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Site contamination: Claims for latent defects - Notice and prescription

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On what grounds may a landowner who discovers soil contamination caused by an old heating oil tank sue the former owner of the property? In this bulletin we examine whether the warranty against latent defects found at Article 1726 of the *Civil Code of Québec* can be invoked to have the sale annulled or to obtain a reimbursement of part of the purchase price.

The recent decision of the Superior Court in *De La O* v. *Sasson*[1] is instructive in two respects. First, we are reminded that a purchaser who discovers a latent defect must notify the vendor within a reasonable amount of time. In order to have a claim dismissed on the basis of late notice, however, it must be established that some sort of damage was thereby caused to the defendant. The judgment also serves as a reminder that even in the case of site contamination, where it is not always easy to pinpoint the exact moment when the purchaser became aware of the defect, failure to take action may result in the claim being prescribed.

To be successful, the person claiming that a property has a latent defect must convince the court that the conditions giving rise to the action are met. Although not required to prove that the vendor was at fault or that the existence of the defect breaches a clause in the deed of sale, the plaintiff must nonetheless establish that:

the property has a defect
the defect is serious
the defect was unknown to the plaintiff at the time of sale and was not apparent; and
the defect predates the sale

If proof of the latent defect is successfully established within the meaning of the Civil Code, the purchaser must also convince the judge that the vendor was given notice of the defect within a reasonable time and that the action was filed within three years. In both cases, the purchaser's discovery of the defect starts the meter running. In *De La O*, the sale took place in 2006 and the contamination was discovered soon after (a strong smell of oil filled a storage room after it was emptied for cleaning) and the action was brought in 2012, after the purchaser had had soil samples tested.

On the issue of when the contamination was discovered, Justice Daniel W. Payette assessed the evidence, including the purchaser's testimony, and held:

> [Translation]
> **[30]** The Court finds that the Purchaser noticed a persistent smell of heating oil beginning in 2006, that the odour constituted an initial tangible manifestation of the soil contamination under the building, that the Purchaser was aware of and concerned about the possibility that the land was contaminated but that, for reasons known only to him, he did not notify the

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vendors, did not take legal action and did not take any steps to resolve the problem.

The plaintiffs may have believed that only laboratory testing could prove a latent defect involving soil contamination. This might explain why they waited for the expert's report before notifying the vendors of the defect and then suing them. According to the Court, although lab results may be needed to prove the defect, legal proceedings must be instituted within three years of the time the owner first becomes aware of the contamination. In *Lavoie* v. *Comtois*,[2] Justice André Rochon, as he then was, described this moment as occurring when signs noticeable to a layperson would have caused a duly diligent person to become concerned. In this case, it was when the plaintiffs first noticed the smell of oil that they became aware of the latent defect; that was enough to start the clock on the three-year prescription period.

The defendants also claimed that the fact that they were not notified of the defect for six years from the discovery of the contamination should be grounds for dismissing the action. In setting aside that argument, the Court recalled that notice should not be confused with a formal demand: although a legal action cannot be instituted without a formal demand, a late notification is only a bar to an action for latent defects if the defendant has suffered damage as a result. It is up to the judge hearing the case to assess the consequences of the late notice based on the evidence.

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1 2015 QCCS 713 (CanLII).

2 J.E. 2000-40.

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