Citation: Low v. Petro-Canada Inc.
2001 BCSC 251

Date: 20010214
Docket: C992423
Registry: Vancouver

# IN THE SUPREME COURT OF BRITISH COLUMBIA



BETWEEN:

**FLORENCE LOW**

PLAINTIFF

AND:

**PETRO-CANADA INC.**

DEFENDANT

# REASONS FOR JUDGMENT

# OF THE

# HONOURABLE MR. JUSTICE MACAULAY

# (IN CHAMBERS)

Counsel for Plaintiff: J. Sullivan

Counsel for Defendant: J.R. Schmidt

Dates and Place of Hearing: June 9, November 7, 2000
January 23, 2001
Vancouver, BC

[1] The defendant, Petro-Canada Inc. (“Petro-Canada”) seeks an order under Supreme Court Rule 18A that the action commenced by the plaintiff, Florence Low (“Low”), be dismissed as statute barred pursuant to s. 3(2) of the *Limitation Act*, R.S.B.C. 1996, c. 266 (the “*Act*”).

[2] Low alleges various causes of action against Petro-Canada in contract, negligence, trespass, nuisance and breach of statute, all arising out of the leakage or spillage of gasoline on commercial property owned by her, part of which had been leased by Petro-Canada for use as a gas bar. A different party operated a convenience store on another part of the same property.

[3] The issues raised are as follows:

1) Does s. 3(2) of the *Act* apply? Is the damage direct as alleged by Petro-Canada so that a two year limitation period would apply, or indirect as alleged by Low so that a six year limitation period would apply?
2) Does the claim for breach of lease relating to a failure to remediate result in a six year limitation period for breach of contract outside the ambit of s. 3(2)?

3) If s. 3(2)(a) applies, did Petro-Canada confirm the cause of action within two years before Low commenced her action?

If Petro-Canada confirmed the cause of action, it will not be strictly necessary to deal with the first two questions. Accordingly, I will start with the last question on the assumption that the limitation period is only two years.



**Background**

[4] In 1985, Petro-Canada leased part of the property from a previous owner. The lease had an initial term of five years and provided that Petro-Canada had an option to extend the term for five successive terms, each for a period of five years. In 1986, Low purchased the property and took an assignment of the lease. Thereafter, Petro-Canada continued to operate the gas bar and renewed the lease at the end of the first term. On April 30 1996, the first renewal terminated. At that time, Petro-Canada did not seek to further renew and gave up possession. Low eventually sold the property in September 1998.

**The claims**

[5] Low filed the writ of summons and statement of claim on May 12 1999 setting forth claims against Petro-Canada for

breach of contract, negligence, nuisance, and trespass pursuant to the *Waste Management Act*, R.S.B.C. 1996, c. 482. Specifically, Low claimed the following:

> (a) Damages for loss of rental income for the Lands for the period of May 1, 1996 to September 30, 1998 in the amount of $72,500;
>
> (b) Damages in respect of property taxes, common tax costs and other costs thrown away;
>
> (c) Damages for loss of contribution to the operating costs of the Site in the amount of $19,958.60;
>
> (d) Damages for loss of opportunity to negotiate a favourable or reasonable lease agreement with prospective lessees;
>
> (e) Damages for loss of use and enjoyment of the Lands;
>
> (f) Damages for recovery of environmental consultation fees in the amount of $2,450.30 and legal fees in the amount of $19,870.27 in respect of investigations and the remediation of the Lands;
>
> (g) A declaration that the Defendant is a "responsible person" under the *Act* for the purposes of any future proceedings in which liability under the *Act* is in issue in respect of the Lands;
>
> (h) An Order that the Defendant shall indemnify the Plaintiff in the event that she or any of her successors, administrators, executors, heirs, agents or assigns are held liable under the *Act* for the remediation or the costs of remediating the Lands;
>
> (i) Interest pursuant to the *Court Order Interest Act* (British Columbia); and

(j) Costs.

[6] The central underlying allegation is set out in paragraph 9 of the statement of claim. There, Low alleges that Petro-Canada, while in possession of the lands pursuant to the lease, and as a result of its operations on the lands:

> caused, permitted, acquiesced in or contributed to the contamination of the Lands by depositing hydrocarbons and other contaminants on the Lands.

The foregoing, according to the statement of claim, constituted a breach of the terms of the lease that required Petro-Canada to maintain and deliver up the lands in good condition.

[7] As well, Low alleged that the level and quality of contamination exceeded the applicable standards and requirements set out in the *Waste Management Act* thus triggering an obligation upon Petro-Canada to remediate or pay the costs of remediation. Section 27(1) of the *Waste Management Act* reads:

> (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

Subsection 4 permits a person who incurs costs in carrying out remediation to pursue recovery of those costs in an action or proceeding. The *Waste Management Act* was proclaimed effective April 1, 1997. Low claims, pursuant to s. 35 of the *Contaminated Sites Regulation* B.C. Reg. 375/96 to the *Waste Management Act*, for the costs of investigation, analysis and remediation of the site, and related consultant fees that she incurred.



**The remediation**

[8] Petro-Canada does not admit causing the damage to the land but says that the gas bar was decommissioned and the underground storage tanks removed by the early summer of 1996. Accordingly, even if Petro-Canada did cause the damage, it said that it could not have continued to do so after the decommissioning and completion of the remediation.

[9] Petro-Canada also undertook a remediation of the lands to remove certain petroleum hydrocarbons (the “contamination”) in the soils of the lands. It says that it did so in good faith and without admitting any liability in respect of the contamination or the remediation to Low.

[10] On the question of whether or not Petro-Canada acted without admitting any liability, Low seeks to place certain

correspondence in evidence. Petro-Canada opposes the admissibility of the correspondence on the basis it contained privileged communications relating to settlement. If the correspondence is admissible, Low relies on it to demonstrate that Petro-Canada confirmed the cause of action.



**Privilege and confirmation**

[11] Low relies on letters from in-house counsel to Petro-Canada dated June 18, 1997, June 19, 1998 and July 7, 1998 as confirmation of the cause of action within the two year period immediately following termination of the lease. Both 1998 letters relate back to an earlier letter dated July 22, 1997.

[12] Pursuant to s. 5 of the *Limitation Act*, if an action is confirmed in writing before the expiration of the applicable limitation period, the limitation period begins from the time of the confirmation. Accordingly, even if the applicable limitation period is two years as Petro-Canada contended and, for this purpose, I assume that it is, Low says that she commenced her action within two years of June 18, 1997, or alternatively, within two years of the later letters.

[13] Petro-Canada says that the letters are inadmissible pursuant to the *Middelkamp* test for privileged communications (see *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.)) and, in any event, do not, whether

taken together or separately, constitute a confirmation of the causes of action alleged.

[14] I propose to discuss first whether the correspondence meets the objective test for confirmation of a cause of action set out in *Podovinikoff v. Montgomery* (1984), 58 B.C.L.R. 204 (C.A.). If it does, I will then return to the question of whether the communications are privileged and, even if so, whether there is an exception to the exclusionary rule for the purpose of determining confirmation under s. 5.

[15] It is important to understand the context in which these letters were written before determining whether the test in *Podovinikoff* was met.

[16] According to Low, following July 1996, the parties engaged in negotiation about the remediation of the lands. In written argument, counsel for Low described the negotiations and their result this way:

> Petro-Canada had clearly accepted responsibility to clean up the Site, and had, by virtue of the June 18, 199[7] letter to the Respondent, stated that it was “premature [for the Respondent] to seek reimbursement” because Petro-Canada had agreed to clean up the contamination and because the extent of the contamination was not known as at that date.

[17] The accuracy of this description is at issue. Low has a son-in-law, Russell Tong. Commencing in 1995, Tong actively

managed the property on her behalf. In an affidavit sworn October 14, 1999, he deposed to the following facts.

[18] After Tong learned of Petro-Canada's intention to terminate the lease, he made inquiries of a representative of the B.C. Ministry of Environment, Lands and Parks (the "BC MELP") respecting the clean-up requirements for the site. As a result of those inquiries, Tong concluded that Petro-Canada was required to clean up the site to a residential rather than commercial standard.

[19] Tong next retained a consultant to inspect the soil immediately following the decommissioning of the site. He also forwarded a copy of an environmental report obtained by Petro-Canada to that consultant for review. On or about July 27, 1996, Tong advised Petro-Canada, in part, that:

(a) significant degradation of the lands had taken place, prohibiting any form of residential development;

(b) the question of whether the contamination was present on adjacent properties had as yet not been determined.

[20] Petro-Canada responded to Tong advising that it believed it had complied with its obligation under the lease.

Dissatisfied with that response, Tong sought legal advice on behalf of Low.

[21] Following the receipt of legal advice, Tong advised Petro-Canada by letter dated October 29, 1996 that it had failed to return the lands in good condition within thirty days of the termination of the lease. After pointing out that he had retained counsel and been made “fully aware of our legal rights”, Tong threatened legal proceedings unless his concerns were satisfactorily addressed.

[22] Tong’s principal complaints were that their environmental consultants had discovered a further area of contamination under the store and that the lands should have been remediated to the higher residential rather than commercial standard. Thereafter, a series of meetings, discussions and correspondence ensued between the parties or their representatives throughout the winter, spring and summer of 1997 and eventually, well into 1998.

[23] Some, but not all of the ensuing correspondence was between the solicitors for Low and in-house counsel for Petro-Canada. On at least two occasions, once by letter dated November 18, 1996 and again by letter dated March 18, 1997, Petro-Canada agreed to remediate the soil under the store to a

residential level when the store was demolished for redevelopment.

[24] During much of the intervening period and extending into May 1997, consultants for both sides were either engaged in ongoing investigation to determine the extent of further contamination or reviews of such investigations. As a result of this process, Tong's consultant became concerned that further remediation would be required.

[25] Based on the foregoing, the solicitors for Low forwarded a "without prejudice" letter to the solicitors for Petro-Canada on June 3, 1997 seeking an indemnity for further remediation work that might be required by the BC MELP. The solicitors also requested that Petro-Canada reimburse Low for the costs incurred as a result of having to deal with site contamination.

[26] Petro-Canada responded on June 18, 1997 to the "without prejudice" letter. Viewed objectively, Petro-Canada agreed that it would be responsible for the cost of any further remediation ordered by the BC MELP pursuant to the *Waste Management Act*. It also agreed to provide an indemnity and forwarded a draft form of consent and indemnity.

[27] The draft form authorized Petro-Canada to enter on the property to “investigate whether there is any indication of petroleum hydrocarbons and to complete the work that may be required as a result of this investigation.” It also provided that Low “acknowledges that Petro-Canada’s agreement to perform the [w]ork is not an admission of liability on the part of Petro-Canada in respect of any claim that [Low] may make against Petro-Canada.”

[28] In the letter, Petro-Canada went on to assert its position that it believed it had complied with its obligations under the lease. After referring to their negative test results following the decommissioning of the site, Petro-Canada said this about the alleged further contamination:

> The liquid hydrocarbons discovered some time later in borehole 5 came as a complete surprise to Petro-Canada, and it is as yet unclear whether this contamination is in fact related to the previous Petro-Canada operations. We wish to reiterate at this time that Petro-Canada has not accepted liability for the existence of the hydrocarbon contamination in and around borehole 5.

Petro-Canada went on to say:

> [T]he only significant remaining soils problem appears to exist in the vicinity of borehole 5, which is slightly above the commercial standard, and to reiterate, Petro-Canada has not accepted liability for the condition of the property in that immediate area.

Petro-Canada then agreed as a “show of good faith” and to “clarify the source and delineate the extent” to excavate around that area of contamination and to “remove contaminated soil in excess of residential standard, replacing it with clean fill.”

[29] Later in the same letter, Petro-Canada stated that it was “not prepared at this time” to reimburse Low for professional fees incurred. After referring expressly to the issues surrounding the findings at borehole 5, Petro-Canada stated:

> The company has however agreed to dispose of the contaminated soil in the area, but at this point, and in the absence of clear evidence linking this contamination to the Petro-Canada operations, it is in our view *premature to seek reimbursement* for these amounts. [Emphasis added.]

This provides the context for the passage relied upon by counsel for Low in his written submission set out earlier as a confirmation of the cause of action.

[30] Counsel for Low also referred to two later letters dated June 19 and July 7, 1998 respectively as evidencing further confirmation of the cause of action. In the former, Petro-Canada referred to an earlier agreement evidenced by a letter dated July 22, 1997 stating that it provided that ”soils will

be remediated to the residential criteria." The earlier letter is also in evidence.

[31] More specifically, the letter of July 22, 1997 confirmed Petro-Canada's undertakings respecting remediation and stated that, as part of any redevelopment of the site, Petro-Canada would excavate, dispose of and replace soils that were above the residential criteria. It is apparent from the surrounding circumstances that the undertakings were provided as a form of "comfort letter" to give assurance to a prospective purchaser of the property.

[32] The final letter dated July 7, 1998 confirmed that Petro-Canada would reimburse Low for her expenses associated with obtaining a certificate of compliance under the *Waste Management Act.* This had also been agreed to in the comfort letter of July 22, 1997 referred to above.

[33] The letters of June and July 1997 were clearly prepared within two years of the cause of action arising and the letters in June and July 1998 were likely within the period as well, assuming that the cause of action crystallized about October 1996 when Tong sought legal advice.

[34] A party who seeks to establish that the other party has confirmed a cause of action within the meaning of s. 5 of the

*Limitation Act* must show that there has been both an acknowledgement of a cause of action and some admission of liability. In *Canadian Pacific Railway Company v. Enderby* (2000), 74 B.C.L.R. (3d) 346 (C.A.); 2000 BCCA 319, the issue was whether a cause of action had been confirmed in writing within the meaning of s. 5. The court found that the test stated in *Podovinikoff v. Montgomery*, *supra*, applied.



[35] In *Podovinikoff*, the court held at 209 that "what binds a defendant and activates s. 5(2)(a)(i) is an acknowledgement in writing of a cause of action which admits some liability thereunder." The objective test laid down in *Podovinikoff* is whether "a reasonable person receiving the letters and reading them would take it that the insurer was going to settle the respondent's personal injury claim" (at 210).

[36] Returning to *Canadian Pacific*, the Chambers judge found that while the defendants' agent had not expressly denied liability, he had not indicated that he was accepting the claim without reservation. Finch J.A. refused to interfere with that conclusion and stated, at para. 11:

> In my view, their content read in context fails to meet the test laid down by this court in *Podovinikoff, supra.* I think that a reasonable person reading these letters in the context of what had passed between the parties would not conclude that the defendants had admitted any liability. One might say that the letters acknowledged a cause of

> action in the plaintiff but that is not enough. There must in addition be an admission of some liability.

[37] In my view, those words are particularly apposite in the case at bar to the first letter relied on. While it may be said that Petro-Canada acknowledged a cause of action on June 18, 1997, it, at no time, admitted liability for the additional contamination.

[38] In her statement of claim, Low continues to assert that Petro-Canada was required to remediate the property to the higher residential standard and seeks to recover the losses and costs associated with their alleged failure to do so. The reference in *Podovinikoff* to “an admission of some liability” must be related to the claims advanced. I am satisfied that Petro-Canada did not, by its letter of June 18, 1997 confirm the cause of action but that does not end the inquiry.

[39] In my view, the correspondence of July 22, 1997 and the two further letters in 1998 contain some admissions of liability for remediation to a residential standard throughout the entire property, as well as for the costs of remediation and statutory compliance. Accordingly, by these letters, Petro-Canada confirmed the cause of action. None of that correspondence was stated to be “without prejudice” but it is

nonetheless necessary to consider whether the letters are inadmissible as privileged communications.

[40] The question of whether settlement negotiations are privileged was dealt with in *Middelkamp v. Fraser Valley Real Estate Board*, *supra*. In that case, an appeal from a decision allowing the plaintiffs' application for production of documents that had been exchanged on a without prejudice basis was allowed. McEachern C.J.B.C. adopted Wigmore's four tests as "the standard by which case-by-case privilege will be measured" (at 279) and cited the tests as found in the McNaughton revision (1961), vol. 8, p. 257, para. 2285:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

McEachern C.J.B.C. went on to reason, at 281 to 282:

> Considering the enormous scope of production which is required by our almost slavish adherence to the *Peruvian Guano* principle [which supports complete

> disclosure of any material that might be relevant], the questionable relevance and value of documents prepared for the settlement of disputes, and the public interest, I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "'blanket', *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

[41] The Chief Justice then identified the necessary exceptions to this general rule at 282:

> An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. *Other exceptions could arise out of such matters as* fraud, or where production may be required to meet a defence of laches, want of notice, *passage of a limitation period or other similar matters which might displace the privilege*. As we did not have argument on these matters I prefer to say nothing further about them.
>
> [Emphasis added.]

Clearly this decision, although not commenting on the circumstances where such an exception could be made, contemplates the admissibility of otherwise privileged communications where limitation periods and the proper disposition of litigation is at stake. Both earlier and

subsequent appellate decisions have found that even communications that were marked “without prejudice” were admissible for the purpose of meeting a defence respecting the expiry of a limitation period.

[42] In *Belanger v. Gilbert* (1984), 14 D.L.R. (4th) 428 (B.C.C.A.), the issue of whether a cause of action had been confirmed within the meaning of s. 5 of the *Act* was raised where the communication was with respect to settlement. As here, the letter in question had not been marked “without prejudice,” but Macdonald J.A. found that it would not have assisted the appellant even if it had been since “[n]ot all letters so marked are to be held inadmissible” (at 429). He then referred to the following extract from *Schetky v. Cochrane,* [1918] 1 W.W.R. 821 as setting the test for determining privilege:

> [B]efore the privilege arises two conditions must exist, *viz.*: (a) a dispute or negotiation between two or more parties; and (b) in which terms are offered… .

This suggests that even where communications are marked “without prejudice” or, as here, it is suggested that they form part of a chain of such communications, the communications may still be admissible if they do not satisfy the twin requirements.

[43] The letters that provide confirmation of the cause of action here do not set out any offers nor are they part of an exchange of offers and accordingly, are not privileged communications. Further, there was no expectation of confidentiality. Quite the opposite, Petro-Canada intended that its letter of July 22, 1997 would be provided to a prospective purchaser as a comfort letter respecting its "undertakings" regarding remediation.

[44] Lambert J.A. added to the reasons given by Macdonald J.A., suggesting, at 430:

> [I]t is possible for a letter to be considered as a "without prejudice" letter and inadmissible in evidence in relation to its contents about the flow of settlement negotiations either on liability or quantum, but at the same time for the same letter to be admissible in evidence for the exclusive purpose of s. 5 of the *Limitation Act*.

It is not necessary for me to rely on this extension to the earlier reasoning in the case. I recognize that Taggart J.A., in a later decision, cast some doubt on the correctness of the assertion by Mr. Justice Lambert. See *Farrell v. Tisdale* (1987), 16 B.C.L.R. (2d) 230 (C.A.) at 241. It remains to be seen whether it was this that the Chief Justice had in mind when outlining the exceptions in *Middelkamp.* Certainly if the extension proposed by Lambert J.A. is correct, there can be no

doubt that the letters in question are admissible for the limited purpose of the s. 5 analysis even if I am wrong on the question of privilege.

[45] Having found that Petro-Canada confirmed the cause of action within two years before Low commenced her action, the application for summary dismissal of the claim as statute barred must be dismissed. Although it is not strictly necessary to deal with the other issues set out at the beginning of my reasons, I will provide my decision and reasons with respect to them as well.

**1) Does s. 3(2) of the *Limitation Act* apply? Is the damage direct as alleged by Petro-Canada (two year limitation period would apply) or indirect as alleged by Low (six year limitation period would apply)?**

[46] Low argued that the claims of nuisance and negligence should be subject to s. 3(5) of the *Act* and a six year limitation period should apply since they do not fall into any of the exceptions set out. It would be necessary to accept that the damage to the property was indirect before I could accept this position. Conversely, if the damage to the property was direct as alleged by Petro-Canada, under s. 3(2) of the *Act,* a two year limitation period would apply.

[47] Section 3(2) of the *Act* provides:

> (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> (a) subject to subsection (4)(k) [causes of action based on sexual misconduct], for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
>
> (b) for trespass to property not included in paragraph (a);… .



Section 3(5) of the *Act* provides:

> Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

Claims or causes of action for, or in relation to, “injury to property” have been considered in a number of cases where the requirement that damage must be direct in order for s. 3(2) to apply has been explained.

[48] In *Flora Farms Ltd. v. Galaxy Agri-Products International Inc.* (1998), 52 B.C.L.R. (3d) 223 (B.C.S.C.), these claims or causes of action were found to arise where direct damage is caused by an identifiable external event. The plaintiff there had contracted a party to provide a greenhouse. The roof of the greenhouse was damaged by a windstorm and the plaintiff sued the supplier. The supplier alleged that the damage resulted from the negligence of the contractor and the

plaintiff added the contractor as a defendant four years after the damage had occurred. The contractor applied to have the action dismissed as statute-barred and argued that the plaintiff should not be able to circumvent s. 3(2) by launching a claim in negligence.



[49] As in this case, the issue in *Flora Farms* was whether the damage to the property fell under s. 3(2) or s. 3(5) of the *Act*. In considering whether s. 3(2) should apply, the Court looked at the wording of the section and the policy behind it. *British Columbia (Workers' Compensation Board) v. Thompson Berwick Pratt & Partners* (1986), 24 B.C.L.R. (2d) 157 at 162 (C.A.) was considered and McLachlin J.A., as she then was, was quoted at 227:

> [p]olicy considerations support the conclusion that "injury to property" refers to damage caused by an identifiable external event. A short limitation period of two years is appropriate where the claim is based on an event which causes direct injury to property. Such a short limitation period may not be appropriate for a claim based on defects in the property which may not manifest themselves clearly for some time, even though with the benefit of hindsight one may be able to say that their onset was revealed at an earlier date.

In the result, the court held that if s. 3(2) was "ever to mean anything," the matter under consideration there was an "appropriate case for its application" (at 228).

[50] The characterization of direct damage was considered by the Supreme Court of Canada in *Ontario (Attorney-General) v. Fatehi,* [1984] 2 S.C.R. 536. Damage in the form of an oil spill was found to have resulted from the negligent actions of the respondent driver who was involved in an accident on a highway. A unanimous Court held that the spillage of gasoline onto property constituted “direct damage” to the property where “the appellant was required to expend its resources in order to make whole its property which had been significantly degraded by the actions of the respondent” (at 541).

[51] As in *Fatehi*, I find that the damage to Low’s property is direct in that she must expend her resources to make the property whole because of the actions of Petro-Canada. Two other decisions support my conclusion that direct damage can result from leakage or spillage over a period of time: *Letroy v. Armenian Apostolic Church of British Columbia,* [1989] B.C.J. No. 1151 (Q.L.) (Co. Ct.) and *Tobacca v. Island Ready Mix Ltd.* (1978), 8 B.C.L.R. 86 (Co. Ct.).

[52] In *Letroy*, the plaintiffs claimed for damages to their house allegedly caused by subsidence resulting from the activities of their neighbours who were preparing a building site in the adjacent property. Over the span of four to six

months, the building site was pre-loaded with eight to ten feet of fill. The settlement of the plaintiffs' home as a result of the fill caused physical damage to the property. It was held that the claim was properly founded in nuisance and that the appropriate limitation period for a claim in nuisance was two years under the *Act*.

[53] In *Tobacca*, the defendant company operated a gravel pit and ready-mix concrete business upstream from the plaintiff's small farm. The Court found that in discharging turbid water into the watershed, damage was caused to the plaintiff's property in the form of a clogged watercourse and flooding. This resulted from the depositing of significant quantities of particulate matter over the span of 17 years. The applicable limitation was held to be two years.

[54] In commenting on the duration of the damage, Millward Co. Ct. J. said, at 89 to 90:

> A "cause of action" by the plaintiff against the defendant must be held to have arisen in each instance at the moment any particular particle at one time discharged by the defendant came to rest in the channel on the plaintiff's property. There is no way in which that instance can be identified with respect to any particular particle, even if such particle could be positively traced to be shown to have been discharged by the defendant at its washing site. It may be reasonably inferred, however, that successive causes of action arose daily at greater or lesser frequencies… .

Having found that direct damage can result from leakage or spillage over a period of time, the appropriate limitation period in the circumstances of this case is two years.



**2) Does the claim for breach of lease relating to a failure to remediate result in a six year limitation period for breach of contract outside the ambit of s. 3(2) of the *Act*?**

[55] Low also argued that the issue of clean-up of contamination is contractual as it arises pursuant to a commercial lease agreement which imposes an obligation on a tenant to return lands to a landlord in good repair and condition. As such, it was submitted that a six-year limitation period should apply. Low relied on *Houweling Nurseries Ltd. v. Fisons Western Corp.,* [1985] B.C.J. No. 64 (Q.L.) (S.C.), varied on other grounds (1988), 37 B.C.L.R. (2d) 2 (C.A.), leave to appeal to S.C.C. refused (1988), 89 N.R. 398 (S.C.C.), as authority for the imposition of a six year limitation period.

[56] In *Houweling*, the court was faced with a motion to amend a statement of claim by adding a cause of action. The original statement of claim sounded only in negligence and claimed that the defendant had provided the plaintiff’s plant nursery with a soil mix too rich in fertility and thereby caused the seedlings to die. The claim, if amended, would

expand into contract. The limitation under s. 3(1)(a) had lapsed at the time of the motion such that in order to allow the amendment, the six year limitation under s.3(4) would have to apply.



[57] McKenzie J. cited the B.C. Court of Appeal in *Spry and Hawkins v. Dwyer* (1981), 27 B.C.L.R. 235 at 236 where the court approved the following extract from *B.C. Hydro & Power Authority v. Homco Internat. Ltd.* (1980), 19 B.C.L.R. 97 at 98-99, affirmed 25 B.C.L.R. 181 (C.A.), at para. 5:

> It is my opinion that s. 3(1)(a) is meant to cover personal injury claims and damage to property arising primarily in tort but also, in some circumstances, from breach of contract and breach of statutory duty. Actions arising from breach of contract not involving physical injury or direct damage, in my view, do not fit within this section. A distinction may be that in breach of contract damages can normally be anticipated in advance, or at least at the time of breach, but in cases of ordinary tort resulting in physical injury or damage to property the damage cannot be anticipated in advance.

In considering this, McKenzie J. went on to allow the amendment finding that the damage sustained was indirect damage that fell outside the ambit of a two-year limitation period under the legislation. Accordingly, it is the finding of indirect damage that was essential to the decision.

[58] Having already found that the damage to Low's property is direct, this authority serves only to support the conclusion that a two-year limitation period is applicable in the case at bar. The language of s. 3(2)(a) shows clear legislative intent that a two year limitation period is to apply where injury to property arises from breach of contract. The section has also been applied to claims brought in contract. See *Allen v. Babco Paint Limited* (1982), 34 B.C.L.R. 242 (S.C.).

[59] In summary, I have found that as the injury to Low's property is direct, a two year limitation period is applicable in the circumstances of this case. Petro-Canada confirmed the cause of action within two years before Low commenced her action. The application for summary dismissal of the claim as statute barred must be dismissed.

"M.D. Macaulay, J."
The Honourable Mr. Justice M.D. Macaulay