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LIMITATION OF ACTIONS FOR ENVIRONMENTAL CONTAMINATION: DISCOVERABILITY

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In *Crombie v. McColl Frontenac* (2015) ONSC 6560 the Ontario Supreme Court dismissed as statute barred the plaintiff's action for environmental contamination of the soil and groundwater on its purchased property . The defendant was the owner of the neighbouring property that had been previously used as a gas station. The station had been decommissioned and the property remediated in 2004. Additional testing in 2005 confirmed that the remaining contaminants met the applicable Ministry of Environment standards at the time. The plaintiff purchased the abutting property in early March of 2012 and closed the deal on April 10, 2012. The action was commenced April 28, 2014. The *Ontario Limitations Act* 2002, SO 2002, c 24, Sch. B provides that an environmental claim must be commenced within two years of its discovery. The plaintiff argued that not until the Phase II report was received from its consultants in September 2012 could it have reasonably known about the contamination on its property that it alleged migrated from the defendant's property. As such, the plaintiff claimed that it was not outside the two-year limitation period for commencing its action. It further argued that in any event, the nuisance was a continuing one and for that reason the limitation period had not run out. The Court rejected both these arguments. The Court stated:

> "A party does not need to have concrete conclusions to start a cause of action. The threshold for discoverability of a claim for the purposes of the *Limitation Act* is a low one. A claim is discoverable when the material facts upon which it is based were discovered or ought to have been discovered by the plaintiff through the exercise of reasonable diligence." (at par.39)

In this case, the plaintiff's consultant had made it aware of concerns regarding potential contamination by petroleum hydrocarbons related to the abutting property even prior to the groundwater and soil monitoring part of the Phase II assessment in March 2012. The Court concluded that by the end of March the groundwater and soil sampling results were available and showed exceedances. In the circumstances, the limitation period would have at least started to run then if not before, but certainly not at the beginning of May when the draft Phase II Report was ready, or September 2012 when the Report was finalized. The Court also rejected the argument that there was a continuing nuisance, finding that none of the environmental reports spoke of ongoing damage. Mere presence of contamination in the soil or groundwater was insufficient to found a claim for continuing nuisance. Rather, there had to be evidence of damage sustained within the limitation period. (pars. 41-44) The message from this October 2015 judgment is clear: Plaintiffs cannot wait for certainty with respect to the occurrence of damage during the limitation period. Moreover, if they wish to wait past the discoverability period they will need evidence of ongoing damage within the limitation period, as distinct from previously discoverable damage outside the limitation period.

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