicable provincial legislation, known as limitation periods. A claim brought beyond that period of time is barred and subject to dismissal. The complex and technical nature of environmental claims poses challenges for calculating limitation periods and can lead to some confusion, or worse – claims being dismissed. In this first article of a series on contaminated lands litigation, we summarize the principles for calculating limitation periods for environmental claims, with a particular focus on limitation periods in Ontario, Alberta, and BC.

Overview of Limitation Periods

Provincial limitation period laws limit most claims to two years from the date that the claim is “discovered”. If a claim is brought past this point, a defendant can plead the limitation period as a defence and seek to have the proceeding dismissed. Provincial laws also typically establish an “ultimate limitation period” that can apply no matter when the claimant discovered the claim.

The basic test for when a claim is discovered differs from province to province, and are set out below:

Province	Ontario	Alberta	BC
When does a claimant “discover” a claim?	The date when the claimant first knew or ought to have known: · The injury, loss, or	When the claimant first knew or ought to have known: · The injury had occurred; · The	BC uses the same test as Ontario.

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Province	Ontario	Alberta	BC
	damage had occurred; · The injury, loss, or damage was caused by or contributed to by an act or omission; · The defendant committed the act or omission; and · A proceeding would be an appropriate means to remedy the injury, loss, or damage.	injury was attributable to the defendant's conduct; and · The injury warrants bringing a proceeding.	
<i>What is the ultimate limitation period?</i>	Subject to certain exceptions, 15 years from when the act or omission occurred.	Subject to judicial discretion, 10 years from when the claim arose.	Subject to certain exceptions, 15 years from when the act or omission forming the claim took place.

Limitation periods are mandatory. Unlike other deadlines, courts have a very limited authority to extend or waive a limitation period. The purpose of these limitation periods is to promote finality in litigation and ensure that claims are brought in a reasonable time – effectively, “get on with it” or else.

Limitation Periods for Ontario Environmental Claims

Most claims in Ontario occur before actual remediation has occurred. Ontario enshrines this system through a statutory right to seek compensation for loss or damage incurred due to a spill of a pollutant from the “owner of a pollutant” or “person having control of a pollutant”. These costs include future costs to remediate and can further arise from ordinary operations leading to contamination that migrates off-site.

Ontario’s *Limitation Act, 2002* states that there is no limitation period for undiscovered claims where the act or omission was to cause or permit a discharge of a contaminant into the natural environment that causes an adverse effect. Once discovered, the normal two-year limitation period begins. This rule leads to companies continuing to face liability decades after the original contaminating event, when environmental standards may have been more relaxed, and leads to many claims arising during real estate transactions or in the land development process. This rule becomes even more difficult when dealing with migrating contamination. In these cases, the migrating contamination can sometimes be characterized as a “continuing tort”, which refreshes the limitation period for each day that the contamination continues to migrate.

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There are no bright-line rules for limitation periods in these claims, but two Ontario Court of Appeal decisions from the last ten years have been instructive.

Case	Facts	When was the claim discovered?
<i>Crombie Properties Holdings Limits v. McColl Frontenanc Inc. (Texaco Canada Limited)</i> , 2017 ONCA 16	Plaintiff purchased a property in a bundle with other commercial properties, and commissioned a desktop report, known as a Phase One Environmental Site Assessment (ESA) for each property, to determine the likelihood of contamination. The Phase One ESA identified that a neighbouring former gas station was a likely source of contamination based on previous environmental reports identifying contamination and recommended further sampling to confirm. The Plaintiff conducted these tests, which revealed contamination. The Plaintiff sued the current and former owners within two years of receiving the sampling results. The current and former owners argued that the Plaintiff discovered the claim when they received the Phase One ESA, and were out of time.	When the plaintiff received the sampling results. The Court found that the Phase One ESA raised the possibility of contamination but did not reveal actual contamination. The Plaintiff only discovered their claim when they received the actual sampling results.
<i>Albert Bloom Ltd v. London Transit Commission</i> , 2021 ONCA 74	This case concerned a third-party claim. The third-party, a former owner of an automotive manufacturing parts facility, sold the property to the defendant City of London, which operated a transit facility from the property. The Plaintiff neighbour discovered contamination that arose from the Defendant's property and served a Statement of Claim on the Defendant. The Defendant, which had in its possession five environmental reports suggesting that its property was the source of contamination, did not investigate its property until the Ministry of Environment got involved. Following this testing, the Defendant initiated a third-party claim against the former owner more than two years after the claim was issued.	The claim was discovered when the Plaintiff served the Statement of Claim. The Defendant had multiple environmental reports identifying the third-party's operations, the direction of groundwater flow, and that trichloroethylene was commonly used by the third-party. The Court held that confirmatory sampling was not needed to establish actual knowledge in this case. The Court also found that the Defendant also did not act with due diligence to carry out sampling until it was directed to do so by the Ministry of

Case

Facts

When was the claim discovered?

Environment. The Court also found that the third-party claim was not a continuing tort as the claim was against a former owner.

Limitation Periods for Alberta Environmental Claims

Alberta's *Environmental Protection and Enhancement Act* (the EPEA) does not create a general statutory cause of action for cost recovery or compensation for contaminated land, and so many claims proceed under common law causes of action as in Ontario. Unlike Ontario, Alberta's *Limitations Act* does not carve out undiscovered environmental claims from the ultimate limitation period, suggesting that claims must be brought within ten years from when the contamination first arose.

Alberta balances this rule with one of the few exceptions to a limitation period. The EPEA permits a judge of the Court of King's Bench, on application, to extend a limitation period for a proceeding based on an alleged release of a substance in the environment. The EPEA requires courts to consider the following factors before granting the request:

- when the alleged adverse effect occurred;
- whether the claimant exercised due diligence to discover the alleged adverse effect and if they could have discovered the alleged adverse effect had they exercised due diligence;
- whether extending the limitation period would prejudice the proposed defendant's ability to maintain a defence to the claim on its merits; and
- any other criteria deemed relevant.

The Alberta Court of Appeal has considered these principles in two decisions since 2019:

Case

Facts

Principles

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

In 1949, the defendant carried out oil production and waste disposal operations on the lands. Subsequent owners decommissioned and abandoned an oil well and obtained a Reclamation Certificate. In 2003, a predecessor to the Plaintiff contracted to purchase the land and conducted a Phase One ESA that did not

The Court of Appeal denied the extension. The Court seemed to accept that the limitation period started when the land became contaminated, which would have occurred sometime between when the Defendant drilled the oil well in 1949 and when the well

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Case

Facts

Principles

identify any elements of concern.

Subsequent sampling in 2008 also did not identify any unusual levels of contaminants, which were only discovered after sampling in 2010 occurred. The Plaintiff commenced the claim in 2012. The Defendant sought a dismissal on the basis that the limitation period had expired, and the Plaintiff sought an extension under the EPEA.

was abandoned in 1961. The Court found that the passage of time placed serious prejudice to the Defendant given the limited documentary evidence and inability to identify witnesses, making it difficult to satisfy the proper legal test. In this case, the Court found that modern standards should not be applied to events “that occurred in another era”.

Paramount Resources Ltd v. Grey Owl Engineering Ltd.,
2024 ABCA 60

The Plaintiff pipeline owner discovered a leak in the pipeline in 2018 and paid \$20 million to remediate the leak in response to regulatory action. The Plaintiff sought to recover part of its costs from the Defendant relating to the installation of a fibreglass liner in 2004. The Defendant sought to have the claim dismissed due to the expiry of the ultimate ten-year limitation period. The Plaintiff brought an application to have this period extended under the EPEA. The lower court declined to extend the limitation period on the basis that the extension under the EPEA was based on the principle that the public should not be left to pay for environmental damage if a person responsible was available to pay. As the Plaintiff was held responsible, an extension would not accord with the purpose of the EPEA.

The Court declined to extend the ultimate limitation period as it found no defects with the lower court’s decision. The Court clarified that the fact that a plaintiff can pay for remediation, or bears some responsibility for the contamination, does not preclude them from seeking an extension. The Court articulated that a judge may consider the relationship between the claimant, which the contamination occurs as a case-specific factor. In this case, the Plaintiff had the ability to assess the pipeline’s condition and take steps to correct the potential risks to the environment.

Limitation Periods for BC Environmental Claims

BC’s *Environmental Management Act* creates a statutory cause of action that allows a person who has incurred the cost of remediation to recover those costs from other “responsible persons” determined in accordance with the *Environmental Management Act*. “Responsible persons” can be included, which are defined as including:

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- current and former owners/operators of a site;
- a person who produced a substance and – by contract, agreement, or other arrangement – caused the substance to be disposed of or treated in a manner that caused the site to become contaminated;
- current and former owners/operators of neighbouring properties where contamination originated and/or the person who transported/arranged for the disposal/treatment of a substance that caused it to migrate to the contaminated site; and
- secured creditors that exercise control over or imposed requirements regarding the treatment of a substance, causing the site to become contaminated, subject to certain exceptions.

The *Environmental Management Act* also exempts a long list of individuals in specific factual situations.

All such claims remain subject to the two-year limitation period and 15-year ultimate limitation period; the difference here though is when does the clock start ticking?

Unlike in Ontario or Alberta, the contaminating act/omission does not start the clock on the limitation period; it starts when the claimant finishes incurring remediation costs. Further, a claimant is not required to complete remediation within the two-year limitation period once contamination is discovered. Instead, as the courts affirmed in the leading case of *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc. (J.I. Properties)*, a claimant can recover all reasonably incurred remediation costs, regardless of when those costs were incurred.

In *J.I. Properties*, the plaintiff acquired James Island in 1994. The island was previously used to manufacture and store explosives, resulting in contamination that the former owner partly remediated in the 1980s. The Plaintiff started additional remediation in 2004 following a change to BC's *Contaminated Sites Regulation* that prescribed more stringent remedial standards. The Plaintiff initiated its cost recovery action against the defendant in 2009, and the Defendant argued that costs incurred before 2007 were barred under BC's previous *Limitations Act*.

The Court disagreed. It found that the Plaintiff's right to bring the action did not start until all remediation costs were incurred and that to deny recovery of remediation costs before 2007 would frustrate the purpose of the cost recovery regime, particularly in complex cases where remediation can take decades to complete. The court suggested that a defendant seeking to immunize itself from liability should instead comply with the statutory framework to remediate contaminated sites, rather than argue a limitation period issue.

Subsequently, the BC Supreme Court affirmed this approach in *Rolin Resources Inc. v. CB Supplies Ltd.*, which concerned a property formerly used as a metal foundry and machine shop owned by a joint venture. These operations ceased in 1990, and certain pits at the property were backfilled with sand. Initial remediation took place between 2003-2009. After a change in ownership to the joint venture, contamination was discovered in 2011 that was linked to the backfilling of the pits. The Plaintiff carried out remediation that

was completed in 2018 but initiated its claim in 2016. The plaintiff claimed remediation costs from this time, as well as the initial remediation costs incurred between 2003-2009, which the defendant argued was barred due to a limitation period under BC's new *Limitations Act, 2012* that adopted a similar discovery regime as Ontario.

The BC Supreme Court disagreed. The Court held that the cost recovery cause of action is only discovered when all remediation costs were known. The Court accepted that there was no limitation period issue because the Plaintiff initiated its claim while remediation was ongoing. The Court also accepted that the Plaintiff could claim the earlier remediation costs because it did not see a practical difference between the earlier remediation work and the present remediation work.

Although BC's regime seems to be more forgiving than Ontario's and Alberta's, some questions remain which have not been considered by the Courts. Does a plaintiff have to pursue remediation diligently, or can it avoid a limitation period issue by delaying remediation? When does a plaintiff have sufficient knowledge that all remediation costs have been incurred? Can a defendant still argue a limitation period issue if a plaintiff fails to properly investigate contamination?

Practical Implications for Litigation Parties

Limitation periods remain a live issue in many environmental claims and are highly fact specific. Courts can and often reach contradictory conclusions in two cases with similar facts, finding one matter is barred by a limitation period while not barred in another. Owners of industrial operations or lands with current or potential historic contamination, whether bringing or defending a claim, should keep in mind the following principles distilled from these cases:

- Plaintiffs have an obligation to investigate all claims with due diligence. A Phase One ESA indicating the likelihood of contamination may be enough to start the clock in some cases, while in others, it merely starts the due diligence obligation. A claimant may be able to infer in some cases though that contamination from industrial operations is likely migrating onto their property.
- Causes of action for contamination attempt to enshrine the "polluter pays principle" and allocate responsibility accordingly. However, parties having control over their operations may not be able to escape liability by failing to initiate claims in a timely manner. Courts will often consider whether a claimant with control over operations could have detected the contamination before it became a problem and whether the claimant complied with the statutory framework for remediation.
- Limitation period analyses are highly fact-specific and can be quite complex. When there is any doubt regarding a limitation period, contact your environmental lawyer to confirm.