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Ontario Court of Appeal Makes Significant Limitations Ruling[1]

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Introduction

In a decision released January 11, 2017 — *Crombie Property Holdings Limited v. McColl-Frontenac Inc. et. al* — the Ontario Court of Appeal overturned a summary judgment decision of the Superior Court of Justice that dismissed a civil lawsuit seeking damages for property contamination based upon the running of a limitation period. The lower court decision may be found here.

The Court of Appeal decision will be carefully scrutinized by all environmental lawyers and other civil litigators who regularly handle such claims.

Background

The lawsuit sought damages for contamination to the "Crombie Property" from an adjacent commercial property formerly used as a gas station. From the Court of Appeal's decision, the following chronology of events may be discerned:

Date	Event
2003-2005	Prior owners of the Crombie Property commission Phase 2 Environmental Site Assessments (ESA) which find evidence of low level hydrocarbon contamination of groundwater, but indicated those levels were decreasing and recommended no further study.
2007	Testing confirms that soil and groundwater conditions at the defendant Dimtsis Property met the applicable Ministry of the Environment ("MOE") standards.
2008	The MOE acknowledges a Record of Site Condition. Under applicable law, the acknowledgment confirmed that the Dimtsis Property complied with environmental regulations.
2012	Crombie enters into an agreement to purchase 22 properties, including the Crombie Property subject to the lawsuit. Presumably, under the agreement, Crombie was required to waive all conditions by March 8, 2012.
2012	
February 20	Crombie's consultant Stantec tells Crombie that a gas station and dry cleaner were formerly nearby the Crombie Property.

[1] This publication is intended for general information purposes only and should not be relied upon as legal advice.

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Date	Event
February 27	In initial scheduling discussions, Stantec and Crombie agree that Stantec will provide a draft Phase 2 ESA for the Crombie Property by April 9, 2012, with verbal results by March 23, 2012.
February 29	Five historical reports (2003-2008) concerning contamination at the Crombie Property are provided to Crombie.
First week of March	Crombie asserts that it instructed Stantec that the Phase 2 ESA is not urgent because Crombie is waiving environmental conditions and closing. Crombie claims it did not discuss or learn of Phase 2 ESA test results until draft Phase 2 delivered in May.
March 8	Crombie waives all conditions (including environmental conditions) on the purchase of the 22 properties.
March 14	Subsurface Phase 2 ESA work begins on the Crombie Property. Initially only with respect to Volatile Organic Compounds (VOC's), but expanded to include hydrocarbons when Stantec's sampling noted petroleum hydrocarbon odours.
March 20	Phase 1 ESA by Stantec provided to Crombie. Stantec summarizes five historical reports and recommends drilling. Stantec also notes that hydrocarbon levels reported in the most recent of the historical reports would not meet current site condition standards.
March 23	Lab results obtained by Stantec for groundwater show exceedances.
March 30	Lab results obtained by Stantec for soil show exceedances.
April 10	Crombie becomes owner of Crombie Property.
May 9	Draft Phase 2 ESA by Stantec provided to Crombie with March lab results. Shows hydrocarbon limits exceeded in groundwater and soil. Crombie attests that it only learned of actual contamination on this date.
September 17	Date the final Phase 2 ESA is provided to Crombie. Crombie initially pleads in Statement of Claim that it only became aware of contamination on this date.

Standard of Review

The Court confirmed that on a summary judgment motion, the determination of the lower court that there is no genuine issue for trial is a "question of mixed fact and law." As a result, the standard of review on appeal is whether the trial judge committed a "palpable and overriding error."

Issue on Appeal

The narrow issue on appeal was whether Crombie's claim in respect of the environmental contamination of its property was "discovered" within the meaning of s. 5 of the *Limitations Act, 2002* before April 28, 2012 (two years prior to the commencement date of the action).

That is, the Court clarified that on the appeal before it, only actual knowledge of contamination (injury, loss, or damage under s. 5(1)(a)(i) of the *Limitations Act, 2002*) was at issue. The Parties did not take issue that the requirements of s. 5(1)(a)(ii) — cause of the injury, s. 5(1)(a)(iii) — identity of defendants, and s. 5(1)(a)(iv) — action is appropriate means of seeking a remedy, had been met.

The Court stressed that the test under s. 5(1) of the *Limitations Act* is **actual** knowledge, not mere possibility:

> The limitation period runs from when the plaintiff **is actually aware** of the matters referred to in s. 5(1)(a)(i) to (iv) or when a reasonable person with the abilities and in the circumstances of the plaintiff first ought to have known of all of those matters…
>
> It is "reasonable discoverability" and not "the mere possibility of discovery" that triggers a limitation period.[3] [emphasis added]

Equating Suspicion of Contamination with Actual Knowledge of Contamination

Under this heading, the Court ruled that the motion judge made a palpable and overriding error in concluding that mere suspicions of possible contamination were enough to trigger the running of s. 5(1)(a)(i).

It was not sufficient for the defendants to prove that by February 29, 2012, Stantec and Crombie had Phase 2 reports for the Crombie property which showed historical contamination on the subject property six years earlier:

> …At its highest, in relation to hydrocarbon contamination, the Pinchin Report revealed the presence of hydrocarbons in groundwater in 2005 that were marginally above potable water standards and appeared to be decreasing, leading Pinchin to recommend no further investigation. It was not evidence of contamination of the property over six years later, nor was it interpreted as such by Stantec, Crombie's environmental consultant. Indeed, the purpose of the Phase II drilling and sampling program recommended and undertaken by Stantec, was to determine whether or not the soil or groundwater at the Crombie Property was contaminated.[4]

And further:

> **It was not sufficient that Crombie had suspicions or that there was possible contamination**. The issue under s. 5(1)(a) of the *Limitations Act, 2002* for

[3] Court of Appeal Decision, para. 35.
[4] *Ibid.*, para. 41.

> when a claim is discovered, is the plaintiff's "actual" knowledge. The suspicion of certain facts or knowledge of a potential claim may be enough to put a plaintiff on inquiry and trigger a due diligence obligation, in which case the issue is whether a reasonable person with the abilities and in the circumstances of the plaintiff ought reasonably to have discovered the claim, under s. 5(1)(b). Here, while the suspicion of contamination was sufficient to give rise to a duty of inquiry, it was not sufficient to meet the requirement for actual knowledge. The subsurface testing, while confirmatory of the appellant's suspicions, was the mechanism by which the appellant acquired actual knowledge of the contamination. [emphasis added]

In addition, the finding by the motion judge that the contamination was in the soil and therefore "available and discoverable," set too low a threshold for discoverability under s. 5(1)(a)(i):

> The fact that contamination was there to be discovered was of course not sufficient to start the limitations clock.[5]

Failure to Consider Relevant Circumstances: the Transactional Context

Under this heading, the court found the motion judge made palpable and overriding errors on two counts. First, the lower court wrongly imputed actual knowledge of contamination to Crombie in March 2012 (when the laboratory results were sent to Stantec), contrary to the contextual evidence. Second, the court wrongly imputed reasonable discoverability of actual contamination to Crombie before April 28, 2012, again contrary to the contextual evidence.

Concerning actual knowledge, the court stated:

> The fact that Crombie was directing and paying Stantec [to complete both a Phase 1 and 2 ESA] … was not sufficient to ground the [motion judge's] conclusion that Crombie knew about the test results as soon as they were reported by the laboratory to Stantec.[6]

According to the Court, the motion judge also erred by inferring that because Stantec had verbally reported the Phase 1 findings to Crombie, that it must have also verbally reported the March 2012 laboratory results to Crombie. According to the Court, this reasoning "…ignores completely the circumstances of the multi-property transaction Crombie was involved in, the due diligence process and the waiver of conditions" and "she did not factor Crombie's [March 8, 2012] waiver of conditions into her assessment of its conduct." Most important, the Court accepted the plaintiff's argument that:

> Once the conditions were waived, there was no urgency to confirming whether the Crombie Property was contaminated, as Crombie was required to close the purchase. It was unreasonable for the motion judge to draw an inference about

[5] *Ibid.*, para. 47.
[6] *Ibid.*, para. 43.

> Crombie's knowledge of the test results without considering such circumstances.[7]

The same mistake, says the Court, also caused the motion judge to err by inferring that the contamination was reasonably discoverable under s. 5(1)(b), prior to April 28, 2012:

> Determining "whether the plaintiff has acted reasonably will include an analysis of not only the nature of the potential claim, but also the particular circumstances of the plaintiff."[8]

In short, the Court of Appeal accepted that under the particular circumstances of the multi-property transaction and the waiver of all conditions (including environmental), it was reasonable for the plaintiff to not treat the Phase 2 investigation as urgent and to postpone communications around the contamination of the Crombie property until whenever it was communicated by the environmental consultant on a non-urgent basis (in this case, by May 9, 2012):

> …in arriving at her conclusion that Crombie's claim was reasonably discoverable, the motion judge did not consider the relevant and important circumstances of the multi-property transaction and its waiver of conditions. What the motion judge ought to have considered, was whether, a reasonable person in Crombie's position, after the waiver of conditions, would have sought out and obtained the laboratory results before April 28, 2012.[9]

Continuing Tort

Regarding the continuing tort argument made by the appellant, the Court found it unnecessary to address this issue and declined to do so.

Analysis

The Court of Appeal's decision is noteworthy, and also problematic, in a number of respects:

1. It confirms existing authority that summary judgment decisions make rulings of "mixed fact and law", and are only appealable if there is a "palpable and overriding error."

2. It affirms that a Phase 1 ESA is generally not enough to prove knowledge of actual contamination, only "suspicions" or the "possibility" of such contamination. However, if the Phase 1 ESA provides knowledge of a potential claim, this may "trigger a due diligence obligation", a "duty of inquiry", to undertake a Phase 2 ESA.

3. More controversially, however, the Court's decision suggests that even where there exists a due diligence obligation or duty of inquiry to undertake a Phase 2 ESA, the party contracting for that work, or its consultant, may unilaterally decide when to discharge the duty.

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[7] *Ibid.*, para. 50.
[8] *Ibid.*, para. 51.
[9] *Ibid.*, para. 52.

In this case, a significant number of historic records were disclosed to a prospective purchaser and its environmental consultant, showing that the property in question was definitely contaminated, six years earlier, at levels that would not meet current standards (but perhaps were getting better). However, simply because the plaintiff's consultant opined that the historic records did not prove current contamination and recommended further drilling and testing (a full Phase 2 ESA), this effectively prevented a court from finding "actual knowledge" of damage, and stopped the running of the limitation period.

This raises the important question of how much knowledge equals actual "discovery" of damage under s. 5(1) of the *Limitations Act, 2002*? The statute states that "A claim is discovered on the earlier of, (a) the day on which the person with the claim first knew, (i) that the injury, loss or damage had occurred; and (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known." But surely, interpreted purposively, the statute is only requiring a level of knowledge sufficient to sustain a civil action, i.e. on balance of probabilities? Why, under this statute, must damage be confirmed 100% by current testing, as required by the Court of Appeal? It must be noted that s. 5(1) does not use the term "actual."

Moreover, by setting the standard for discovery so high, query whether the Court of Appeal's decision effectively makes s. 5(1)(b) meaningless? That is, even in the face of historical evidence of contamination, does the court not permit plaintiffs to arbitrarily delay the triggering the start of the limitation period, by unilaterally requesting confirmatory evidence of injury, loss or damage, and requesting that the delivery of such confirmatory evidence be delayed?

Also, given consultants — who are generally paid by the hour (like lawyers) — will invariably recommend that they should be retained to conduct more (and more current) testing, and this is often an approach favoured by the Ministry, one may ask what amount of historic evidence of contamination of a subject property will ever be enough to trigger the running of a limitation period? It must be noted that the plaintiffs in this case were willing to commence this action on April 28, 2014, based on evidence of contamination that was more than two years old. If six year old evidence is too old to prove damage, why is two year old evidence acceptable?

4. Also raising as many questions as it answers, is the Court of Appeal's ruling on "reasonable discoverability". According to the Court, even where both a Phase 1 and 2 ESA have been recommended and commissioned, due to a well-known risk of historic contamination from adjacent properties, and clear and current test results are going to be obtained by the purchaser's consultant before closing, a purchaser is entitled to defer and delay not only the completion of the Phase 2 ESA but more problematically, also the transmission of the test results from its own consultant to purchaser, and may still be found to have acted "reasonably" or with "reasonable diligence." According to the Court, for a purchaser to do so it need only announce to its consultant that it intends to "waive" environmental conditions and, as a result, it no longer needs those test results urgently.

Query whether the Court of Appeal has assumed that the standard of urgency for "reasonable discoverability" is whether damage information is needed to close a real

estate deal? By accepting, without further analysis, that a purchaser may delay (indefinitely?) receipt of damage information because it is not needed for closing, that seems to be what the Court has done.

A strong argument may be made that the *Limitations Act, 2002*, interpreted purposively, is not concerned with what is reasonably discoverable in order to close a real estate deal; rather, it is concerned with protecting defendants from unreasonable delay by forcing plaintiffs to commence their civil actions within two years after they are "actually" damaged, or alternatively (under s. 5(1)(b)), after they first ought to have known that they were actually damaged. In this case, arguably, the date on which the plaintiff was actually damaged was the date of closing — April 10, 2012 — when it became the owner of a contaminated property. Although the plaintiff takes the position that it did not "actually know" that the Crombie Property was contaminated on this date, it certainly knew that there was a very significant risk it had acquired a contaminated property on this date. Shouldn't a reasonably diligent purchaser have asked its consultant to provide all available test results as soon after the closing date as possible?

In other words, it may be argued that the date upon which a purchaser comes into ownership of a property and faces a real risk that it has just acquired a contaminated property and has suffered injury, damage or loss, should be the date on which that reasonably diligent purchaser insists upon receiving all available laboratory test results.

However, the Court does not consider the above issue. Instead, it appears to assume that because the purchaser decided (in early March) that it did not need this information for the purposes of completing the real estate closing, it also did not need this information for the purposes of satisfying its reasonable discoverability obligations under the *Limitations Act, 2002*. Had the Court broadened its consideration of "context" to one that was relevant to the purpose of the Act, it may have come to a very different result.

Put differently, this author would respectfully submit that when a court is considering the "context" of a real estate transaction for determining when damage was "reasonably discoverable" by a plaintiff/purchaser under the *Limitations Act, 2002*, it ought not to arbitrarily stop its analysis at the point at which a purchaser chooses to close its eyes to environmental test results in order to waive environmental conditions to complete a transaction. The court should also consider whether the decision of a plaintiff/purchaser to close its eyes to actual, available test results, is itself reasonable and reasonably diligent within the meaning of the *Limitations Act, 2002*, in light of when the plaintiff/purchaser knows it will be closing (will become owner) and could suffer damages, given all known risks. Unfortunately, the Court of Appeal did not undertake this broader analysis.

Since the parties have until Monday, March 13, 2017 to serve and file an application for leave to appeal to the Supreme Court of Canada, it is too early to say whether the Court of Appeal's ruling will be the last word on these issues.