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Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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October 21, 1991

The Honourable Howard Hampton
Attorney General
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Publication #203
ISBN# 978-1-77189-527-9

Dear Attorney General:

Thank you for your invitation to comment on the draft General Limitations Act. Although the original deadline for submissions was to be October 1st, we were informed by the Attorney General's office that the deadline for comments had been extended.

Generally, the reforms proposed by the new Act are an immense improvement over the current limitations system. However, we are concerned about the impact that the 30 year ultimate limitation period outlined in s. 17(2) will have on claims for environmental harm.

Although the adoption of the date of discoverability rule will ensure a plaintiff's right to commence an action, limiting the maximum time to commence an action to 30 years from the date of the act or omission will seriously prejudice potential plaintiffs from bringing a valid claim.

Central to this issue is the fact that a cause of action may expire before a plaintiff is aware of its existence. Although a 30 year limitation may be beneficial to many plaintiffs, it will severely prejudice those who have suffered long term environmental harm. Problems inherent in a maximum limitation period are found in situations involving contaminated land (ie. community and individual health effects of toxic landfill sites and pesticide use), latency periods for chemical exposure, and forest issues.

The key concern with regard to the examples cited above is the uncertainty inherent in each one. In many cases, the deleterious effects of environmental harm will only become evident after a very long time period. One environmental lawyer has stated that one of the key features of contaminated land is its complexity and uncertainty. This same concern exists with regard to pesticide use, and exposure to carcinogens and radioactive material.

Although there are examples of occasions where a 30 year ultimate limitation period will be sufficient, as the damage in basic negligence cases will almost always become evident within a 30 year time frame, there is no such predictability in the environmental context. In many environmental cases, the latency periods are, as yet, unknown, and there is a great degree of uncertainty as to when damages will become evident. In 1978, a Statistics Canada Report entitled Human Activity and the Environment stated at p. 25 that the "long term and possibly synergistic effects of exposure to chemicals are virtually unknown, with the evidence of adverse effects becoming visible only after many years."

A 30 year ceiling on when a plaintiff can commence an action will statute bar many claims for environmental harm, leaving plaintiffs with no recourse, as the date of discoverability rule will no longer be available to them. The situation is complicated by the fact that many of these cases will involve potentially serious injury to health and cumulative, enduring effects on ecosystems. There is simply not enough information available at this time to make such a judgment.

A clear illustration of the problems inherent in a 30 year limitation period is the Malvern development case (See Heighington v. The Queen in Right of Ontario (1987), 41 D.L.R. (4th) 208 (Ont.H.C.), aff'd 61 D.L.R. (4th) 190 (Ont.C.A.). In that decision 43 homeowners in Scarborough successfully sued the Ontario Government after discovering that their housing subdivision was built on an area contaminated with radioactive waste. The contamination occurred in 1945, and was known to government officials at the time. It was brought to the government's attention again in 1975, but did not become public knowledge until 1980. Although the 6 month limitation defence under the Public Authorities Protection Act was abandoned at trial, had the more thorough provisions in the proposed act been in place, it is possible that the defendant may have convinced the court to strictly interpret the ultimate 30 year limitation, thus denying the plaintiffs their claim. It should be noted that in this instance, the land was contaminated with low level radioactivity, and fortunately, the health risk imposed on the community was not great.

Although s. 17(11) states that in the case of continuing acts or omission the 30 year period may be calculated from the date of the last act or omission, in environmental cases the damage may result from one particular contaminating event, resulting in the contaminated land or danger to health. Even if the act is continuing, there is no certainty as to the latency period for a carcinogen or exposure to radioactivity. As well, the discovery of the contamination may only be triggered by a particular event, such as redevelopment of the land, as was the situation with the Malvern case.

As well, if an actor or corporation knows that there will be no liability for harm becoming evident after 30 years, it will do little to ensure that its business practices will result in long term environmental responsibility.

Finally, one of the factors commonly advanced in support of the notion of an ultimate limitation period is that it is unreasonable for a defendant to be expected to preserve records as evidence for an unduly long time period. However, this concern will affect a potential plaintiff much more than a potential defendant, as it is the plaintiff who bears the burden of proving all of the elements of the claim.

In short, we urge you to reconsider the inclusion of a 30 year ultimate limitation period for commencing an action, especially with regard to environmental harm. As this is still a largely undeveloped area of law, and there may be many possible environmental causes of action brewing that we are not yet aware of, statute barring such novel claims into a 30 year time frame is premature.

In addition, the Task Force on the Environmental Bill of Rights, recently established by the Honourable Ruth Grier, has been specifically mandated to examine whether certain types of environmental litigation should be exempted from the proposed 30 year limitation period. The Task Force consists of representatives from both environmental groups and industry. CELA is a participant, and will be addressing these concerns in greater detail in that forum. Accordingly, we respectfully request that you defer any further consideration of this proposal until the Task Force investigates and reports upon this issue.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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