The tricky business of limitations and contaminated land claims

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In May of 2016, the Superior Court of Justice delivered reasons in Valco Instruments Canada v. Imperial Oil, dismissing in part a defendant's summary judgment motion related to a contaminated land claim. The court concluded that the limitation period for a negligence claim had expired by the time the claim was brought; however, the court also concluded it could not dismiss the nuisance claim because an original cause of action arises each day that a nuisance remains unabated.

Given the expert evidence before it, the court ordered that the matter go to trial on the question of whether, and to what extent, there had been a continuing and ongoing migration of contaminating petroleum hydrocarbons from the defendants' property onto the plaintiff's property as of a particular date, and the extent of damages, if any, suffered by the plaintiff as a result. [As an aside, it's important to remember that merely having contaminants flow is not sufficient to found a claim in nuisance. There must be a substantial and unreasonable interference with the use and enjoyment of the property to find that a nuisance is occurring].

The more interesting question before the court, however, was the question of what a limitation period might otherwise have been for the negligence claim. Unfortunately, on this issue, the court did not ultimately give the guidance it could have. The court declined to answer the question of whether the purchaser's limitation period started when it purchased the property, on the basis it knew or ought to have known, by virtue of its ability to conduct due diligence on purchase, if the property was contaminated. The plaintiff in this case decided not to do conduct any due diligence related to the environmental condition of the property at the time of purchase. In the end, the court decided that in any event, by 2006 the plaintiff knew its property was contaminated, and it could not rely on a later 2009 expert report, as it sought to, as the start of the limitation period. For that reason, the court concluded the negligence claim was out of time when it was brought in 2011.

While the judge in Valco declined to determine the question of whether the limitation period starts at the time of purchase, where the purchaser fails to do due diligence investigations, the court referenced an earlier summary judgement motion, Bolton Oak Inc. et al. v McColl-Frontenac et al., for the proposition that the limitation period actually runs from *before* the purchase date—that is, from the date when the prospective purchaser actually knows of the contamination, even before it owns it, based on the purchaser's due diligence investigations. In our opinion, the court's commentary on the Bolton Oak decision is a misinterpretation of that decision: a cause of action cannot exist for a plaintiff regarding damage to a property that it does not yet own. We suggest the earliest the cause of action can arise is from the date of ownership. Therefore, the earliest a limitation period can start is from the date of ownership of the property.

The main issue in the Bolton decision was when the plaintiffs knew or ought to have known *who* had caused the contamination. In Bolton, the court concluded the plaintiffs ought to have reasonably known by conducting its due diligence who the cause of the historical contamination was by May 2006, shortly after one of the plaintiffs, Bolton Oak Inc., took title to its property. The plaintiffs in Bolton argued they could not reasonably have known until discoveries, occurring some two years later in a related action, who had caused the contamination they now complained of.

The court in Bolton did not address the question of whether the other plaintiff in that case, Prestige Developments Inc., ought to have known many years earlier than May 2006, specifically in 2001, whether its property was contaminated, on the basis that it ought to have done its due diligence prior to taking title in 2001. It appears the issue was simply not raised by the defendant. All we know from the court's reasons is that Prestige learned of the contamination around the same time as Bolton did.

It is our view that a limitation period for a possible claim cannot run any earlier than from when one takes title to a property; by then, the purchaser has an interest in the property, and therefore can suffer losses, *and* knows or *ought to have known through reasonable due diligence prior to purchase*, that the property was contaminated by a neighbouring source, and possibly by whom. However, in light of the court's confusing comments in Valco, an owner of recently acquired contaminated land may need to consider making a claim against owners and/or former owners (as appropriate) of a neighbouring source within two years of when it reasonably knew of the contamination, not from within two years of becoming the owner of the property.

If a purchaser chooses not to do any due diligence prior to purchase, we suggest that there remains a risk that a claim may be statute barred if the purchaser determines more than two years after purchase that its property is or was contaminated by the owners of a neighbouring source. We suggest this on the basis that the purchaser ought to have known and could have known about it prior to purchase, through proper due diligence efforts. To date, however, the courts have not thoroughly considered this question.