Continuing Nuisance Requires Proof of Additional Damage and Damages During the Prior Two Year Limitations Period, Court Confirms

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On Thursday, October 22, 2015 the Ontario Court of Justice released its decision on a motion for summary judgment in a civil action for damages arising from environmental contamination. In Crombie v McColl-Frontenac, 2015 ONSC 6560*, Justice Wright affirmed the law of continuing nuisance as we have understood it: that the law of "continuing nuisance" applies to environmental claims but only where there is actual evidence of additional damage during the two year limitation period immediately preceding the claim.*

In a continuing nuisance claim, the plaintiff can commence an action but can only seek damages going back two years prior to the date of issuance of the action. The law of "continuing nuisance" does not extend the original limitation period to allow the plaintiff to claim for all damage and damages sustained prior to expiry of same.

This decision begs the question about what a Court may accept as evidence of damage and damages inside of a two-year period. In the case of environmental contamination, the answer may very well be multiple rounds of sampling data showing rising contaminant concentrations during the two years prior to the issuance of the claim. This decision on a motion for summary judgment shows that a mere inference about possible ongoing migration in the context of soil and groundwater contamination may not be enough.

Justice Wright in *Crombie v McColl-Frontenac* relied on the reasoning of the British Columbia Court of Appeal, and found that the plaintiff had filed insufficient evidence to show fresh damages within the two year limitation period.

> [41] I am guided by and grateful for Justice Penny's summary of the law relating to continuing damage:
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> > 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.
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> [42] There is a paucity of evidence from the plaintiff regarding ongoing damage or nuisance, aside from the allegation in their Statement of Claim.

Justice Wright's decision referred with approval to other cases cited by the *ML Plaza* decision, applying this analysis of continuing nuisance claims into the Ontario framework:

> [12] In *Roberts*, the defendant continued to operate the sewage lagoon that discharged polluted water onto the plaintiff's land. The action succeeded, but as I read it, only for "fresh damage" resulting from flooding of polluted water within the limitation period. Damage resulting from earlier flooding was barred. This is confirmed by the citation, with approval, of *Dufferin Paving* where the plaintiffs' action failed for vibration damage to their house caused by the defendant's heavy trucks passing in the street because the damage was caused outside the limitation period, notwithstanding that the truck traffic and vibrations continued within the limitation period, without causing significant further damage.

The appeal period in *Crombie v McColl-Frontenac* has yet to expire.

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