COURT OF APPEAL FOR ONTARIO

CITATION: 863880 Ontario Limited v. Canadian Pacific Railway Company, 2025 ONCA 755
DATE: 20251107
DOCKET: COA-25-CV-0156

Huscroft, Copeland and Rahman JJ.A.

BETWEEN

863880 Ontario Limited

Plaintiff (Appellant)

and

Canadian Pacific Railway Company*
and Oxford Properties Group Inc.

Defendants (Respondent*)

John M. Buhlman, Michael Statham and Lia Boritz, for the appellant

Rosalind H. Cooper and Nicholas R. Carmichael, for the respondent

Heard: October 16, 2025

On appeal from the judgment of Justice Ira G. Parghi of the Superior Court of Justice, dated December 6, 2024, with reasons reported at 2024 ONSC 6786.

REASONS FOR DECISION

[1] This is an appeal from the order of the motion judge granting summary judgment and dismissing the appellant's action against the respondent on the basis that it was statute barred.

[2] The action was brought seeking damages for the presence of contaminants on property the appellant purchased in 1990 from the predecessor of the respondent. The facts are set out in the decision of the motion judge and need not be recounted here. In short, the motion judge found that the appellant property developer had actual knowledge in April 1991 of soil contamination on the property. This triggered the start of the limitation period, which was then six-years. Accordingly, the limitation period had long since expired by the time the appellant commenced its action in January 2004.

[3] The appellant argues that the motion judge erred in principle by failing to account for the context, made palpable and overriding errors of fact, and failed to consider whether its claim of continuing nuisance was statute-barred.

[4] We do not accept these arguments.

[5] The motion judge found that the appellant had actual knowledge of the contamination of the property, sufficient in nature to trigger the start of the limitation period, by April 1991. She made this finding having reviewed four reports from environmental consultants the appellant had received in 1990 and 1991, all of which indicated that the land was contaminated, albeit to an uncertain degree.

[6] The appellant argues, in essence, that although it was aware of contamination in 1991, it considered the extent of the contamination to be minor and unimportant, in part because it was going to be excavating the relevant land in pursuing its development plans in any event. The appellant submits that it did not know that it was worse off until 2002, when it learned that the extent of the contamination was much greater than it had known.

[7] We do not agree. The appellant knew that the land was contaminated in 1991 and made the decision not to deal with it. It was not required to know the full extent of the contamination in order for the limitation period to begin to run: *Hamilton (City) v. Metcalfe & Mansfield Capital Corp., 2012 ONCA 156*, 347 D.L.R. (4th) 657, at paras. 54-61.

[8] The appellant invites this court to remake the motion judge's findings, but that is not our function on appeal. The motion judge made no error, let alone a palpable and overriding error, in finding that the appellant had actual knowledge sufficient to trigger the limitation period by April 1991.

[9] The appellant argues that even if most of its claims were brought past the limitation period, its continuing nuisance claim should not have been statute-barred. The continuing nuisance claim is based on allegations that contamination continued to leak into the property until sometime between 2010 and 2014.

[10] The appellant argues that the motion judge failed to consider its continuing nuisance claim. This argument faults the motion judge for not addressing an argument mentioned in passing, in a single paragraph in the appellant's factum, in the context of a lengthy argument about contamination of an uncertain extent that already existed. The Angus report from 1991 indicated that there was likely more than one source or cause of the contamination, and that the "actual source(s) ha[d] not been identified conclusively". The appellant was warned specifically that it is "very difficult to clean-up sites with [trichloroethylene contamination]", and that it would pose a "major challenge".

[11] The respondent had the onus of establishing there was no genuine issue requiring a trial, but the appellant had to put its best foot forward on the material issues to be tried and it did not do so. It argued that it knew of the contamination but was not worse off until excavation revealed more extensive contamination than it had understood. The summary judgment motion was not argued on the basis that continuing contamination was a discrete issue. The motion was argued on the basis that the appellant knew that the land was contaminated in 1991, albeit to an uncertain extent. The appellant took a risk concerning the extent of the contamination of the land. It cannot now hive off the continuing nuisance cause of action in the context of a claim so clearly time barred.

[12] Accordingly, the appeal is dismissed.

[13] The respondent is entitled to costs in the agreed amount of $35,000, all inclusive.

"Grant Huscroft J.A."
"J. Copeland J.A."
"M. Rahman J.A."