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Known unknowns: Ontario Court of Appeal provides guidance on discoverability in potentially contaminated lands cases

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In *Crombie Property Holdings Limited v McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 15 (*Crombie v McColl*), the Ontario Court of Appeal released an important decision regarding environmental due diligence in a real estate transaction, particularly as to when "knowledge" of contamination arises for the purpose of understanding when applicable limitation periods in environmental litigation may be deemed to have expired. The *Crombie v McColl* decision is relevant for those who rely on environmental investigations, particularly Phase I and Phase II Environmental Site Assessments (ESA), as part of their due diligence process in the context of a land transaction involving potentially contaminated land.

Background

On April 28, 2014, the appellant, Crombie Property Holdings Limited (Crombie) brought an action for alleged damages resulting from hydrocarbon contamination on a property in Grimsby, Ontario, which Crombie purchased on April 10, 2012 (the Crombie Property). The alleged source of contamination was an adjacent property that served as a gas station until 2004 (the Dimtsis Property). Crombie, in its action, sued the current owners of the Dimtsis Property, along with the former owners and a former tenant of the Dimtsis Property, for the contamination on the Crombie Property.

In response to the Crombie action, the defendants brought a motion for summary judgment on the basis that Crombie had discovered the contamination more than two years before commencing its claim, and was therefore time-barred under the Ontario *Limitations Act, 2002*. In particular, the defendants pointed to a number of facts that occurred before April 28, 2012 (i.e., two years before the claim was commenced): (i) Crombie's decision to waive all conditions, including environmental conditions, for the purchase of the Crombie Property, on March 8, 2012; (ii) the receipt by Crombie of a Phase I ESA report dated March 20, 2012; and (iii) Crombie's decision to complete the transaction on April 10, 2012. Crombie responded by explaining that it did not have actual knowledge of contamination on the Crombie Property, including the potential sources of the contamination, until it received a final Phase II ESA report on September 17, 2012.

Motion judge's decision

On October 22, 2015, the motion judge granted the defendants' motion for summary judgment and dismissed the action as time-barred, on the basis that Crombie had become aware of the environmental contamination at the Crombie Property "well before April 28, 2012, two years before its notice of action was issued."

In support of her decision, the motion judge pointed to the Phase I ESA report, which the judge asserted was sufficient to alert Crombie to potential contamination. As a result, the motion judge concluded that "by March 9, 2012, when Crombie waived the environmental conditions, they had become aware of sufficient material facts to form the basis of an action." In the alternative, the motion judge concluded that Crombie would have been made aware of the contamination on the Crombie Property through groundwater and soil sampling test results obtained by Crombie's consultant on March 23 and March 29, 2012, respectively. The motion judge concluded that "[i]t is difficult to believe that Crombie did not know about these results given that they were directing and presumably paying [its consultant] to go ahead with the further testing." Finally, the motion judge held that, even if Crombie wasn't provided the results until a later date, Crombie ought to have known about the contamination and did not exercise proper diligence.

Ontario Court of Appeal's decision

Crombie appealed the decision to the Ontario Court of Appeal, arguing that the motion judge erred when she concluded that the appellant knew or ought to have known it had a cause of action against the respondents more than two years before it commenced the action.

The Court allowed Crombie's appeal, set aside the motion judge's decision and awarded Crombie its costs of the appeal. In reaching this conclusion, the Court found that the motion judge made two palpable and overriding errors by: (i) equating knowledge of *potential* hydrocarbon contamination with Crombie's *actual* knowledge that the Crombie property was contaminated; and (ii) ignoring the surrounding circumstances of Crombie's purchase of the Crombie property, namely that the purchase involved twenty-two separate properties and its waiver of all conditions on March 8, 2012.

Conflating "potential" knowledge with "actual" knowledge

The difference between a Phase I ESA and a Phase II ESA was critical to Crombie's appeal and the Court's decision. In a nutshell, a Phase I ESA is an investigation of a property for areas of potential environmental concern, based solely on an environmental consultant's review of available historical reports (including old Phase I and Phase II ESA reports, if any), an interview with a person familiar with the environmental conditions and practices at the site, and a visual inspection at the site by the environmental consultant. A Phase II ESA will often follow a Phase I ESA by investigating the areas of potential environmental concern (identified in the Phase I ESA) through intrusive sampling and testing. In other words, a Phase II ESA will help to confirm (or refute) the areas of potential environmental concern identified in a Phase I ESA.

In reaching the conclusion that the motion judge erred in finding that Crombie had discovered its claim before April 28, 2012, the Court first summarized the relevant test for determining when a claim is "discovered." The Court explained that the limitation period only begins to run when the plaintiff is "actually aware" of the facts sufficient to bring a claim or when a reasonable prospective plaintiff must have known or ought to have known the material facts necessary for a claim. The Court highlighted that "[i]t is "reasonable discoverability" and not "the mere possibility of discovery" that triggers a limitation period.

Applying this test, the Court held that the motion judge did not identify any evidence which supported the conclusion that Crombie had "actual knowledge" of contamination on March 9, 2012 (i.e. the day Crombie had waived the environmental conditions, and the day the motions judge ruled that Crombie had discovered their claim). Instead, the Court concluded that the evidence available to the motion judge — including the Phase I ESA — was only evidence of "potential contamination." Moreover, the Court rejected the motion judge's

finding that Crombie was aware of the groundwater and soil test results before they were provided to Crombie as part of a draft Phase II ESA provided to Crombie on May 9, 2012. Simply put, the Court concluded that there was no evidence that the results had been made available to Crombie earlier than that date. In the result, the Court found that the motion judge failed to accurately determine when Crombie had "actual knowledge of the elements of its claim."

The Court made it clear that while "suspicion of certain facts or knowledge of a potential claim," including of potential risks disclosed in a Phase I ESA or in historical environmental reports, may trigger a duty of further inquiry and a due diligence obligation, it is not enough to meet the requirement of actual knowledge for the purposes of a limitation period argument. Rather, it was the subsurface testing (i.e., the Phase II ESA work) that was "the mechanism by which [Crombie] acquired actual knowledge of the contamination."

The surrounding circumstances of the purchase

The Court also ruled that the motion judge failed to consider the surrounding circumstances of the transaction. Specifically, the motion judge made no mention of the multi-property nature of the transaction, which involved the purchase and sale of twenty-two separate properties. According to the Court, this was "an important omission" that undermined the motion judge's analysis.

Furthermore, the Court ruled that the motion judge failed to consider the context in which Crombie's waiver of conditions was given and the impact that waiver had on the urgency of the due diligence process. Since waiving the conditions required Crombie to close the purchase transaction, the moment the waiver was given all urgency in respect of confirming whether the Crombie Property was indeed contaminated disappeared. Failing to recognize this consequential result of the waiver factored into the motion judge's improper conclusion that Crombie didn't conduct its diligence appropriately or in a timely manner. Ultimately, the Court concluded that "[w]hat 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."

Discussion

The Court of Appeal's decision in *Crombie v McColl* restores clarity in respect of diligence requirements in the context of contaminated land transactions. The motion judge's decision failed to appreciate the fundamental difference between a Phase I ESA and a Phase II ESA. The Court's ruling respects this difference by clarifying that knowledge of possible contamination obtained in a Phase I ESA "may be enough to put a plaintiff on inquiry and trigger a due diligence obligation" but it does not automatically amount to knowledge of actual contamination or discovery of a claim.

Having said that, the Court was also clear that a suspicion of contamination can give rise to a duty of inquiry/due diligence obligation. If, in satisfying this duty of inquiry, a reasonable person would have discovered the existence of a claim, the limitation period will be deemed to have begun. The Court's decision in *Crombie v McColl* reemphasizes the importance of landowners approaching issues of contamination diligently and in a precautionary manner if potential environmental risks associated with the property – known unknowns – come to light.

Additionally, and perhaps unfortunately, the Court determined that it was not necessary to give guidance to an issue raised during the summary judgment motion related to continuing nuisance. The motion judge had dismissed Crombie's argument that the continuing

migration of contaminants from the Dimtsis Property to the Crombie Property constituted a continuing tort, such that the limitation period had not expired, on the basis that no evidence had been presented to support Crombie's argument that migration was continuing. On appeal, Crombie argued that it was up to the defendants, as moving parties seeking summary judgment, to tender evidence that there was no continuing nuisance before Crombie, as respondent, was required to tender evidence of a continuing nuisance. Perhaps it is noteworthy that, during this discussion, the Court cited the recent Court's decision in *Sanzone v. Schechter*, 2016 ONCA 566, which affirmed the evidentiary burden of proof does indeed rest presumptively on parties, like the defendants in *Crombie v McColl*, who seek summary judgment. Despite the Court's decision not to provide clarity on this point, the overall crux of the Court's decision is that demonstrable scientific facts are crucial in a contaminated lands dispute.

Finally, while this issue was not directly relevant in *Crombie v McColl*, it is worth noting that in Ontario, there is no limitation period in respect of an environmental claim that has not been discovered. While not directly citing this provision of the *Limitations Act, 2002*, the Court's statement in *Crombie v McColl* – "the fact that contamination was there to be discovered was of course not sufficient to start the limitations clock" – affirms the policy choice made by Legislature, that undiscovered or unknown environmental claims are not to be whittled away by the passage of time.