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TAB 1

THE SIX-MINUTE Environmental Lawyer

The Latest on Damages for Continuing Nuisance

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October 20, 2016

cpd Continuing Professional Development

Six-Minute Environmental Lawyer 2016

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(Case Update: *Crombie v. McColl-Frontenac* – Limitations and Continuing Nuisance)

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One of the enduring questions facing neighbours in a dispute over contamination that has crossed a property boundary, is the extent to which any tort or nuisance committed is 'continuing' and the impact that may have on the applicable limitation period and the recoverable damages. The decision in *Crombie v. McColl-Frontenac*[1] re-visits many of the old questions and perhaps raises some new ones in the context of Ontario's *Limitations Act* and motions for summary judgment.

Facts

Crombie purchased property in Grimsby, Ontario on April of 2010. The purchase agreement included a condition with respect to environmental investigation. As a result of a Phase I investigation, Crombie became aware that an adjacent property had been used as a gasoline service station for many years. A Phase II was ordered but the report was not finalised until after closing. In March, 2012, Crombie waived the environmental condition and decided to close.

In April of 2014, Crombie issued a Notice of Action against the current and former owners and tenants of the neighbouring property alleging they were responsible for petroleum hydrocarbon contamination found at the Crombie property.

Grounds for Summary Judgment Motion

The defendants argued that Crombie knew or should have known of the presence of contamination prior to April of 2014 or more than two years before the action was commenced.[2]

The summary judgment motions judge, after reviewing the facts before her, agreed:

[1] 2015 ONSC 6560; The decision is under appeal and as of the time of writing was scheduled to be heard before the Ontario Court of Appeal on October 25, 2016.

[2] Interestingly, no one seems to have raised the question of whether Crombie even had any cause of action under these facts. If indeed Crombie knew of the contamination prior to going firm on the deal, then would Crombie not have had every opportunity to walk away from the deal or negotiate a price that took into account the contamination? How does such a voluntary assumption of risk give rise to a cause of action against the defendants?

"[30] It is obvious from my above findings of fact that the contamination issues attached to the Crombie property were a concern even at the time the initial Offer to Purchase was made. To address those concerns, Crombie hired Stantec.

[31] I find that by March 9, 2012, when Crombie waived the environmental clause, they had become aware of sufficient material facts to form the basis of an action. I am mindful that most of the material available to them on that date was a review of the property, but that does not make it any less actionable. It is the compilation of the material that was presented to them that armed them with sufficient knowledge at that moment to move forward with a claim. All the testing that followed simply confirmed their suspicions about what had already been reported on.

[32] Even if I am wrong on that, it is incontrovertible, on the facts as I have found them to be, that Crombie had more than a sufficient basis for an action by March 30, 2012. It is of no moment that the draft Phase II report is dated May 9, 2012. The crucial part of that report is the findings from the drilling and soil sample all of which was made available to Crombie in March 30, 2012. It is difficult to believe that Crombie did not know about these results given that they were directing and presumably paying Stantec to go ahead with the further testing."

The plaintiff further argued that even if a limitation period had expired, the entire claim was not necessarily extinguished as there was a continuing nuisance. The motions judge dealt with this argument in seven short paragraphs:

"[41] I am guided by and grateful for Justice Penny's summary of the law in relation to continuing damage:

> The law is clear when a party claims a continuing nuisance, evidence of damages sustained *during the limitation period* is required. In the face of a limitation defence, the mere presence of contaminants in the soil or groundwater is not sufficient to found a claim for damages for continuing nuisance. Rather, there must be evidence of damage sustained *within the limitation period*. *ML Plaza Holdings Ltd. v. Imperial Oil Ltd*., [2006] B.C.J. No. 479, 2006 CarswellBC 520 (B.C.S.C.) at para. 72, aff'd 2006 BCCA 564 (CanLII).

[42] There is a paucity of evidence from the plaintiff regarding ongoing damage or nuisance, aside from the allegation in their Statement of Claim.

[43] In fact, there is some evidence to suggest that the water is running into the property from an easterly direction and the Dimtsis property on the west side.

[44] None of the environmental reports that have been generated speak to the issue of ongoing damage.

[45] The plaintiff argues that the ongoing damage is a separate cause of action and therefore a separate and distinct limitation period applies.

[46] Given the absence of evidence in relation to the allegation of continuing damage and my inability to distinguish it as such, I am not prepared to attach an artificial limitation period to it.

[47] The limitation period in question attaches to the entire claim. There is no evidentiary foundation that would support a bifurcation of the issues."

Commentary

There is some unpacking to be done of the above paragraphs. The general principles cited appear to be relatively uncontroversial. In cases where there is a continuing damage, a new limitation period starts to run on every day on which the nuisance continues. Thus where a tenant breached a covenant to operate its business continuously, a fresh cause of action was found to accrue on every day that the breach continued.[3] Even though the initial breach occurred more than two years before the commencement of the action:

> "the two-year limitation period commenced each day a fresh cause of action accrued and ran two years from that date. Thus, Pickering was entitled to claim damages for breach of the covenant for the period going back two years from the commencement of its action".[4]

Things become a bit murkier however, when one analyses the question of the onus of proof of continuing nuisance in the context of a summary judgment motion.

As a starting point, it is important to note that the quote from Justice Penny, cited above by the motions judge, was from another summary judgment decision, that of *Bolton Oak Inc. et al., v. McColl-Frontenac Inc.*[5]. In that case, the issue of continuing damages is dealt with in two paragraphs, the one cited by the motions judge in *Crombie* (above) and the following:

> "In the absence of any pleading of continuing damage in the statement of claim and, more importantly, in the absence of any evidence whatsoever *to support* an allegation of continuing damage (which cannot in the circumstances be presumed), I do not think there is any other conclusion possible than that there is no genuine issue requiring a trial on the issue of continuing damage after March, April or May 2006."[6]

In contrast to *Crombie* and *Bolton Oak*, the *ML Plaza* decision relied upon by both motions judges was a trial decision. One of the questions that is expected to be raised before the Court of Appeal in *Crombie* concerns the onus of proof of the continuing tort in the context of a summary judgment motion. As the Court stated in *Crombie*

> "On a motion for summary judgment the onus is on the moving party to show that there is no genuine issue for trial, and the responding party must present its best case or risk losing. The Court is entitled to assume that both parties have put their best foot forward. If the moving party meets the evidentiary burden of producing evidence on which the

[3] Pickering Square Inc. v. Trillium College Inc., 2016 ONCA 179

[4] ibid., at paragraph 38

[5] 2011 ONSC 6567; incidentally this is another case where the Plaintiff appears to have been aware of the presence of contamination prior to the purchase

[6] ibid. at paragraph 62

> Court could conclude that there is no genuine issue for trial, the responding party must either refute or counter the moving party's evidence or risk summary judgment."[7]

How is an allegation of continuing tort to be dealt with in the context of a motion for summary judgment by a defendant? Does the moving party defendant satisfy its "evidentiary burden of producing evidence on which the Court could conclude that there is no genuine issue for trial" simply by asserting that there is no evidence of continuing migration, or are they required to bring forward some positive evidence that there is no continuing migration? What would such evidence look like? Would one need to show a stable plume with no migration laterally or vertically? Absent any such evidence, from the moving party, is there any onus on the respondent plaintiff to bring forward evidence of ongoing migration?

Is it enough for the moving party alleging all the plaintiff's claims are out of time, to show that the claim arose more than two years before the action commenced? The Court in *Bolton Oak*, premised its comments with the words "in the face of a limitation defence".[8] Certainly, this would be sufficient for a discrete tort, but should it also be enough to shift the evidentiary burden to the respondent plaintiff alleging a continuing tort or nuisance?

Both Justice Penny in *Bolton Oak* and Justice Wright in *Crombie* appear to be concluding that on a summary judgment motion, once the claim is shown to have been commenced more than two years after it was discovered, the onus is indeed on the respondent plaintiff to bring forward evidence of "continuing damage" even if there is no positive evidence on the point led by the moving party. The comment by Justice Penny that continuing damage in that case "cannot in the circumstance be presumed" necessarily implies that the lack of continuing damage was presumed.

Note also that in *Bolton Oak*, unlike *Crombie*, the question of continuing damage was not pleaded - a distinction which does not appear to have had any influence on the conclusion reached in *Crombie*.

One can see policy reasons for forcing the plaintiff to bring forward some evidence of a continuing tort in such circumstance. After all, the Rules are silent on the question of onus of proof, the test simply being that the Court be "satisfied that there is no genuine issue requiring a trial".[9] But the decisions in *Crombie* and *Bolton Oak* do appear to have, without any discussion, accepted that a moving party can "show" that there is "no genuine issue for trial" with respect to a continuing tort or nuisance, simply by proving the date the claim was discovered and asserting "no evidence" of continuing tort – a proposition that does appear to amount in substance, to a subtle reversal of the onus of proof that the caselaw has up to now placed on the moving party in a summary judgment motion.

Simply proving the alleged continuing tort was discovered more than two years before the action was commenced would certainly give rise to summary judgment on all parts of the claim outside the limitation period. But what is the basis for this also leading to dismissal of claims that are alleged to be ongoing and within the limitation period? How is the moving party's evidence of the date of discovery sufficient to entirely negate the plaintiff's claim for a continuing tort? It may be enough to reduce the amount of damages. But is it perhaps a step too far to also use this evidence as a basis to extinguish the entire claim, as happened in *Crombie* and *Bolton Oak*?

[7] *Crombie*, supra, at paragraph 8

[8] *Bolton Oak*, supra, at para. 52

[9] Ontario Rules of Civil Procedure, Rule 20.04(2)(a)

While there is obvious merit to efficiently reaching a final decision in litigation through summary judgment, questions of absence of evidence on an issue will always be decided against the party with the onus of proof. Where no evidence is called by either party, should the onus of proof of a continuing nuisance be the same on a motion for summary judgment as it would be at trial (as *Bolton Oak* and *Crombie* appear to decide), or is there a case to be made for shifting the onus to the moving party? A policy argument in favour of the latter position could follow the following reasoning: There is a presumption in all litigation that a properly laid out pleading entitles a party to a trial. A motion for summary judgment is a challenge to that presumption. To deprive a party of their right to a trial requires some positive effort by the moving party. Some evidence must be called to rebut the impugned assertion in the pleading. The threshold for "some evidence" may be quite low and if crossed would then shift the evidentiary burden squarely onto the respondent plaintiff to demonstrate that there is a continuing nuisance. But it should not be enough for the defendant moving party to obtain summary judgment simply by stating there is "no evidence" on a claim asserted in the other party's pleading. Absent anything more positive by the moving party, the plaintiff should be entitled to take their pleading to trial since no substantive challenge would have been made to the original presumption that the assertion in the pleading raises a triable issue.

As mentioned at the outset, the appeal hearing in *Crombie* is imminent. It will be interesting to see how this question is dealt with by the Court of Appeal.