

Court of King's Bench of Alberta

Citation: DAKA Holdings Ltd v Boyle (Village), 2026 ABKB 83

Date: 20260206
Docket: 1903 18339
Registry: Edmonton

2026 ABKB 83 (CanLII)

Between:

DAKA Holdings Ltd., H.E.R.O. Construction Ltd., Spectar Consulting Ltd., Omnicore Inc., and Gen-X Initiatives Inc.

Plaintiffs

- and -

Village of Boyle and County of Athabasca No. 12

Defendants

**Reasons for Judgment
of the
Honourable Justice N. Whiting**

I. Introduction and Overview

[1] These reasons address three applications raising substantially identical limitations issues. Those issues are defined in the March 7, 2025, Order of Justice Hayes-Richards (the “Procedural Order”) in these terms:

- (a) Whether the *Limitations Act*, RSA 2000, c L-12 defence raised by Defendants in their pleadings is a bar to the Plaintiffs’ action.

- (b) Whether any applicable limitation dates should be waived pursuant to Section 218 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

[2] These applications are, in substance, applications for summary dismissal pursuant to r. 7.3 of the *Alberta Rules of Court*, A.R. 124/2010, and as such are governed by the principles established in *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49.

[3] The dispute underlying this proceeding relates to an 80-acre parcel of land (the “Lands”) located in the Village of Boyle (the “Village”), in the County of Athabasca (the “County”). In June, 2019, the Plaintiffs were engaged in developing the Lands when they discovered that an historical landfill lies beneath a portion of them. The presence of the landfill has effectively frustrated any further development of the Lands. The Plaintiffs now sue the Village and the County, both as the former owners and operators of the landfill, and as the municipal authorities who issued permits, approvals, and tax assessments on the mistaken assumption that no landfill was present. The Plaintiffs’ Statement of Claim was filed on September 9, 2019.

[4] In seeking summary dismissal of the Plaintiffs’ claims, the Defendants do not suggest that the landfill was discoverable by the Plaintiffs prior its discovery in June, 2019. However, they submit that the Plaintiffs’ claims arose prior to September 9, 2009, and are therefore barred by the 10-year “ultimate” limitation period prescribed by s. 3(1)(b) of the *Limitations Act*.

[5] In response to the Defendants’ limitations defences, the Plaintiffs submit that the Defendants’ conduct was “a continuing course of conduct or a series of related acts or omissions” for the purposes of s. 3(3)(a) of the *Limitations Act* which extended beyond September 9, 2009, and into the 10-year period before the filing of the Plaintiffs’ Statement of Claim. Additionally, and in the alternative, the Plaintiffs submit that the Defendants “fraudulently conceal[ed] the fact that the injury... occurred” for the purposes of s. 4(1) of the *Limitations Act*. In the further alternative, the Plaintiffs seek an extension of the applicable limitation period pursuant to s. 218 of the *Environmental Protection and Enhancement Act*.

II. Facts

[6] Although there are many factual matters in this proceeding which are simply unknown, there are few, if any, factual matters in dispute.

A. The Historical Landfill

[7] The County was the owner of the Lands from 1938 until 1978.

[8] From some unknown point in time until 1968, an area in the southeast quadrant of the Lands was used by the residents of Boyle as a landfill. Scant evidence exists as to the landfill’s historical existence or operation. Grainy aerial photographs taken between 1949 and 1968 show land disturbance consistent with a landfill operation at that location. Somewhat more informative are the following minutes from a meeting of the Council of the County of Athabasca held on July 14, 1965:

Councillor Duplessis reported that the nuisance grounds located at the SE corner of SE 33-64-19 -W4 are not being looked after and that garbage is being dumped along the road allowance by residence (sic) of the village of Boyle.

Information was received that as these grounds were first acquired for the hamlet of Boyle, they should be looked after by the Village of Boyle.

Moved by Councillor Duplessis that the Village of Boyle be notified that the nuisance grounds located at the south-east corner of SE 33-64-19-W4 were acquired for the Hamlet of Boyle, which is now incorporated into a village and as a result the maintenance and upkeep of these grounds is the responsibility of the village of Boyle.

[9] Since the Hamlet of Boyle became the Village of Boyle in 1954, it may be deduced from the above meeting minutes that the County “acquired” or designated the landfill site for the use of the then-Hamlet of Boyle sometime prior to 1954, that in 1965 the landfill was being neglected by both the County and the Village, and that in 1965 the County resolved to notify the Village that the Village was responsible for maintaining the landfill.

[10] Little else in the way of conclusions may be drawn respecting the historical operation of the landfill. Several meeting minutes from the Council of the Village of Boyle indicate that in the 1960’s the Village identified a need to establish a new landfill, and a certain report from the Mayor of the Village indicates that a new landfill south of the Lands was established during the year 1966.

[11] In 1978, the County sold the Lands to a private landowner who is not a party to this proceeding.

[12] Despite searches, no other informative records respecting the landfill have been located by the parties. No witnesses have been identified who were employed with the Defendants prior to 1978 or who have knowledge concerning the use of the Lands prior to 1978. No witnesses have been located who were present during the County Council meeting of July 14, 1965. Councillor Duplessis, being the person identified in the minutes of that meeting, is now deceased.

B. The MacLaren Report

[13] In October, 1982, Alberta Environment and Environment Canada released a report entitled *Identification and Verification of Active and Inactive Land Disposal Sites in Alberta*, which had been prepared by consultants MacLaren Plansearch Lavalin. In preparing that report, the authors consulted with Alberta municipalities to identify active and inactive landfills within their jurisdiction. With respect to landfills for the Village, the report lists only the landfill that began operating in 1966, and not the landfill present on the Lands. The Plaintiffs infer that the Defendants failed to report the presence of the landfill to the authors of this report.

C. The Plaintiffs’ Acquisition of the Lands

[14] The Plaintiff DAKA Holdings Ltd. (“DAKA”) purchased the Lands from a private landowner on October 1, 2006. DAKA subsequently conveyed undivided 12.5% interests in the Lands to each of the other four Plaintiffs and the remaining 50% interest to itself. The Plaintiffs were all unaware of the presence of the landfill when they acquired their respective interests in the Lands.

D. Subdivision Approval by the County

[15] On January 5, 2007, the Plaintiffs made application to the County to change the permitted use of the Lands from “Rural Use” to “Country Residential” as defined by the applicable by-law. On March 9, 2007, this change was approved.

[16] Also on March 9, 2007, the Plaintiffs applied to the County for approval of subdivision of the Lands into residential lots.

[17] At the time of the Plaintiffs’ application for subdivision approval, s. 13(2)(b) of the *Subdivision and Development Regulation*, A.R. 43/2002 (“SADR”) read:

13(2) Subject to subsection (5), a subdivision authority shall not approve an application for subdivision for school, hospital, food establishment or residential use if the application would result in a property line of a lot created by subdivision for any of those uses being located

[...]

(b) within 300 metres of the disposal area of an operating or non-operating landfill...

[18] On July 26, 2007, Mr. Bob Clark, Mayor of the Village of Boyle, sent a letter to the County expressing support for the Plaintiffs’ application for subdivision approval.

[19] On August 28, 2007, the County’s subdivision authority granted preliminary approval of the Plaintiffs’ application for subdivision.

[20] On May 26, 2008, the County’s subdivision authority granted formal approval of the Plaintiffs’ application for subdivision.

[21] There is no evidence that anyone associated with the Defendants was aware of the presence of the landfill on the Lands in 2007 and 2008 when subdivision approval was applied for and granted.

E. The Subdivision Report

[22] Sometime prior to the County’s preliminary subdivision approval on August 28, 2007, an undated “Subdivision Report” was created in relation to the Plaintiffs’ application. Although the evidence respecting the timing and authorship of this report is thin, a copy of the report is in evidence, and it appears on its face to have been created by staff members of the County for the benefit of the County’s subdivision authority sometime in August, 2007.

[23] On its third page, the Subdivision Report notes the support of the Village, and on its fourth page, under the heading “Staff Analysis” the report states: “Sections 9 through 13 of the Subdivision and Development Regulation are satisfied.” The Plaintiffs now rely upon this statement respecting compliance with s. 13 of the SADR as a negligent misrepresentation by the County.

F. The Development Agreement

[24] On October 11, 2007, the Plaintiffs and the County entered into a development agreement (the “Development Agreement”). That Development Agreement provided that the Plaintiffs, as the developer, would construct local improvements by August 28, 2008, and that the County would approve or reject those improvements within a further 45 days. The Development

Agreement also provided that the Plaintiffs would be responsible for the maintenance of the roadways and other improvements for one year following the County's approval. The expiration of that maintenance period constituted the end of the development process encompassed by the Development Agreement.

[25] The Development Agreement also contained the following provision:

XV. COMPLIANCE WITH THE LAW

[...]

3. Where anything provided for herein cannot lawfully be done without the approval or permission of any authority, person, or board, the obligation to do it does not: come in to force until such approval or permission is obtained, PROVIDED, that the parties will do all things necessary by way of application or otherwise in an effort to obtain such approval or permission.

[26] The local improvements were completed sometime in November, 2008, being 2-3 months beyond the completion date contemplated by the Development Agreement.

[27] On October 12, 2008, the County's acceptance period expired.

[28] On October 12, 2009, the Plaintiffs' maintenance period expired, and the Development Agreement was concluded.

[29] During the currency of the Development Agreement, s. 13(5) of the SADR read:

13(5) The requirements contained in subsections (1) to (4) may be varied by a subdivision authority or a development authority with the written consent of the Deputy Minister of Environment and Parks.

[30] Despite Section XV.3 of the Development Agreement and s. 13(5) of the SADR, the County made no efforts to obtain a variation from the Minister respecting the Lands during the term of the Development Agreement.

[31] The Development Agreement did not expire until after the 10-year ultimate limitation period had commenced. During the 33-day period from September 9, 2009 (being the date 10 years before the Statement of Claim was filed), until October 12, 2009, the Plaintiffs would have been maintaining the local improvements on the Lands, such as by clearing the roadways and mowing the grass. It has not been proven that the Defendants engaged in any active conduct during that 33-day period. In particular, the County did nothing to pursue the written consent of the Minister pursuant to s. 13(5) during that 33-day period.

G. Annexation of the Lands by the Village

[32] By Order in Council 52/2009, the Lands were annexed by the Village of Boyle effective January 1, 2009.

H. Building Permits and Inspections Prior to Discovery of the Landfill

[33] Following subdivision approval, the Lands were divided into residential lots, and some of the lots were sold to purchasers who are not parties to this proceeding. Also, one of the lots was sold to the Plaintiff H.E.R.O. Construction Ltd. ("HERO").

[34] Between July 16, 2008, and March 6, 2015, the County and the Village issued numerous unconditional development permits to the purchasers of the lots. The permitting process respecting lots on the lands included related inspections, inspection reports, and other steps.

[35] At the time that the permitting process was underway, s. 13(3) of the SADR read:

13(3) Subject to subsection (5), a development authority shall not issue a development permit for a school, hospital, food establishment or residence, nor may a school, hospital, food establishment or residence be constructed if the building site

[...]

(b) is within 300 metres of the disposal area of an operating or non-operating landfill,

[36] There is no evidence that anyone associated with the Defendants was aware of the presence of the landfill on the Lands between July 16, 2008, and March 6, 2015, when the development permits were approved and issued.

[37] The County's involvement in the permitting and inspection process terminated on August 29, 2009, when it closed its file respecting a lot owned by Jeff Scammel and Carrie Scammel. The Scammels are not parties to this proceeding. Beyond that date, the Village took over the permitting and inspection process from the County.

[38] The permit applications on the Lands included an application for a development permit by HERO to the Village on April 26, 2013. That development permit was approved and issued by the Village on April 26, 2013. A series of building, gas, and plumbing permits respecting HERO's lot followed. The final inspection report respecting that lot was issued on March 6, 2015. The County did not issue any permits or conduct any inspections respecting HERO's lot.

I. Municipal Tax Payments

[39] Following annexation of the Lands by the Village effective January 1, 2009, municipal taxes on the Lands became payable to the Village rather than the County.

[40] In 2008, the Plaintiffs paid annual taxes of \$354.52 to the County. The following year, the change from Rural Use to Country Residential and the grant of subdivision increased the appraised value of the Lands considerably and the Plaintiffs became responsible for increased taxes. In 2009, the Plaintiffs paid annual taxes of \$10,243.50 to the Village. The Plaintiffs paid a total of some \$221,613.96 in municipal taxes on the Lands from 2007 to 2024. Of that amount, more than \$221,000 was paid to the Village.

J. Discovery of the Landfill

[41] In June, 2019, the Plaintiffs became aware of debris surfacing on a treed and unused portion of the Lands. Upon further investigation, they determined that the Lands had been used as a landfill sometime prior to their acquisition by the Plaintiffs.

[42] Upon inquiries with the County and the Village, the Plaintiffs were advised that neither had any records respecting the landfill's existence. A short time later, the Plaintiffs' corporate representative, Mr. Garry Szymrko, consulted arial photographs at the provincial archives which indicated land disturbance consistent with a landfill between 1951 and 1968.

[43] Following the discovery of the landfill in 2019, experts excavated 22 test holes on two of the lots in the Lands and found rural/residential waste in 11 of those holes.

[44] The discovery of the landfill effectively halted any further development of the Lands.

K. The Filing of the Statement of Claim

[45] The Plaintiffs filed their Statement of Claim in this action on September 9, 2019.

L. Development Permit Issued by the Village to Ron Veremy

[46] On July 22, 2019, Ron Veremy, an owner of one of the lots on the Lands and not a party to this action, applied to the Village for a development permit. By this time, the historical landfill had been discovered and was known.

[47] On September 4, 2019, the Village approved and issued a development permit on conditions which included “that the applicant ensure that there is no required setback of 300 metres required regarding a possible abandoned landfill”.

[48] Given the presence of the landfill, the Plaintiffs state that it is impossible for Mr. Veremy to meet the conditions included in the development permit for his lot.

M. Investigation of the Landfill by Alberta Environment and Parks

[49] After the discovery of the landfill, the site was investigated by Alberta Environment and Parks as the provincial regulatory authority. At the conclusion of that investigation in 2021, it was determined that the operation and placement of waste at the site had been lawful according to the legal standards that existed at the time, that the site was not causing an adverse environmental effect, and that no enforcement action would be taken. These points were communicated to the County in a letter dated February 26, 2021, which states in relevant part as follows:

FILE CLOSURE

This letter is to advise you of the conclusion of an investigation undertaken by Alberta Environment and Parks (AEP) on the County of Athabasca located at lands legally described as SE 33-064-19-W4M in the County of Athabasca No.12, Alberta. This relates to the finding of waste on August 8th, 2019 when it first came to the attention of the department.

It is our assessment that this incident was not a contravention of Section 23 of the *Waste Control Regulation* (WCR) under the *Environmental Protection and Enhancement Act* (EPEA).

The period of the 1950 to 1970, where air photo imagery showed a land disturbance that was described in the county council minutes (July 14th, 1964 Athabasca County minutes) as the "Boyle nuisance grounds" predated EPEA, and nuisance grounds permitting were administered by Alberta Health Services. The permitting for waste management sites was not in place for nuisance grounds at this time (1968 for populations >5000), so the operation of the grounds and the placing of waste was lawful.

The county is responsible for activities that have occurred on lands that they own or have owned in the past however a person responsible or party that placed the waste could not be identified to meet the requirements of the current legislation.

Additionally, AEP could not place the waste as causing a significant adverse effect or in exceedance of Alberta Tier 1 guidelines for contaminants at this time. However, if new information is discovered and presented to the department; it is our obligation to compare new found information to all applicable legislation.

However, the development of residential housing on this site is covered under the *Municipal Government Act* and the *Subdivision Development Regulation* which outlines setback distances from waste management sites. It falls under the jurisdiction of the Municipality and is not an offence under the *Environmental Protection and Enhancement Act*.

No enforcement action is contemplated for this incident. However, please note that any future contraventions may be subject to enforcement action.

N. The CT & Associates Engineering Inc. Report

[50] The Plaintiffs retained engineers to determine the boundary of the landfill and to assess the extent of any contamination. The resulting investigation conducted by CT & Associates Engineering Inc. included test pits, soil sampling, groundwater sampling, and chemical testing. The resulting report concluded that there was no indication of contamination above acceptable levels:

5.2.1 Soil

- All of the hydrocarbon test results were found to be below laboratory detection limits (Table 1);
- All of the trace metals test results were found to be below the most stringent Residential Land Use Criteria (Table 2);
- The majority of the routine salinity test results were found to be below the most stringent Residential Land Use Criteria (Table 3), with the exception of the pH in samples at locations TP-7, TP-11, TP-14, and TP-16, all located outside the refuse area, though considered not an indication of contamination.

5.2.2 Groundwater

- All of the hydrocarbon test results were found to be below laboratory detection limits (Table 4);
- All of the polycyclic aromatic hydrocarbons test results were found to be below laboratory detection limits (Table 5);
- All of the glycol test results were found to be below laboratory detection limits (Table 6);
- The majority of the routine salinity test results were found to be below the most stringent Residential Land Use Criteria (Table 7). The results for

chloride (TP-8 only), sulfate (TP-13 only), and TDS were above criteria, through not an indication of contamination.

- The majority of the trace metals test results were found to be below the most stringent Residential Land Use Criteria (Table 8). The results for arsenic (TP- 1 only), iron (TP-1 only), and manganese were above criteria, through not an indication of contamination.

III. Issues

[51] The language of the Procedural Order quoted above and which defines the issues in these applications directs me to determine the applicable limitations issues. That Order does not direct me to assess any other aspects of the merits of the Plaintiffs' causes of action. During oral arguments, the Defendants conceded for the purposes of these applications only that the Plaintiffs' claims raise triable issues, and limited their submissions to limitations. For these reasons, these applications do not direct me to assess the merits of the Plaintiffs' claims beyond the limitations issues, and I must assume that those claims are sufficiently meritorious to justify a trial.

[52] These applications properly raise the following limitations issues:

- (1) Does the Plaintiffs' claim of fraudulent concealment under s. 4 of the *Limitations Act* raise a genuine issue for trial?
- (2) Does the Plaintiffs' claim that their causes of action are based on "a continuing course of conduct or a series of related acts or omissions" for the purposes of s. 3(3)(a) of the *Limitations Act* raise a genuine issue for trial?
- (3) Should the Plaintiffs be granted an extension of the applicable limitation periods pursuant to s. 218 of the *Environmental Protection and Enhancement Act*?

IV. Analysis

A. The Test for Summary Dismissal

[53] In *Weir-Jones*, the Court of Appeal established the following framework for summary dispositions:

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.

[54] In the present proceeding, the parties have all but completed the pre-trial discovery process, and they have chosen to file most of the resulting material. They appear to have exhausted their ability to discover any informative evidence respecting the historical operation of the landfill, and no material credibility issues have been identified by the parties in their submissions. To the extent that the material facts are known, they are not in dispute. For these reasons, and excepting certain narrow issues identified below, I find that the issues raised by these applications may be fairly and justly determined by summary adjudication.

B. Fraudulent Concealment

[55] Although addressed by the parties second, it is analytically convenient to address the issue of fraudulent concealment first. This issue is governed by s. 4 of the *Limitations Act*:

4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or (1.1)(b) was suspended.

[56] The Plaintiffs invoke and rely upon the above s. 4 in their Amended Statement of Claim:

19. The Defendants and each of them have, within the meaning of s. 4 of the *Limitations Act RSA* fraudulently concealed the existence of the Landfill from the Plaintiffs. Particulars of the fraudulent concealment include:

- a. Failing to the of a landfill on Lands previously owned by it: disclose existence on the Lands previously owned it;
- b. Failing to disclose a landfill the subdivision the existence of landfill on the Lands during subdivision approval process;

- c. Failing to disclose a latent defect on the Lands being the Landfill;
- d. Representing to the Plaintiffs by way of approval of the subdivision that the subdivision of the Lands was not contrary to and did not offend the provisions of the Subdivision Approval Regulation in force at the time; and
- e. Failing to take any steps to disclose the Landfill to future purchasers of the Lands before or following sale of the Lands.

[57] In support of their position on this issue, the Plaintiffs rely upon the following passage from *King v Victor Parsons & Co.*, [1973] 1 All E.R. 206 at 209-210 (C.A.) per Lord Denning:

In order to show that he ‘concealed’ the right of action ‘by fraud’, it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he *knowingly* committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by ‘fraud’ as those words have been interpreted in the cases. To this word ‘knowingly’ there must be added ‘recklessly’; see *Beaman v ARTS Ltd*, [1949] 1 All ER 465 at 469, 470, [1949] 1 KB 550 at 565, 566. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further enquiry lest it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough: see *Kitchen v Royal Air Forces Association*, [1958] 2 All ER 241, [1958] 1 WLR 563. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if, by an honest blunder, he unwittingly commits a wrong (by digging another man’s coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations.

[58] In the Court of Appeal’s most recent decision on this subject, *Geophysical Service Incorporated v Canadian Natural Resources Limited*, 2025 ABCA 426, the Court summarized the applicable principles as follows:

[20] A plaintiff who seeks to rely on section 4(1) has the burden of proving the limitation period was suspended: *Limitations Act*, s 4(2). They must show: 1) the defendant perpetrated “some kind of fraud”; 2) the fraud concealed a material fact; and 3) the plaintiff exercised reasonable diligence to discover the fraud...

[...]

[23] Fraudulent concealment is an equitable doctrine that prevents limitation periods from being used as an instrument of injustice. It is concerned with “equitable fraud”, which is broader than the common law action for fraud. The central consideration is “whether it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed” the fact that the injury occurred. The inquiry is “into the *unconscionability* of the conduct itself”. Unconscionable conduct can include “some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts”:

[59] One of the cases cited by the Court of Appeal in support of the above passage is *M(K) v M(H)*, [1992] 3 SCR 6, where LaForest J. adopted the following statements from *Halsbury's Laws of England*, 4th ed., vol. 28, para. 919, at p. 413:

It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed.

[...]

In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

[60] To the same effect is *Ambrozic v Burcevski*, 2008 ABCA 194:

[23] Fraudulent concealment requires an element of unconscionability, “some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts”: *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 57, 96 D.L.R. (4th) 289. Unconscionable conduct can be either active concealment or a failure to disclose: *H.(V.A.)* at para. 35. As well, the defendant must know of the wrong. A defendant who is unaware that he has committed a wrong is protected by statutory limitations: *King v. Victor Parsons & Co.*, [1973] 1 All E.R. 206 (C.A.).

[61] A case dealing with similar circumstances to those of the present case is *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72. In *Motkoski*, the Defendant County had sold a developer a parcel of land and its subdivision authority had granted subdivision approval with respect to that land. It was later discovered that an historical landfill was present under a portion of the land which rendered the approval contrary to s. 13 of the SADR. At trial, the Defendant was found liable for fraudulent misrepresentations in the sale agreement. That finding of liability was overturned by the Court of Appeal, and the claim was dismissed. Although *Motkoski* did not specifically address equitable fraud or s. 4(1) of the *Limitations Act*, the following analysis from that case remains instructive:

[89] Even assuming there was a representation as to the suitability of the site, it could not in these circumstances become fraudulent because of “corporate knowledge”. There is no authority supporting liability on that basis. In order to have such attributed knowledge amount to fraud, something more is needed. Absent fraudulent intention or conduct by one of the individual corporate representatives, fraud cannot be attributed to the corporation: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145, [1990] 3 W.W.R. 690 at p. 161 (C.A.) aff’d on this point [1993] 1 S.C.R. 12 at pp. 22, 54, 74-5. For example, if the person with the key knowledge intentionally withheld it from the representative who is making the critical decision, knowing or intending that others would proceed on false assumptions, that might result in corporate fraud. However, merely because the

appellant's archives contained information which the appellant negligently did not access cannot be turned into fraud.

[90] As previously noted, fraud ordinarily arises from the making of false statements, knowing they are false. The necessary deceitful intention cannot arise if the key decision makers are ignorant of the incorrect fact. Knowledge and ignorance are incompatible opposites. Statements cannot be made recklessly, without caring whether they are true or false, unless the person making the representation is aware, at least, that there is some issue about the truth of the fact. A person who is ignorant of the existence of information that might throw the fact into doubt cannot be reckless in this sense of the word.

[...]

[95] Notwithstanding the errors discussed to this point, was it still reasonable to draw an inference of fraud from the total record? In addressing this ultimate issue it must be remembered again what is required to prove fraud in this case. It must be shown that Mr. Beck actually knew that there was a landfill on Lot 1, or that he was reckless to that fact. It is not sufficient to prove that he "ought to have known" of the location of the landfill, nor that he "could have found out". Further, it was common knowledge that there was a landfill somewhere on the SE 1/4. The prevailing belief was that it was located on Lot 2, not Lot 1. It is insufficient to found fraud to prove that Mr. Beck knew there was a landfill on the SE 1/4; his knowledge or recklessness must relate specifically to Lot 1.

[62] Applying the legal principles summarized above to the present case, I find that the Plaintiffs have failed to prove fraudulent concealment or to raise a triable issue respecting its commission by the Defendants for the purposes of s. 4(1) of the *Limitations Act*.

[63] Regarding any historical acts of fraudulent concealment, the Plaintiffs have brought forward no evidence that anyone associated with the Defendants deliberately or recklessly concealed the landfill at any time prior to the Plaintiffs' acquisition of the Lands. Despite the best efforts of all involved, nothing is known about how the landfill came to be covered over and forgotten. No knowledgeable witnesses have been identified, and no records evidencing any such conduct have been brought to light. Nor do the parties anticipate discovering any such evidence in the future.

[64] Of course, it is most likely that the historical disposal site was covered over intentionally rather than accidentally. But covering over a disposal site or dump does not entail deliberate concealment of wrongdoing since doing so is standard practice.¹ On the present record, the only available inference is that the site was covered over in the ordinary course of business and forgotten. There is no evidence that anyone knew or suspected that they were doing anything wrong or concealing any wrongdoing when these events occurred. In the absence of any evidence beyond the vague meeting minutes of July 14, 1965, and a few blurry aerial photographs from the same period, it cannot be inferred or concluded that the historical covering over of the disposal site was done to conceal the commission of any wrongdoing. In fact, given that the landfill was lawfully placed and operated, there was no wrongdoing to conceal.

¹ See e.g. *Code of Practice for Landfills*, s. 9, adopted by s. 24(1)(b) of the *Waste Control Regulation*, A.R. 192/96. (Of course, these standards were not in place at the time of the historical operation of the landfill on the Lands.)

[65] Similarly, no inference helpful to the Plaintiffs may be drawn from the fact that the landfill was not disclosed to the authors of the McLaren Report in and around 1982. There is no evidence that this lack of disclosure was deliberate, reckless, or otherwise unconscionable. It is much more likely that the existence of the landfill was not reported since its existence had been forgotten.

[66] Regarding the absence of records respecting the landfill's location, there is again no evidence as to why no such records presently exist. There is certainly nothing to suggest that records were intentionally concealed or destroyed. On the resulting record, the most that may be inferred against the Defendants is, in Lord Denning's words, the commission of "an honest blunder" or an "unwitting" breach of duty by failing to maintain records respecting the landfill's existence and location. Even this historical failure to maintain records cannot presently be found to have been negligent since there is no available evidence respecting the standards of practice that prevailed at the time.

[67] Regarding more recent events, there is no evidence that any of the Defendants' employees were aware that an historical landfill was present on the Lands when the approvals, permits, and Subdivision Report were issued to the Plaintiffs beginning in 2007. There is also no evidence that any employees had any suspicion that a landfill might be present, or that they "turned a blind eye" towards any such suspicion. Knowledge held in the 1950's and 1960's cannot be attributed to the Defendants when acting in the 2000's. In the absence of actual knowledge or suspicion, it cannot be concluded that the Defendants fraudulently concealed the presence of the landfill, or otherwise acted unconscionably, when issuing the approvals, permits and reports respecting the Lands.

[68] In summary, the Plaintiffs have failed to raise a triable issue respecting the application of s. 4 of the *Limitations Act*. There is no evidence that the Defendants committed "some kind of fraud" or "unconscionable" conduct by deliberately concealing facts or by "turning a blind eye" towards facts they suspected to be true. More specifically, there is no evidence that anyone associated with the Defendants deliberately kept the landfill a secret or knew about its existence when the approvals and permits were issued. Although the Defendants may (or may not) have committed an "unwitting blunder" by failing to create or retain sufficient records respecting the presence of the landfill on the Lands, such conduct does not amount to legal or equitable fraud.

[69] For these reasons, I find that the Plaintiffs' claims are not protected by s. 4 of the *Limitations Act*.

C. Are the Plaintiffs' Claims Based on "a continuing course of conduct or a series of related acts or omissions"

[70] The Plaintiffs submit that their causes of action arise from "a continuing course of conduct or a series of related acts or omissions" which continued beyond September 9, 2009, being the date 10 years prior to the filing of their Statement of Claim. Consequently, they submit that their causes of action did not arise until "the conduct terminate[d] or the last act or omission occur[red]" by operation of s. 3(3)(a) of the *Limitations Act*:

Limitation Periods

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 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.

[...]

(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;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

1. The Plaintiffs' Claims

[71] Given that s. 3(3)(a) focuses upon a “claim” or any number of “claims” based on any number of breaches of duty, it has been noted that its application depends on how one characterizes the claim: *Douglas Homes Ltd. v Rainbow Falls Development Inc.*, 2025 ABCA 185 at para. 38. It is therefore necessary to identify the claims or causes of action that may be discerned from the Plaintiffs’ Amended Statement of Claim. As explained above, these applications have been brought on the assumption that the Plaintiffs’ claims raise triable issues.

i. “Breach of Statutory Duty”

[72] In their written and oral submissions on these applications, the Plaintiffs identify the primary cause of action raised by their pleadings as “breach of statutory duty”. With respect to the County, the Plaintiffs claim that it breached what was then s. 13(2)(b) of the SADR by granting subdivision approval despite the proximity of the then-undiscovered landfill. With respect to the Village, the Plaintiffs submit that it became complicit in the County’s breach of statutory duty by expressing support for the County’s unlawful subdivision approval, and then committed its own breaches of statutory duty by issuing building permits in breach of s. 13(3)(b) of the SADR. The pleadings which raise this claim include paragraphs 6-8 and 17 of the Amended Statement of Claim.

[73] Although neither the SADR nor any other statute creates a cause of action for a breach of s. 13, the Plaintiffs’ theory is that the alleged breaches of statutory duty by the Defendants are sufficient to give rise to liability without proof of negligence or other actionable conduct. In

support of this cause of action, the Plaintiffs cite only *Dixon v. Edmonton (City)*, [1924] SCR 640, which is a negligence case. The Plaintiffs do not allege that the Defendants' conduct rose to the level of misfeasance of a public office.

[74] As noted above, the Defendants have conceded for the purposes of these applications that this first cause of action raises triable issues, and the applicable Procedural Order directs me to determine the limitations issues on the basis of that assumption.

[75] The difficulty presented by this aspect of the Plaintiffs' argument and the Defendants' concession respecting its merits is that there is no cause of action for "breach of statutory duty". The leading authorities on this subject are *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at p. 225 and *Holland v Saskatchewan*, 2008 SCC 42 at paras. 9-11, the net effect of which are summarized in *Wu v Vancouver (City)*, 2019 BCCA 23 at para. 43:

[43] ...It is a settled principle that Canadian law does not recognize a nominate tort of breach of statutory duty. As *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, and *Holland v. Saskatchewan*, 2008 SCC 42, make clear, there is no duty of care imposed on officials to act in accordance with authorizing statutes or regulations. Standing alone, a breach of a statutory duty is not a breach of a private law duty of care. While a breach of statutory duty is subsumed within the law of negligence, a breach of a statutory duty can be evidence of negligence. As a general rule, a breach of a public law duty is not sufficient to establish the breach of a private law duty. The first is not readily converted to the second. The existence of a private law duty of care must be established by the application of common law principles.

[76] Similar sentiments were expressed by the Court of Appeal in dismissing the claim in *Motkoski* respecting grants of subdivision and re-zoning for lands containing an undiscovered landfill contrary to s. 13(2)(b) of the SADR:

[53] As the municipality, the appellant may have certain statutory duties respecting the subdivision, zoning, and development of the lands. For example, it arguably has a general duty not to zone lands for inherently unsuitable uses. Whatever the planning duties of the appellant are they are, however, public duties; they are not private duties owed to the respondent...

[77] It is conceptually difficult to assume that a non-existent cause of action raises triable issues and to then determine whether it is barred by a limitation period. But given the terms of the applicable Procedural Order, I will presume that the Plaintiffs' claims respecting the issuance of the approvals and permits raise triable issues, whether in "breach of statutory duty", negligence (see e.g. *Kamloops v Nielsen*, [1984] 2 SCR 2), or some other unidentified cause of action.

ii. Negligent Misrepresentation

[78] The Plaintiffs describe the second claim to be considered in these applications as their "tort-based claim" (thereby implying that their first cause of action is something other than a tort-based claim). This second claim is grounded in the tort sometimes referred to as "negligent misrepresentation" or "negligent misstatement" and which was first recognized by the House of Lords in *Hedley Byrne & Co. v Heller & Partners Ltd.*, [1964] AC 465. In the leading Canadian

case of *Queen v Cognos Inc.*, [1993] 1 SCR 87, the elements of that cause of action are stated as follows:

[33] The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[79] The Plaintiffs submit that the negligent misrepresentations which give rise to this aspect of their claim include the Subdivision Report of August, 2008, which includes a statement that “Sections 9 through 13 of the Subdivision and Development Regulation are satisfied.” The Plaintiffs argue further that each approval and permit granted by the Defendants constituted an implicit representation that s. 13 of the SADR had been satisfied. These representations were false due to the presence of the historical landfill.

[80] The pleadings said to give rise to this second claim include paragraph 21(d) of the Amended Statement of Claim which pleads that the Defendants breached duties owed to the Plaintiffs by “[r]epresenting to the Plaintiffs by way of the approval of the subdivision that the subdivision of the Lands was not contrary to and did not offend the provisions of the Subdivision and Development Regulation in force at the time”.

[81] Again, this cause of action faces significant challenges on its merits. As the Court of Appeal stated in dismissing a similar negligent misrepresentation claim in *Motkoski* at paras. 53 and 55: “It is, however, unreasonable to suggest that any time a municipality subdivides or zones land it owns, it makes an implied representation that the lands are fit for certain uses... The mere fact that the lands were subdivided does not amount to a representation that they are suitable for development.” Further, since the statement in the Subdivision Report respecting compliance with s. 13 of the SADR was made by staff members of the County to and for the benefit of the County, it is doubtful that it constituted a representation *to the Plaintiffs* for the purposes of this cause of action: *Motkoski* at para. 54. It may also be argued that the Plaintiffs have sued the wrong party since the County and its subdivision authority are separate legal entities: *Motkoski* at para. 52.

[82] Nevertheless, I am again required by the terms of the present applications to assume that this cause of action raises triable issues.

iii. Breach of the Development Agreement

[83] The third cause of action identified by the Plaintiffs in the present applications is a breach of the Development Agreement between the Plaintiffs and the County of October 11, 2007. In particular, the Plaintiffs argue that the County breached Section XV.3 of that agreement which is here again reproduced for ease of reference:

XV. COMPLIANCE WITH THE LAW

[...]

3. Where anything provided for herein cannot lawfully be done without the approval or permission of any authority, person, or board, the obligation to do it does not come in to force until such approval or permission is obtained, PROVIDED, that the parties will do all things necessary by way of application or otherwise in an effort to obtain such approval or permission.

[84] In relation to the obligations of the parties under the above Section XV.3 to “do all things necessary by way of application or otherwise”, the Plaintiffs invoke s. 13(5) of the SADR which, until its repeal on June 1, 2022, read as follows:

13(5) The requirements contained in subsections (1) to (4) may be varied by a subdivision authority or a development authority with the written consent of the Deputy Minister of Environment and Parks.

[85] The Plaintiffs submit that the County is liable for breach of Section XV.3 of the Development Agreement since the County failed to “do all things necessary by way of application or otherwise” to seek written consent from the Deputy Minister for a variance pursuant to s. 13(5) of the SADR. As their evidence in support of this argument, the Plaintiffs rely upon an undertaking response from the County which states that no records respecting any request by the County to the Deputy Minister have been found to exist.

[86] Unlike the Plaintiffs’ other causes of action, the Defendants do not concede that the Plaintiffs’ breach of contract arguments raise triable issues in this proceeding. As counsel for the Village pointed out in oral arguments, no such claim appears in the Plaintiffs’ Amended Statement of Claim. In fact, the Plaintiffs did not raise any arguments respecting this cause of action in their application materials. This claim was asserted for the first time during the Plaintiffs’ oral response submissions on these applications and the Defendants’ only opportunity to address them was in reply.

[87] On this point, I agree with the Defendants. Although the Development Agreement is referred to at paragraph 7 of the Amended Statement of Claim, there is no pleading alleging that the agreement was breached by the County, either by failing to seek the consent of the Deputy Minister under s. 13(5) of the SADR or otherwise.

[88] Given that the Amended Statement of Claim does not contain any claim for breach of the Development Agreement, and given that there is no application to amend at this late stage with its attendant costs consequences, it is unnecessary for me to determine whether any claim for breach of the Development Agreement survives the applicable limitation period. No such claim exists.

iv. Property Taxes Paid by the Plaintiffs

[89] At paragraph 26(d) of their Amended Statement of Claim, the Plaintiffs claim “Damages for property taxes previously paid by the Plaintiffs under an incorrect valuation of the Lands, in the approximate amount of \$150,000.00”.

[90] In their written brief on these applications, the Plaintiffs address these tax payments as follows:

59. Both before and following the annexation of the subdivision, increased taxes were charged by the County and the Village. The Village continues to assess and charge taxes on the individual properties as Country Residential although the

legislation prevents those properties from being used as Country Residential. The Village continues to rely on the rezoning and subdivision approval in doing so. It is submitted that these actions are continuing conduct and acts within S.3(3) of the *Limitations Act*, RSA 2000, c L-12.

[91] The great majority of the municipal taxes paid by the Plaintiffs to the Village in respect of the Lands were assessed and paid after September 9, 2009 – that is, within 10 years of the filing of the Plaintiffs’ Statement of Claim on September 9, 2019.

[92] Although not expressly argued by the Plaintiffs in these applications, I find that paragraphs 26(d) and 59 of the Amended Statement of Claim respecting the payment of taxes to the Village raise genuine issues respecting a right of restitution. It has been held in certain circumstances that taxes paid to public authorities pursuant to mistakes or legally invalid instruments may be recoverable: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 84-96.

[93] In order to ensure fairness to the Village in recognizing this cause of action, I raised it with counsel for the Village during oral arguments, and counsel very fairly conceded that such a claim does find support in the Plaintiffs’ pleadings and that the payments were made within the 10-year ultimate limitation period.

v. Historical Negligence

[94] Although not mentioned by the Plaintiffs in the present applications, the Plaintiffs’ Amended Statement of Claim includes a claim for historical negligence:

22. The Defendants had an ongoing duty to monitor and supervise the Landfill, and to ensure disclosure of its existence and to ensure that subsequent owners, developers, and users of the Lands did not suffer loss and damage as a consequence of their failure to do so. The Defendants breached their duty causing loss and damage to the Plaintiffs, particulars of which include:

- a. Failing to record the existence of the Landfill on the Lands;
- b. Selling the Lands without notice of the existence of the Landfill to subsequent purchasers of the Lands; and
- c. Failing to ensure the Defendants did or were able to monitor, assess, consider, or apply setbacks for development in proximity to landfills as required by law.

[95] In addition to being prominently featured in the Amended Statement of Claim, the Plaintiffs’ claim for historical negligence may be an implicit component of the Plaintiffs’ other claims.

[96] For these reasons, I find it advisable to address the applicability of limitation periods to the Plaintiffs’ claim for historical negligence, both standing alone and in conjunction with the Plaintiffs’ other claims despite its absence from the Plaintiffs’ submissions.

2. Legal Principles Respecting the Continuing Course of Conduct Doctrine in s. 3(3)(a) of the *Limitations Act*

[97] By its terms, s. 3(3)(a) applies only to the 10-year ultimate limitation periods in ss. 3(1)(b) and 3(1.1)(b) of the *Limitations Act*. The balancing of interests embodied the 10-year

ultimate limitation period was explained by Hunt J.A. in *Meek (Trustee of) v San Juan Resources Inc.*, 2005 ABCA 448 at para. 37:

...There must be a balance of fairness between plaintiffs (who are unaware of their claims) and defendants. From the standpoint of certainty, there comes a time when defendants should be secure in the expectation that they will not be held to account for ancient obligations. From an evidentiary standpoint, claims based on stale evidence should be foreclosed. Finally, plaintiffs are expected to act diligently and not sleep on their rights.

[98] Section 3(3) of the *Limitations Act* specifies when a claim “arises” for the purposes of the ultimate limitation period. As noted above, s. 3(3)(a) states that “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”.

[99] Although the precise origins of the “continuing violations doctrine” now embodied in s. 3(3)(a) have been lost to time, case reports from as early as the 16th century recognize its application to claims in nuisance and trespass. Those cases held that a nuisance or trespass claim does not arise once and for all when the offensive activity first manifests itself. Instead, each day’s failure to remove a nuisance or trespass will give rise to a new and separate cause of action.² Writing in 1768, Blackstone noted in his *Commentaries* that “every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie”: William Blackstone, *Commentaries on the Laws of England*, vol III, (Oxford: Clarendon Press, 1768) at p. 220.

[100] By the time that *Hole v Chard Union*, [1894] 1 Ch 293 (CA) was decided, the concept of a “continuing cause of action” had been incorporated into r. 58 of the *Rules of the Supreme Court* in England which read: “Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the date of the assessment.” Interpreting and applying that provision, Lindley L.J. said at pp. 295-96:

...What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case—appears to me precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the Defendants would be to render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance. The Judge was, therefore, right in treating it

² Kyle Graham, “The Continuing Violations Doctrine” (2007) 43:2 Gonz L Rev 271 at p. 308, citing *Beswick v Cunden*, Cro Eliz 402, 78 ER 646 (KB 1593): “If a dam be made in a river, so as to occasion an overflow of water upon the adjoining land, the tort is not extinguished by the sale of the land ; and the purchasor may maintain an action on the case for the continuing nusance ; for every continuance a is a fresh nusance... Gawdy, Justice. The action is well brought for continuing of the first nusance, but not for the levying thereof; and therefore the action is well brought for the keeping it up in his time, and not for the levying thereof.”

as a continuing cause of action, and in assessing the damages down to the date of the Chief Clerk's certificate.

[101] In the same case at p. 296, Smith L.J. stated: "If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*."

[102] The continuing violations doctrine was recommended for adoption into Alberta's limitations legislation in the report *Limitations* (Report No. 55), (Edmonton: Alberta Law Reform Institute, 1989). In that report, ALRI explained the rule's underlying rationale in the following terms:

45 ... Insofar as the objectives of limitations law are concerned, it doesn't matter how many breaches of duty there were, how many different duties were breached, how many claims there are, or when they accrued, if the claims all resulted from a continuing course of conduct or a series of related acts or omissions. The policy issue is when should the ultimate period begin: when the legally wrongful conduct began or when it ended... If the ultimate period were to begin when the conduct started, the defendant would be entitled to assert his immunity from liability under the claimant's claims a moment after the defendant's conduct stopped. The reasons for a limitations system based on evidence and repose do not require this harsh result. Stale evidence should not present a significant problem, for the evidence will have continually renewed itself with the defendant's repetitive conduct. Justice does not require giving the defendant repose for wrongful conduct which just stopped.

[103] It has recently been noted that the cases considering the application of s. 3(3)(a) of the *Limitations Act* do not provide a definitive statement as to when a claim is based upon a single or isolated breach of duty and when a claim is based upon a continuing course of conduct or a series of related acts or omissions: *Living Waters Catholic Separate School Division v UFA Construction*, 2025 ABKB 319 at para. 32. What guidance does exist is reflected in the following authorities:

- "An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action."

Roberts v City of Portage La Prairie, [1971] SCR 481 at p. 491, quoting *Salmond on Torts*, 15th ed., at p. 791.

- "For a claim to be "continuing" in the sense that the limitations clock repeatedly resets, the impugned conduct must be repetitive."

Emmons v. Alberta (Workers' Compensation Board), 2024 ABCA 78 at para. 36.

- “...while the damage to the land is continuous, that does not mean that there is a continuous breach of duty that would start the limitation period running anew every day”.
Brookfield Residential (Alberta) LP v. Imperial Oil Ltd., 2019 ABCA 35 at para. 6.
- “[F]or a claim to be “continuing”, the legal injury itself must continue, not merely the ill effects of the legal injury.”
RVB Managements Ltd. v. Rocky Mountain House (Town), 2015 ABCA 188 at para. 18.
- “In essence, the term [continuous] is used to describe causes of action that accrue from repeating actionable conduct. Because each repetition of the actionable conduct is identical and occurs continuously, it founds a new and discrete cause of action.”
Huether v Sharpe, 2025 ONCA 140 at para. 39.
- “To be a “continuing contravention”, there must be a succession or repetition of separate acts of discrimination of the same character.”
Manitoba v. Human Rights Commission (Man.), *Galbraith and Lylyk* (1984), 25 Man R (2d) 117 (CA) at para. 19.
- “A continuing cause of action is not in our view constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation.”
National Coal Board v Galley, [1958] 1 WLR 16 (CA) at p. 27.
- “A continuous cause of action refers to a cause of action which arises from the repetition of acts [or] omissions of the same kind as that for which the action was brought.”
Archer v. Pollydore, 2001 FCT 871 at para. 27.

[104] In considering the authorities listed above, it bears emphasis that the language of s. 3(3)(a) is significantly broader than that of similar provisions in Alberta and elsewhere. Unlike, for example, the rule applied in *Hole*, an equivalent of which currently resides in the *Alberta Rules of Court*,³ s. 3(3)(a) is not limited to “continuous” or “continuing” conduct. It also encompasses conduct which comprises “a series of related acts or omissions”. The significance of this additional language is illustrated by its impact upon the outcome of *Krook v Cold Lake (City)*, 2010 ABCA 324. In that case, a construction company had built a house in the fall, stopped work over the winter, and then returned in the spring to construct a retaining wall. Although the winter interruption negated the presence of a “continuous” course of conduct, the Court of Appeal concluded that the work could potentially constitute “a series of related acts or omissions”:

³ *Alberta Rules of Court*, A.R. 124/2010: “9.9 The Court must determine damages for a continuing claim to the time the Court makes its determination of the amount.”

A plain reading of this provision requires that the conduct complained about in the statement of claim is caught so long as part of it occurred less than 10 years before the filing of the claim, provided the conduct is a continuous course or consists of a series of related acts. In this case, it is at least arguable that the acts are related as they all concerned the construction of the house. More importantly, there is an obvious relationship between backfilling and levelling a lot. In many cases, weather permitting, these aspects of home construction are accomplished by the same workers at the same time. The fact that the Allan Block wall was built and the lot levelled in the spring following occupation of the house was likely attributable to weather because in Northern Alberta little landscaping is done in the dead of winter. In fact, other work on the home was completed after it was occupied. Although negligent installation of exterior siding would likely not be part of a series of related acts with respect to earlier plumbing or electrical work, it could be treated as part of a series of related acts when considered along with, for example, exterior papering of the wall. [Emphasis added]

[105] Finally, I will refer to *Bowes v City of Edmonton*, 2007 ABCA 347 being a case cited by all of the parties to the present applications. In *Bowes*, the defendant municipality had issued building permits respecting the plaintiffs' two homes. More than 10 years later, a riverbank collapse destroyed the homes. In overturning the trial court's finding of liability, the Court of Appeal found that the plaintiffs' causes of action, if any, arose when the permits were issued and could not be said to be "continuous" with the subsequent collapse:

[169] I see nothing continuous here. Permits were given (two for each house) on distinct days in the early 1980s. Each house was built over a few months in the late 1980s and then fully completed. Each lot and house suddenly collapsed October 23, 1999. Even if one counted some subsidence and cracking before, that only went on for a few months. Absolutely nothing happened from the late 1980s until 1998 or 1999.

[170] For each house, the City's (supposedly negligent) omission occurred on one date when a permit was given. The reliance occurred and was completed shortly thereafter, by construction and occupation. The harm occurred suddenly years later. The situation was inevitable once the last permit was issued (for a given house), and irreparable when each house was built. Cf. *Meek v. San Juan Res.*, *supra*.

[171] Permits were not reissued, and harm did not occur evenly day by day over a long period. Quite the contrary. This tort was less continuous than most torts.

[172] Separation of the wrongful act (or omission) and the harm does not mean a continuous tort.

[173] What if in theory the City had a duty to keep warning after the development and building permits were issued? Further warning would be pointless after construction. After a house was built and occupied, failure to warn further had no causal effect. To regard every ancient failure to warn as occurring every day would be a fiction destroying all limitation periods.

[174] If the above were not the law, then most cases of delayed harm from a tort could be dressed up as failures to warn, with no limitation period.

[106] In the present case, the Plaintiffs raise arguments which are not covered by the authorities summarized above. In particular, the Plaintiffs submit that s. 3(3)(a) encompasses continuous or related conduct which does not form part of their causes of action, as well as conduct by multiple defendants. I will next address these legal issues.

3. Conduct Not Forming Part of the Plaintiffs' Causes of Action

[107] In support of their arguments respecting the applicability of s. 3(3)(a) of the *Limitations Act*, the Plaintiffs rely upon certain conduct by the Defendants which does not form part of their causes of action. In the Plaintiffs' view, it will be sufficient for the purposes of s. 3(3)(a) if the Defendants engaged in *some* continuous or related conduct within the ultimate limitation period, even if that conduct was not actionable.

[108] In support of this aspect of their arguments, the Plaintiffs relied upon ***Krook*** in their oral submissions. As noted above, the Court of Appeal held in that case that it was at least arguable that the installation of a retaining wall within the ultimate limitation period was sufficiently "related" to the earlier steps taken in the construction of a house for the purposes of s. 3(3)(a). From this, the Plaintiffs appear to argue that s. 3(3)(a) will be satisfied wherever a contractual relationship between the parties subsisted into the ultimate limitation period, regardless of whether any actionable conduct occurred under the contract during that period.

[109] With respect, I do not agree with the Plaintiffs' reading of ***Krook***. As a review of paras. 7, 12 and 14-17 of that case confirms, the conduct which occurred during the ultimate limitation period (being the installation of the retaining wall) was part of the conduct which comprised the plaintiffs' negligence claim. That is, the plaintiffs pleaded that the retaining wall had been negligently installed. This point was essential to the Court of Appeal's decision (see paras. 14-15). The mere continuance of the applicable construction contract within the ultimate limitation period, without more, would have been insufficient.

[110] The Plaintiffs' argument on this point is also contrary to s. 3(3)(a)'s plain language. That language indicates that the claims must be based on breaches of duty "resulting from" the continuing or related conduct. A breach may be said to be "resulting" from the conduct if it follows, and is caused by, that conduct: ***Rothwell v Caverswall Stone Co Ltd.***, [1944] 2 All ER 350 at p. 365. In other words, the conduct which occurred within the 10-year limitation period must form "part of" the conduct which gives rise to the claims. As the Court of Appeal stated in ***Krook***:

[19] ... A plain reading of this provision [s. 3(3)(a)] requires that the conduct complained about in the statement of claim is caught so long as part of it occurred less than 10 years before the filing of the claim, provided the conduct is a continuous course or consists of a series of related acts. [Emphasis added]

[111] For these reasons, I find that for the Plaintiffs' claims to be caught by s. 3(3)(a), part of the conduct which gives rise the claims must have occurred within the ultimate limitation period. It is insufficient for the Plaintiffs to establish the occurrence of continuous or related conduct within the ultimate limitation period which does not form part of or contribute to the Plaintiffs' causes of action.

4. Continuous or Related Conduct by Multiple Defendants

[112] The Plaintiffs submit that the two Defendants in this case are “joint actors”, such that each are liable for the conduct of the other. Consequently, in the Plaintiffs’ view, they may sue the County for conduct that terminated prior to the commencement of the ultimate limitation period since conduct that was continuing or related to the County’s conduct was committed by the Village after the commencement of the ultimate limitation period.

[113] Can s. 3(3)(a) of the *Limitations Act* encompass conduct by multiple defendants? None of the parties have identified any authority on this point, and in my view, neither the existing case law nor the language of the legislation provides a clear answer.

[114] There are differing lines of American authority on this point. For example, in *Mnyofu v. Bd. of Educ. of Rich Twp. High Sch. Dist. 227*, Case No. 03-cv-8717, 2007 WL 1308523 (N.D. Ill. Apr. 27, 2007) it was held that the “continuing violation rule” will only apply to acts “by the same actor”:

...But under the [continuing violation] rule, a defendant’s conduct may be viewed as a continuous whole for statute of limitations purposes only where “the acts are continuous, *by the same actor*, and of a similar nature ...”[...] Here, plaintiff attempts to invoke the continuing violation rule by improperly lumping different acts by *different* actors at varying time periods. The individual defendants’ conduct cannot be considered collectively simply because they were all associated with District 227...

[115] In contrast, it has been held that the “continuous treatment doctrine” may suspend the tolling of a limitation period against multiple health care providers where there exists “an agency or other relevant relationship between the health care providers”: *Curry v State*, 239 AD 3d 1058, 236 NYS 3d 761 (3d Dep’t 2025). The reasoning reflected in this line of authority suggests that the continuing violations doctrine might encompass the conduct of multiple defendants depending upon the nature of their relationship, the nature of the conduct, and other circumstances.

[116] In the absence of any additional authority or focused submissions on this point, I only find it necessary to conclude in the present case that this issue is unclear and arguable from both sides.

5. Application of Legal Principles to the Plaintiffs’ Claims

i. The Plaintiffs’ Maintenance Period under the Development Agreement

[117] As noted above, the Plaintiffs’ oral arguments on these applications included an attempt to raise or identify a claim that the County breached Section XV.3 of the Development Agreement of October 11, 2007, by failing to “do all things necessary by way of application or otherwise” to seek written consent from the Deputy Minister for a variance pursuant to s. 13(5) of the SADR. I have previously found that the Amended Statement of Claim does not raise any claim for breach of the Development Agreement. It remains to be determined whether the subsistence of that agreement might support the Plaintiffs’ remaining causes of action pursuant to s. 3(3)(a).

[118] The Plaintiffs submit that s. 3(3)(a) of the *Limitations Act* applies to both their breach of contract claim and their other causes of action since the contractual relationship created by the Development Agreement between the Plaintiffs and the County endured for the first 33 days of the ultimate limitation period and the performance of that agreement constitutes part of “a continuing course of conduct or a series of related acts or omissions”. Therefore, they argue, their claims did not arise for limitations purposes until after the ultimate limitation period had started running.

[119] The Development Agreement provided that once the local improvements constructed by the Plaintiffs had been approved by the County, the Plaintiffs would be responsible for maintaining the roadways and other improvements for a period of one year. By its terms, the Development Agreement remained in effect until the expiration of that maintenance period.

[120] The Plaintiffs’ maintenance period under the Development Agreement expired on October 12, 2009. This means that there was a 33-day period within the 10-year ultimate limitation period (September 9, 2009, to October 12, 2009) during which the Plaintiffs and the County remained parties to a subsisting development agreement.

[121] However, other than the Plaintiffs’ late argument that the County failed to seek the consent of the Deputy Minister (which I have disallowed), they do not suggest that the Defendants committed any other breach or actionable conduct during those final 33 days. In fact, the Plaintiffs do not suggest that the Defendants did anything under the agreement during that period.

[122] None of claims pleaded in the Plaintiffs’ Amended Statement of Claim are based upon breaches of duty by either Defendant which “resulted from” any acts or omissions under the Development Agreement during the final 33 days prior to its expiration. Nor is the mere subsistence of the Development Agreement alleged to constitute conduct giving rise to a cause of action.

[123] For these reasons, I find that the mere subsistence of the Development Agreement for the first 33 days of the ultimate limitation period does not bring the Plaintiffs’ claims within s. 3(3)(a). Since nothing was done by either Defendant during that period which forms part of the Plaintiffs’ causes of action, s. 3(3)(a) is inapplicable.

ii. Inspections and the Issuance of Permits to Non-Parties

[124] After the Lands had been subdivided into 27 lots, and before the discovery of the landfill, some of the lots were sold by the Plaintiffs to purchasers. The new owners then applied for and obtained their own development permits, inspection reports, and the like from the Defendants respecting their lots. These owners were Jeff and Carrie Scammel, Janneman Fourie Prof. Corp., Rod Veremy, and HERO. Of these entities, only HERO is a Plaintiff. The other entities are not parties to these proceedings.

[125] The non-parties who obtained decisions from the Defendants are referred to in paragraph 18 of the Amended Statement of Claim which states that the non-parties “will also have claims against the Defendants”. However, as far as the parties are aware, no such claims by the non-parties have been brought.

[126] I conclude that the issuance of permits, inspection reports, and the like, by the Defendants to *non-parties* within the ultimate limitation period does not bring the Plaintiffs’ claims within s. 3(3)(a) since that conduct does not form part of the Plaintiffs’ claims. It is merely conduct for

which other parties might theoretically have brought their own claims. Conduct which does not form part of or otherwise contribute to the Plaintiffs' causes of action is not encompassed by s. 3(3)(a).

iii. Permits Issued by the Village to HERO

[127] One of the purchasers of a lot on the Lands was the Plaintiff HERO. On April 26, 2013, HERO applied to the Village for a development permit respecting its own lot, and a development permit was approved and issued that same day. Further permits and inspections continued from time to time until March 6, 2015, when the final inspection report was issued. These events occurred prior to the discovery of the landfill.

[128] As noted above, the procedural posture of these applications requires me to presume that the issuance of allegedly invalid permits by the Defendants raises triable issues.

[129] As they do with respect to the permits issued to non-parties, the Plaintiffs rely upon the inspections and permits with respect to HERO's lot in support of the claims of all the Plaintiffs.

[130] The County responds that it had no involvement with permits or inspections respecting HERO's lot, and that conduct by the Village after the commencement of the ultimate limitation period cannot be imputed to the County for the purposes of s. 3(3)(a).

[131] The Village submits that although the permits and inspections respecting HERO's lot did occur within the ultimate limitation period, those events are not continuing or related to the events which comprise the remainder of the Plaintiffs' claims, since, among other things, they only involved HERO and not the other Plaintiffs. Further, the Village argues that since HERO's lot lies more than 300 metres from the landfill's boundary, the permits and inspections were not issued contrary to s. 13(3)(b) of the SADR and cannot be taken as misrepresentations respecting compliance with that provision.

a. The Claims of the Plaintiffs other than HERO

[132] Dealing firstly with the claims of the Plaintiffs other than HERO, I find that the issuance of permits to HERO does not serve to extend the claims of those other Plaintiffs into the ultimate limitation period pursuant to s. 3(3)(a). Even assuming that those permits were invalid and that their issuance is actionable, they were only issued to HERO and not to the other Plaintiffs. Consequently, their issuance does not form part of the other Plaintiffs' causes of action and cannot be relied upon as continuous or related conduct for the purposes of s. 3(3)(a).

b. The Significance of HERO's Lot Lying More than 300 Metres from the Landfill

[133] Is the issuance of permits to HERO between 2013 and 2015 part of HERO's claims given that the lot lies more than 300 metres from the landfill's boundary? As noted above, at the time the permits to HERO were issued, s. 13(3)(b) of the SADR provided that "a development authority shall not issue a development permit for a... residence... if the building site... (b) is within 300 metres of the disposal area of... [a] non-operating landfill". The Plaintiffs have acknowledged in answer to an undertaking that HERO's lot lies more than 300 metres from the landfill. Hence, the permits to HERO were not issued in direct contravention of the applicable legislation.

[134] However, I agree with the Plaintiffs' submission that the legal validity of the permits necessarily relies upon the legal validity of the earlier subdivision approval, which in turn

appears to have been unwittingly issued in contravention of s. 13(2)(b) of the SADR. Hence, the permits issued to HERO would likely be invalid despite their own direct compliance with s. 13(3)(b), and the Defendants have conceded for the purposes of the present applications that the issuance of such permits raises triable issues.

[135] For these reasons, I do not find that HERO's reliance upon the issuance of permits within the ultimate limitation period is defeated by reason only of the fact that HERO's lot lies more than 300 metres from the landfill.

c. Does the Issuance of Permits and Approvals Respecting HERO's Lot Engage s. 3(3)(a) of the *Limitations Act*?

[136] It is next necessary to determine whether the issuance of permits and inspection reports to HERO after the commencement of the ultimate limitation period forms part of "a continuing course of conduct or a series of related acts or omissions" for the purposes of HERO's claims.

[137] By way of summary, the conduct relied upon by HERO in support of its causes of action and which occurred prior to September 9, 2009, (i.e. more than 10 years prior to the filing of the Plaintiffs' Statement of Claim) includes the following:

- March 9, 2007 - Receipt of the application for subdivision by the County;
- June 27, 2007 and July 26, 2007 - Correspondence from the Village to the County supporting the subdivision application;
- August, 2007 - Subdivision Report including representation that s. 13 of SADR is complied with;
- August 30, 2007 - Conditional approval of subdivision by the County;
- October 11, 2007 - Development Agreement between Plaintiffs and the County;
- May 26, 2008 - Formal approval of subdivision by the County;
- June 30, 2008 - Agreement by the Village to annex subdivision and to adopt the Development Agreement;
- January 1, 2009 (effective date) - annexation of Lands by the Village by Order in Council.

[138] The Village acknowledges that after the commencement of the 10-year period preceding the filing of the Statement of Claim it issued a series of permits and inspection reports to HERO respecting HERO's lot:

- April 26, 2013 - Development Permit;
- June 14, 2013 - Building Permit;
- July 26, 2013 - Gas Permit;
- July 30, 2013 - Plumbing Permit;
- December 4, 2013 – Electrical Inspection;
- March 6, 2015 - Final Inspection Report.

[139] I conclude that conduct listed above is not a “continuing course of conduct” since it is characterized by numerous interruptions for significant periods of time. These interruptions included January 1, 2009, to April 26, 2013, when little or nothing of significance to HERO’s claim happened. Unlike an ongoing false imprisonment or nuisance claim, it cannot be said that this course of conduct was “continuing”.

[140] In contrast, I am unable to finally conclude at this summary dismissal stage whether the conduct relied upon in support of the Plaintiffs’ claims constitutes a “series of related acts or omissions” for the purposes of s. 3(3)(a) as interpreted and applied in *Krook*. It may be fairly argued that some or all of the events are “related” and form a “series” since they are all necessary steps in the development process and relate to the same land. In my view, these circumstances at least raise a genuine issue for trial.

[141] I therefore conclude there exists a triable issue as to whether the approvals, permits, and related conduct outlined above and underlying HERO’s claim are captured by s. 3(3)(a) of the *Limitations Act*. The permits and inspections respecting HERO’s lot occurred within the ultimate 10-year limitation period, and the Defendants have conceded for the purposes of these applications that this conduct raises triable issues.

d. Can the County’s Conduct Respecting HERO’s Lot be Encompassed by s. 3(3)(a)?

[142] Regarding conduct by the County within the ultimate limitation period, the only permits issued by the County in relation to the Lands were issued to the Scammels. The County received its first permit application from the Scammels on May 23, 2008, and continued to conduct inspections and issue permits to the Scammels until August 27, 2009. After that date, the County closed its file. The County did not conduct inspections or issue permits respecting any of the lots within the Lands after September 9, 2009, when the ultimate limitation period commenced. The County issued no permits or approvals respecting HERO’s lot. So, the acts and omissions by the County which are encompassed by HERO’s claims terminated prior to the commencement of the 10-year ultimate limitation period.

[143] However, following annexation of the Lands by the Village on January 1, 2009, the Village essentially “stepped into the shoes” of the County in that the Village took over responsibility for the permitting and inspection processes respecting the Lands. The Village issued numerous permits to all the non-party owners and to HERO. The Village first approved a development permit respecting the Lands on June 11, 2009, to the Scammels, and continued to conduct inspections and issue permits respecting the Lands until it issued its last development permit respecting the Lands to Rod Veremy on September 4, 2019.

[144] Can it be said that the County’s pre-September 9, 2009, conduct and the Village’s post-September 9, 2009, conduct can together form a “series of related acts or omissions” for the purposes of s. 3(3)(a)? As noted above, it is my view that neither the language of s. 3(3)(a) nor the existing case law provides a clear answer as to whether the conduct of multiple defendants may be encompassed by that provision.

[145] In *Weir-Jones*, it was held at para. 45 that the law does not have to be beyond doubt before summary judgment can be granted, but that there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record.

[146] I conclude that the potential applicability of s. 3(3)(a) to multiple defendants, and these two Defendants in particular, raises a genuine issue for trial. None of the parties provided focused submissions on this issue, and there appears to be no Canadian case law on point. The parties also have not focused upon the nature of the relationship between the County and the Village. Clearly, the Village took over responsibility for the County after the Lands were annexed to the Village. The extent to which the Defendants may have utilized common employees, documents, and information is unclear on the evidence.

[147] For these reasons, I find that the application of the ultimate limitation period to HERO's claims against the County raises a genuine issue for trial. Although the County's conduct with respect to HERO occurred prior to the commencement of the ultimate limitation period, it could potentially be found that the conduct of the County and the Village together comprises a single "series of related acts or omissions" for the purposes of s. 3(3)(a).

iv. The Plaintiffs' Claim for the Recovery of Property Taxes

[148] As noted above, the Plaintiffs paid some \$221,000 in property taxes to the Village within the ultimate limitation period. The assessments underlying those payments were conducted on the mistaken belief or assumption that the subdivision approval and the related development approvals and permits were legally valid. I have also found that it is arguable (though far from certain) that taxes paid to public authorities pursuant to mistakes or legally invalid instruments may be recoverable: *Elder Advocates* at paras. 84-96.

[149] Since this aspect of the Plaintiffs' claim is based upon payments made to the Village within the ultimate limitation period, and since the presence of the landfill was not discoverable until its discovery in 2019, I decline to grant summary dismissal of this claim based upon the Village's limitations defence.

[150] The only property taxes respecting the Lands that were paid to the County occurred prior to the commencement of the ultimate limitation period, and before the value of the lands had been increased by the subdivision approval. Consequently, the Plaintiffs' claim against the County for the recovery of property taxes (if any such claim exists) is barred by the applicable limitation period.

v. The Plaintiffs' Historical Negligence Claim

[151] Despite having been swept under the rug in the present applications, I find it advisable to address the Plaintiffs' "historical negligence" claim – that is, the claim that the Defendants negligently failed to monitor, record, and generally keep track of the landfill in the 1960's and 1970's so as to ensure that it not harm the interests of future landowners. For ease of reference, paragraph 22 of the Amended Statement of Claim is here again reproduced:

22. The Defendants had an ongoing duty to monitor and supervise the Landfill, and to ensure disclosure of its existence and to ensure that subsequent owners, developers, and users of the Lands did not suffer loss and damage as a consequence of their failure to do so. The Defendants breached their duty causing loss and damage to the Plaintiffs, particulars of which include:

- a. Failing to record the existence of the Landfill on the Lands;
- b. Selling the Lands without notice of the existence of the Landfill to subsequent purchasers of the Lands; and

c. Failing to ensure the Defendants did or were able to monitor, assess, consider, or apply setbacks for development in proximity to landfills as required by law.

[152] All of the conduct relied upon in paragraph 22 occurred long before the commencement of the ultimate limitation period in s. 3(1)(b) of the *Limitations Act*. In deference to *Bowes* at paras. 169-173, the Plaintiffs do not suggest that this historical conduct is encompassed by s. 3(3)(a), and as found previously, the Plaintiffs have not raised a triable issue respecting the commission of fraudulent concealment for the purposes of s. 4.

[153] For these reasons, I find that the Plaintiffs' claim for historical negligence is barred by the ultimate limitation period in s. 3(1)(b) of the *Limitations Act*.

D. The Plaintiffs' Application for an Extension of the Limitation Period Pursuant to s. 218 of the *Environmental Protection and Enhancement Act*

[154] With respect to those aspects of their claims which are barred by the applicable limitation period, the Plaintiffs seek an extension of that limitation period pursuant to s. 218(1) of the *Environmental Protection and Enhancement Act* (“EPEA”):

218(1) A judge of the Court of King'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.

[155] The parties do not dispute that s. 218 is applicable to this proceeding since “the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment”. The parties disagree, however, as to whether an extension of the applicable limitation period ought to be granted.

[156] In *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited*, 2019 ABCA 35 at paras. 12-13, the Court of Appeal emphasized that a decision pursuant to s. 218 of the *EPEA* should take into account the objectives of both the *EPEA* and the *Limitations Act*. The Court also specified the relevant objectives of those enactments.

[157] With respect to the *Limitations Act*, the Court noted in *Brookfield* at para. 12 the underlying purposes of repose and finality. Actions must be commenced within set periods because:

- (a) it is in the public interest that defendants be protected from ancient obligations, and that they be allowed to order their affairs going forward on the basis that those obligations will no longer be enforced;
- (b) disputes should be resolved while evidence is still available, when the memories of witnesses are still fresh, and when (if necessary) pertinent expert evidence can be obtained;
- (c) it is not unreasonable to require claimants to act in a timely manner, and to put defendants on notice of claims against them;
- (d) claims should be adjudicated based on the standards of conduct and liability in place at the time, and not by applying the standards of today with hindsight.

[158] With respect to the *EPEA*, its purposes are identified in s. 2. The purposes of potential significance to the present case include the following:

2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

[...]

(b) the need for Alberta’s economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

[...]

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

[...]

(i) the responsibility of polluters to pay for the costs of their actions;

[159] Of the purposes identified in s. 2 of the *EPEA*, the Court of Appeal has emphasized “the paramountcy of the polluter pays principle”: *Paramount Resources Ltd. v Grey Owl Engineering Ltd.*, 2024 ABCA 60 at para. 51. In doing so, the Court referred to the following passage from the decision of Feth J. (as he then was) in *United Inc. v Canadian National Railway Company*, 2020 ABQB 413 at para. 139:

[139] A cornerstone of the public policy underlying the *EPEA* is that the polluter pays. That philosophy promotes the protection, enhancement and wise use of the environment by ensuring that polluters are held responsible for their actions and inaction. By promoting accountability, undesirable environmental practices are deterred. Accordingly, liability for environmental contamination should not be

extinguished or transferred from a polluter to another person, unless the claimant clearly intends that result.

[160] The Court also found in *Brookfield* at para. 13 that the discretion to extend limitation periods in the *EPEA* reflects competing policy objectives:

- (a) the objective of much environmental legislation is that the “polluter pays”, and in some circumstances a polluter should not escape responsibility by the mere passage of time; and
- (b) environmental contamination may be difficult to detect, meaning that the strict application of the “discoverability” rule to environmental claims may be unreasonable or unfair in some situations.

[161] The Court of Appeal reiterated the above aspects of *Brookfield* in *Paramount Resources*. The Court also emphasized at para. 55 that s. 218 does not create categories of permitted and unpermitted claims for which an extension can (or cannot) be granted. Instead, s. 218 empowers a King’s Bench justice to exercise their discretion as to whether to extend a limitation period based on the listed factors as well as “any other criteria the court considers relevant” to the particular case. As examples of other criteria that may be considered the Court identified (1) whether the environmental harm has already been remediated (para. 58), and (2) the relationship between the claimant, the pollution and the land on which the pollution occurred (at para. 60).

[162] Applying these principles to the present case, all parties agree, and I accept, that the Plaintiffs could not reasonably be expected to have discovered the landfill any earlier than they did. When the Plaintiffs purchased the Lands, the landfill had been buried out of sight for decades, and no known living person was aware of its existence. This consideration weighs in the Plaintiffs’ favour, or at least does not weigh against them.

[163] However, I find that an extension of the applicable limitation periods would do little to advance the purposes of the *EPEA* and would greatly undermine the objectives of the *Limitations Act*. This conclusion is based upon the following considerations.

[164] Not all landfills constitute “pollution” for the purposes of the “polluter pays” principle. The landfill at issue in the present case has been investigated by the provincial authorities who determined that the placement and operation of the landfill was lawful. Further, both these authorities and the Plaintiffs’ experts have determined that the site does not present a significant adverse effect to the environment since its contaminant levels are below the applicable guidelines. For these reasons, no remediation, clean-up, or enforcement steps are required, and there is therefore no “polluter” for the purposes of the “polluter pays” principle.⁴

[165] Further, the conduct which is the focus of the Plaintiffs’ claim as they characterize it, namely the issuance of approvals, reports and permits beginning in 2007, is not undesirable environmental conduct that the *EPEA* seeks to deter. That conduct did not involve the release of

⁴ The term “polluter” in s. 2(i) is not defined in the *EPEA*. The following definition of “pollution” appearing in the different context of a pollution exemption clause of an insurance policy was stated in *Construction Distribution and Supply Company Inc. v. Continental Casualty Company*, 2023 ONSC 7526 at para. 27: “It is my view, that the commonly understood definition of pollution is the escape of an irritant or contaminant into the natural environment that causes damages related to the clean-up of the contamination, and the costs of investigating, testing, and monitoring the contamination. In other words, an “irritant or contaminant” does not become “pollution” unless the substance enters the natural environment, and there is a requirement to investigate, test and clean-up the substance.”

any contaminants or other substances into the environment, and there is no evidence that it was done with any knowledge or suspicion that the landfill was present. Holding the Defendants accountable for conduct of this nature would do little to advance the objectives of the *EPEA*.

[166] It is arguable that holding the Defendants accountable for their historical failure to keep records respecting the landfill's location and operation would advance the purposes of the *EPEA*. Regulations enacted under the *EPEA* currently require landfill operators to maintain extensive records for landfills,⁵ and permitting this action to proceed could potentially encourage landfill operators to comply with standards of this nature.

[167] But the Defendants' apparent failures to keep records occurred some 50 years before the Plaintiffs' claims were commenced. Consequently, any advancement of the *EPEA*'s purposes is greatly outweighed by the policy considerations underlying the *Limitations Act*. As explained in *Brookfield*, those purposes include giving defendants repose from ancient obligations, resolving disputes when evidence is still available, and adjudicating claims based on the standards in place at the time rather than on current standards in hindsight. Despite extensive efforts, the parties in this case have been unable to discover any evidence respecting either the historical events or the historical standards of practice. Under these circumstances, the Defendants' ability to defend these claims would be severely prejudiced by an extension of the applicable limitation periods.

[168] In summary, the Plaintiffs cannot be reasonably expected to have discovered the presence of the landfill any earlier than they did. But an extension of the limitation periods applicable to the Plaintiffs claims would do little to advance the purposes of the *EPEA* and would greatly undermine the purposes of the *Limitations Act*. For these reasons, the Plaintiffs' application for an extension of the limitation period is denied.

V. Conclusions and Order Granted

[169] In conclusion, I return to the terms of the March 7, 2025, Order of Justice Hayes-Richards which direct me to determine the following issues:

- (a) Whether the *Limitations Act*, RSA 2000, c L-12 defence raised by Defendants in their pleadings is a bar to the Plaintiffs' action.
- (b) Whether any applicable limitation dates should be waived pursuant to Section 218 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

[170] In answer to these questions I grant the following declaration:

- (a) The entirety of the claims of the Plaintiffs DAKA Holdings Ltd., Spectar Consulting Ltd., Omnicore Inc., and Gen-X Initiatives Inc., excepting their claim for the recovery of property taxes from the Village of Boyle, are barred by the ultimate limitation period in s. 3(1)(b) of the *Limitations Act*;
- (b) The "historical negligence" claim of all the Plaintiffs as pleaded at paragraph 19 of the Amended Statement of Claim is barred by the ultimate limitation period in s. 3(1)(b) of the *Limitations Act*;

⁵ By operation of s. 24(1)(b) of the *Waste Control Regulation*, A.R. 192/96, landfill operators are required to comply with the *Code of Practice for Landfills*, which contain record keeping requirements at s. 10.

- (c) The Plaintiffs' claim for recovery of property taxes from the Village of Boyle is not barred by the applicable limitation period;
- (d) The applicability of s. 3(3)(a) of the *Limitations Act* to the remainder of the claim of H.E.R.O. Construction Ltd. against both Defendants raises a genuine issue for trial; and
- (e) The Plaintiffs' application for an extension of the applicable limitation period pursuant to s. 218 of the *Environmental Protection and Enhancement Act* is denied.

Heard on the 23rd day of September, 2025.

Dated at the City of Edmonton, Alberta this 6th day of February, 2026.

N. Whiting
J.C.K.B.A.

Appearances:

Patrick D. Kirwin
for the Plaintiffs

Peter D. Gibson
for the Defendant Village of Boyle

Kent T. West
for the Defendant County of Athabasca No. 12