Court of King's Bench of Alberta

Citation: Northern Lights (County) v Wood Canada Limited, 2025 ABKB 57

Date: 20250130
Docket: 2203 06085
Registry: Edmonton

Between:

County of Northern Lights

Plaintiff

- and -

Wood Canada Limited and Aldea Engineering Services Ltd

Defendants

Memorandum of Decision
of
Applications Judge B.W. Summers

Introduction

[1] The Defendant Aldea Engineering Services Ltd ("Aldea") applies for an order summarily dismissing this action against it on the grounds that the action was started by the County of Northern Lights ("CNL") after expiry of the appropriate limitation period.

Facts

[2] In 2015 CNL retained a predecessor of Wood Canada Limited (the predecessor and successor shall hereinafter collectively be referred to as "Wood") to design a 59 km water line and manage its construction ("Project"). Wood was both consultant and project manager for CNL. Wood retained Aldea to design the horizontal directional drilling ("HDD") portion of the Project. Wood recommended and CNL retained E.O.S. Pipeline & Facilities Incorporated

("EOS") to construct the Project. EOS retained Big Bore Directional Drilling ("Big Bore") as the drilling subcontractor.

[3] Construction of the Project started in August of 2018. EOS immediately encountered difficulties including the following:

(a) "frac-outs" which occur when drilling fluids used in the HDD return to the surface;

(b) exertion of pulling forces on the pipe sections in excess of the maximum allowable;

(c) breaking of electrical tracer wires installed beside the underground pipe for the purpose of locating.

("HDD Construction Issues")

[4] On September 18, 2018 representatives of EOS, Aldea, Wood and CNL met to discuss the HDD Construction Issues.

[5] On September 26, 2018 Big Bore sent a letter to EOS advising that the HDD design was not constructible and suggested that the drive lengths be reduced in half from 400 meters to 200 meters.

[6] On September 28, 2018 EOS sent a letter to CNL and Wood that stated, among other things:

(a) The HDD installation as designed is not constructible;

(b) Big Bore attributes the problematic HDD installation to the lengths of the bores and soil conditions;

(c) Big Bore suggests that the only remaining option is to cut the bores in half;

(d) EOS has retained BlueFox Engineering Inc ("BlueFox") to assess the execution plan;

(e) BlueFox suggests reducing the HDD length, but the reduction could be lessened if a buoyancy program is used;

(f) If CNL elects to shorten the length of any one bore, it necessarily requires adjustment of the next bore and every bore thereafter down the line. This requires the Project to be redesigned;

(g) Given there is no guarantee that shortening the bore lengths will lead to successful bore drives, EOS is of the view that HDD installation is not feasible and open trench installation is required;

(h) However, if CNL decides to proceed with the work, it must be designed in a constructible manner and EOS expects there will be further delay; and

(i) EOS gives notice of its claim to entitlement to additional time and payment.

[7] The work on the HDD portion of the Project ("HDD Work") stopped between September 29, 2018 and October 18, 2018.

[8] On October 18, 2018 Wood sent a letter of response (copied to CNL) that stated, among other things:

(a) Certain findings of BlueFox are due to design differences with the contract drawings and calculation methods set out by Aldea;

(b) Wood/Aldea will not validate the statement of *"the HDD drives as currently designed/engineered are not constructible and thus not feasible as designed"* as factual or correct. Actually, BlueFox recommends that HDD sections 14, 18 and 24 can be installed with sufficiency buoyancy controls which is a requirement of the contract documents. For longer drives, the current design meets the current industry standard practice (see correspondence from Aldea for more details);

(c) The contract states that if the contractor (EOS) proposes any change to the tunneling methodology or design it shall submit to the Engineer (Wood) a proposal and the Contractor shall be responsible for all redesign permits and property;

(d) If EOS elects to redesign the HDD drives, Wood/Aldea will review the changes;

(e) EOS and Big Bore have limited experience in completing long HDD drives;

(f) Wood continues to investigate Big Bore's references to see if it is in fact qualified; and

(g) EOS allowed work to proceed without first obtaining approval for submittals.

[9] EOS retained a second HDD engineering firm called CCI Inc ("CCI").

[10] On November 16, 2018 EOS sent a letter to CNL and Wood regarding findings of CCI and stated that the bores must be shortened and "pit to pit" methodology be used rather than "surface to surface" and that there will be cost and scheduling impacts from these changes, if approved.

[11] On November 27, 2018 EOS sent a letter to CNL and Wood which stated, among other things:

(a) As stated in EOS' letter of September 28 the HDD Work as designed is not feasible or constructible. This is now further supported by EOS' drilling efforts and CCI's findings;

(b) EOS agrees with CCI's suggestions regarding bore lengths and pit to pit methodology;

(c) EOS is not responsible under the contract or at law to redesign the HDD Work. The anticipated additional costs are $6,883,550;

(d) EOS incurred an additional $2,250,000 trying to work with the original design; and

(e) EOS hereby gives notice of its claim to additional entitlement.

[12] On December 3, 2018 Wood sent a letter to EOS, providing a notification on behalf of CNL and Wood, that there were several items of non-conformance to the contract specifications for the Project, in addition to those identified in Wood's letter of October 18, 2018. Five specific items of non-conformance were noted as well as noting EOS' default in failing to provide

scheduling information and documentation. This letter, which was copied to CNL, advised that progress payments to EOS would be suspended.

[13] On December 7, 2018 EOS sent a letter to CNL and Wood which stated that it had addressed all issue of alleged non-conformance (with respect to both the October 18 and December 3 letters) and asked CNL and Wood to reconsider their positions.

[14] Further letters were exchanged between EOS and Wood on whether there had been defaults and whether they had been corrected. EOS continued to contend that the original design of the HDD Work was not constructible and Wood and Aldea continued to dispute that fact. CNL received those letters.

[15] Meanwhile, in December of 2018, Wood advised CNL that Wood and Aldea wanted to retain a third-party engineer, Associated Engineering Alberta Ltd ("AE"), to provide a further review of the HDD design. CNL accepted this recommendation. Wood was the party responsible for contracting, communicating and working with AE. CNL was not involved in, or copied on, any meetings, telephone calls or correspondence with AE.

[16] EOS ultimately completed the HDD Work based upon a "pit to pit" methodology and design and shorter bore lengths and claimed for additional amounts under the contract. The HDD Work was completed in approximately November of 2019.

[17] On April 20, 2020 EOS sent a letter to CNL, copied to Wood, seeking mediation and binding arbitration with respect to claims in excess of $28 million. That claim included a claim for an extra $17.7 million as a result of trying to implement the original design for the HDD Work and having to redesign and implement the redesign.

[18] During the arbitration process (specifically January 2021) Wood provided to CNL, for the first time, the following documents that it had received from AE:

(a) a "Preliminary Findings Report" dated January 22, 2019;

(b) a "Final Report Draft" dated September 14, 2019; and

(c) a "Technical Memorandum" dated October 30, 2020.

(collectively "AE Reports").

[19] The AE Reports were largely consistent with EOS' position with respect to the HDD design being faulty, but this information was kept from CNL until January of 2021.

[20] CNL commenced this action against Wood and Aldea on April 20, 2022 for in excess of $28 million.

[21] On December 8, 2022 an arbitration award was made in favour of EOS in the amount of $16,986,926.59. A further award was made in favour of EOS in the approximate amount of $4.5 million on February 27, 2023 (collectively "Arbitration Award"). The essential basis for the Arbitration Award was that the HDD portion of the Project was not constructible as designed by Aldea.

[22] Aldea was not a party to the arbitration proceeding.

Issue

[23] The single issue for consideration on this application is whether CNL's action against Aldea was commenced outside the applicable limitation period. However, I must keep in mind that this is an application for summary dismissal under r 7.3 of Alberta *Rules of Court*.

Discussion

[24] Aldea's application for summary dismissal asks the Court to consider two different provisions of the *Limitations Act*: s 3(1)(a) and s 3(1.1). The former section is the general limitation provision and the latter section sets out the limitation period for an action against a tortfeasor for contribution or indemnity. For CNL to successfully defeat Aldea's application, it would only need to succeed under either provision. Since I conclude below that the parties must go to trial on the general provision, I do not need to deal with the latter provision.

Section 3(1) of the *Limitations Act*

[25] This section of the *Limitations Act* states:

> **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.

[26] This case deals with when the two-year limitation period started.

[27] This action was commenced by CNL on April 20, 2022. Therefore, if Aldea is to succeed on this application, I must be satisfied, on a balance of probabilities, that on or before April 20, 2020 CNL had knowledge, or in the circumstances ought to have known that it had suffered an injury, that injury was attributable to the conduct of Aldea, and that the injury suffered by CNL, assuming liability on the part of Aldea, warranted bringing a proceeding.[1]

[1] Neither party discussed Ministerial Order 27/2020. If applicable, the days between April 20, 2020 and June 1, 2020 would not have been included in the two year calculation. This would have put back the "inquiry date" by 41 days to March 10, 2020. I anticipate that this was not discussed because it is academic, given the argument made by Aldea that CNL had the requisite knowledge in 2018.

[28] The essence of CNL's claim against Aldea is that Aldea's design of the HDD portion of the Project was not constructible and CNL was required to pay EOS because of that fact.

[29] Aldea says that CNL had the requisite knowledge for the limitation clock to start as early as September 28, 2018, but in any event by November 27, 2018.

[30] It was on September 28, 2018 that EOS sent a letter to CNL that advised that the HDD installation as designed was not constructible and EOS claimed entitlement to additional payment ("First Notice").

[31] It was on November 27, 2018 that EOS sent a further letter to CNL that repeated that the HDD design was not constructible and EOS estimated its further claim for redesign work to be $6,883,550 plus extra work performed to date amounting to $2,250,000 ("Second Notice").

[32] Aldea asserts that by the time of the First Notice and certainly by the time of the Second Notice, CNL was aware of the injury to it, that the injury was attributable to Aldea and that the injury, assuming liability on the part of Aldea, warranted bringing a proceeding. The case of ***Grant Thornton LLP v New Brunswick,*** 2021 SCC 31 is cited by Aldea as authority for the principle that the limitation clock begins to run when "a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn" (at paragraph 42).

[33] CNL has several arguments as to why Aldea's position is incorrect. However, I only need to deal with the argument that I think is dispositive, which is in favour of the action going to trial.

[34] CNL responds to Aldea's limitation argument by saying that it was entitled to rely on the professionals that it had retained, Wood and Aldea, who advised CNL that there was nothing wrong with the Aldea design and the problems that occurred were due to the inexperience and incompetence of EOS and Big Bore.

[35] Wood's letter to EOS dated October 18, 2018, copied to CNL, is of particular note. In that letter Wood said that it would not validate EOS' statement that the HDD design was not constructible and provided reasons why findings of BlueFox were not supportable, including that findings of BlueFox were due to BlueFox not following contract drawings and calculation methods provided by Aldea.

[36] Assurance that a claim will be successful is not required for the purpose of a limitations analysis. In ***Aseniwuche Winewak Nation of Canada v Ackroyd LLP,*** 2023 ABCA 60 ***("Aseniwuche"),*** the Court of Appeal stated at para. 24:

> [24] The parties referred to a number of other cases, none of which are directly and materially applicable to the present appeal. Some of them merely confirm that certainty of success of the claim against the defendant is not needed before an action is warranted: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para. 58, 86 Alta LR (6th) 240. Others confirm that tactical decisions to pursue the claim by other means may not have the effect of extending the limitation period if those alternative measures prove to be unsuccessful. Some cases, however, involve particular facts or circumstances (such as remediation or settlement efforts) which justified the claimant believing that an action was not warranted until later in the chronology. There are cases that turn on a factual analysis of when the claimant knew or ought to have known of

> the injury, some of which confirm that an action may be warranted even if the claimant's information is incomplete or unverified. Some cases concern claims where the magnitude of the injury as initially perceived did not warrant an action, although later the significant extent of the injury became apparent.

[37] Three cases from Alberta that "involve particular facts or circumstances...which justified the claimant believing that an action was not warranted until later in the chronology" follow.

[38] In ***Condominium Corporation 0812755 v IBI Group Inc***, 2019 ABQB 75 Master Robertson concluded that the limitation clock had not started on the condominium corporation's action because the plaintiff reasonably believed that the party having apparent liability (the Developer) had actually assumed responsibility for addressing the injury.

[39] In ***Points West Living Red Deer Inc v Rockliff Pierchaljlo Kroman Architects Ltd,*** 2021 ABQB 589 I stated the following (at paragraphs 42-43):

> [42] As suggested by these precedent cases, I put myself into the shoes of the Plaintiff in this case, as at May 3, 2017 (ie two years before the action was commenced) to consider whether I had sufficient information that commencing action against RPK was then warranted. In doing so, I would have concluded, based upon my understanding of the significant efforts that were being made to correct the Heating Problem by those responsible for the System (and on a warranty, no charge basis at that) and based upon what those parties were telling me, I would conclude that it was premature to commence an action against RPK at that time. I believe that the Plaintiff's reliance was reasonable in all of the circumstances.
>
> [43] In my view, the application of this test achieves the proper balance between not allowing a cause of action to linger and not requiring lawsuits to be commenced prematurely.

[40] In ***Condominium Corporation No 062 1161 v Park Place Communities Ltd,*** 2023 ABKB 373 ***("Park Place")*** the plaintiff condominium board delayed in suing the developer with respect to faulty construction (leaky roof) as the developer represented, by word or conduct, that it was fixing the leaky roof. Justice Mah dismissed the developer's application for summary dismissal based upon a limitations argument and found that the plaintiff condominium board had raised enough to send the case to trial (at paragraphs 46-48):

> [46] After reviewing the record and receiving the submissions of counsel, I conclude there is a genuine issue to be tried. I also conclude that the condo board has demonstrated that the record, the facts and the law preclude a fair disposition on the summary basis.
>
> [47] That issue is whether the conduct and representations made by the developer up to either November 12, 2012 or May 8, 2013 meant that an action was not warranted within the meaning of s 3(1)(a)(iii) of the ***Limitations Act,*** or alternatively, whether that same conduct or representations constituted promissory estoppel so as to delay the start of the limitation period to one of those dates. In this regard, I see these questions for determination by the trial court:

- Do the words and actions of the developer, between February 2007 and either November 2012 or May 2013, mean that the developer had actually assumed responsibility for remediating the leaking roof, and thus the injury did not warrant bring a proceeding?
- Alternatively, did those words and actions on the part of the developer lull the condo board into a false sense of security, such that the limitation period is extended on the basis of promissory estoppel?
- In either case, was the reliance by the condo board reasonable?
- Fundamentally, the determination of those questions relies on the credibility of the witnesses, the weighing of evidence and the interpretation of evidence.

> [48] Given that these are, in my view, live issues to be litigated, I cannot say that there is 'no merit' to the condo board's position, nor that the record in this case makes it suitable for summary disposition.

(collectively "Three Alberta Precedents").

[41] Although the Three Alberta Precedents are not exactly on point, they demonstrate a general principle that a defendant may make representations to the plaintiff that may bring about an extension to the limitation period where there is reasonable reliance.

[42] A case much closer to being on point is ***The Corporation of the United Counties of Prescott & Russell v David S Laflamme Construction Inc and Waterproof Concrete (Canada) Ltd,*** 2017 ONSC 5437 ***("United Counties Case")***. In that case, United Counties retained WSP (Canada) Inc ("WSP") to prepare a proposal for rehabilitation to a bridge. WSP recommended a deck overlay with hydrophobic concrete which negated the need for a waterproof membrane. WSP was retained as consulting engineer to provide specifications and oversee the project.

[43] Not very long after the project was completed, deficiencies were noted in the concrete. After some initial repair work deficiencies recurred.

[44] United Counties sued the concrete supplier and the construction contractor. Four years later United Counties sought to amend their claim to add WSP, based upon a finding in an expert's report. WSP opposed the application on the basis that the claim of United Counties against it was limitation barred. In ruling against WSP, the Court stated:

> [37] WSP were acting as trusted advisor throughout the bridge rehabilitation. The United Counties were relying on WSP's support during this process to their own detriment. WSP cannot benefit from this "support" provided to the United Counties during this litigation. As in Epstein J.A.'s analysis in *Ferrara*, WSP's position that the United Counties action was commenced out of time cannot be rewarded by a pernicious violation of the professional relationship that the United Counties had with WSP.

[45] CNL argues that it reasonably relied upon the advice of Wood and Aldea that there was nothing wrong with the HDD design put forward by Aldea and that it was the inexperience and

incompetence of EOS and Big Bore that was the cause of the problems with respect to the HDD sections of the Project. CNL asserts that particular note should be made of Wood's letters (copied to CNL) as follows:

> Letter dated October 18, 2018 where it stated: "Wood/Aldea Services will not validate the statement of *"the HDD drives as currently designed/engineered are not constructible and thus not feasible"* is not factually correct. (emphasis was provided by Wood); and
>
> Letter dated December 11, 2018 where Wood advised that it was making reference to certain contract provisions "...due to the repeated failures of EOS and its subcontractors to construct the HDD drives in accordance with the Contract documents."

[46] I put myself into the shoes of CNL as at April 20, 2020 (or March 10, 2020 if Ministerial Order 27/2020 applies) to ask whether CNL then had sufficient knowledge and information or ought to have known that action against Aldea was warranted. Part of that analysis is to ask whether it was reasonable for CNL to place reliance upon its consultant and project manager, Wood, that it did.

[47] Under the contract between CNL and Wood, it was the responsibility of Wood to make findings of performance by the Contractor (EOS), without showing partiality to the Owner (CNL) or the Contractor.

[48] In a circumstance such as this, the Court must be extremely wary of accepting a plaintiff's position that its reliance on representations of its consultant and project manager, that a different party was the one responsible for the construction problem, was reasonable in the circumstances. I cannot say that a plaintiff's reliance of this nature could never have been reasonable. There may be circumstances that such reliance was reasonable.

[49] Just as Justice Mah directed in ***Park Place***, I think it is important for the Court to consider all of the representations and interactions between the parties to determine if CNL's reliance upon the advice of Wood was reasonable in this case.

[50] I acknowledge that CNL could certainly have commenced a "place holder" action against Aldea. But arguing that a place holder action should have been commenced may underscore that commencing an action at that time would not achieve the proper balance between premature commencement of an action and allowing it to linger.

[51] CNL has done enough to show that there is merit to its position that a trial is warranted. The trial judge can consider and evaluate all of the communications, written and oral, between the parties to determine if CNL's reliance on the advice of Wood was reasonable. For this reason alone, I cannot grant Aldea's application for summary dismissal on the basis that the action against it was commenced outside the applicable limitation period.

[52] Finally on this point, I should make reference to a decision recently made by me that I think is distinguishable from this case. In the case of ***St Pierre v Black Estate,*** 2025 ABKB 31 the defendant lawyers applied to have the action against them dismissed on the basis that it was commenced after the limitation period. The plaintiff argued that the limitation period was extended by virtue of the fact that he had placed great reliance on the ongoing representations of defendant lawyers (even years after the defendant lawyers' retainer had been terminated) that the initial case that the plaintiff had lost, would be reversed upon appeal (it was not). In that case it

was abundantly clear to me that reliance on such a representation by a defendant was not reasonable and is not of the sort of representation that could extend the limitation clock.

[53] Given my foregoing conclusion, I need not consider whether CNL's claim is that of a tortfeasor and s 3(1.1) of the *Limitations Act* applies.

Conclusion

[54] Aldea's application for summary dismissal is dismissed. If the parties need me to address the issue of costs, that may be done on notice in morning chambers.

Heard on the 14th day of November, 2024.
Dated at the City of Edmonton, Alberta this 30th day of January, 2025.

B.W. Summers
A.J.C.K.B.A.

Appearances:

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