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Busy Beavers: Is a property owner liable for flooding of neighbour's property caused by beaver dams?

Natural Watercourse: Duty owed by Landowner to Neighbour?

Beavers built dams on a pond and stream on the Runges' property causing flooding of Lynds' bottom land and hay. The Lynds claim damages in nuisance and negligence as well as injunctive relief, i.e., removal of the dams by the Runges. Are the Runges liable for the dams?

The beavers came onto their property through the forces of nature. The Runges argue that any interference with the Lynds' property is caused by the beavers and not by them, and they state there is no obligation at law requiring them to remedy natural blockages.

The issue here is whether the Runges have any responsibility at law for the flooding caused by the beaver dams. To resolve this issue, Mr. Justice McKinnon reviewed the law in respect to a natural watercourse. At common law there is a "natural watercourse exception" that states a landowner has no duty to do anything with regard to a natural watercourse if it is a natural watercourse that flows through his or her land. The question arose whether this exception is still good law today in BC.

What is a "watercourse"? Justice McKinnon accepted the definition by

Martin J.A. of the Saskatchewan Court of Appeal in *Edwards v. Rural Municipality of Scott*, [1934] 1 W.W.R. 33, aff'd [1934] S.C.R. 332, at p. 38, as follows.

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A watercourse is defined as a stream, usually flowing in a definite channel, having a bed and sides or banks and discharging itself into some stream or body of water. It must be something more than surface water, spread over a tract of land, caused by unusual freshets or other extraordinary causes. A depression or natural draining that merely carries water in a rainy season is not a watercourse; nor is a ravine, which at certain seasons facilitates the drainage of the country, a watercourse. A watercourse must have the characteristics of a flowing stream, it must have source, outlet and channels; the water need not, however, flow continually...

What are the rights of a lower landowner with respect to accepting **surface water** from an upper landowner? According to *Caplin v. Gill* (1977) 5 B.C.L.R. 115 (S.C.), the lower landowner is under no obligation to accept the surface water and has the right to prevent such water from flowing onto his or her property so long as the water is not running in a natural channel. If it is running in a natural channel, then the lower landowner has no right to divert it.

If the water is surface water, however, then the lower landowner can take measures to stop it draining onto his or her land and will not be liable for damage that the upper landowner may suffer from the former landowner's protection of his or her land. McKinnon J. relied on Madam Justice Humphries comments in *Kraus v. Fech*, 2002 BCSC 714, in which she considered *Caplin v. Gill*, supra, and *Graham v. Lister* (1908), 14 B.C.R. 211 (C.A.).

But on the facts in this case, damage to the lower landowner's land is caused by alteration of a watercourse by beavers on the upper landowner's land. The upper landowners did not alter the watercourse or have anyone alter it on their behalf.

Has the common law "natural watercourse exception" been eroded in

Canada? Mr. Justice McKinnon found that it may no longer prevail in England because of the decision in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty*, [1980] 1 Q.B. 485 (C.A.) and perhaps in British Columbia, because *Leakey* was applied by the majority of the BC Court of Appeal in *Hayes v. Davis* (1991), 54 B.C.L.R. (2d) 350, leave to appeal to the Supreme Court of Appeal refused, [1991] 3 S.C.R. vi.

In *Leakey v. National Trust*, the defendant, the upper landowner, occupied land consisting of a conical-shaped hill composed of soil that made it perilously liable to cracking and slipping as a result of weathering. At the base of this hill, the lower landowner owned two houses. A summer drought was followed by a wet autumn and a large crack formed in the bank of the hill that, if it collapsed, threatened the houses. A large fall of soil from the bank landed in the yard of one of the houses. The upper landowner refused when requested to remove the debris.

He was found liable in nuisance and his appeal was dismissed on the basis that he owed a duty, if he knew or ought to have known of the risk of encroachment, to do what was reasonable in all the circumstances to prevent the risk of the known or foreseeable damage or injury to his neighbour. If he did not, he was liable in nuisance.

Megaw L.J., at p. 524, defined the duty owed by a landowner to his or her neighbour as a “duty to do that which is reasonable in all the circumstances, and to do no more than what, if anything, is reasonable, to prevent or minimize the known risk of damage or injury to one’s neighbour or to his property.”

In determining whether or not there has been a breach of this duty, the court will consider the extent of the risk and what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused.

Is it practicable to prevent, or to minimize, the happening of any damage? If it is practicable, how

simple or how difficult are the measures that could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realized by, the defendant, and the time when the damage occurred?

A large fall of soil from the bank landed in the yard of one of the houses.

Megaw L.J. determined that these factors, so far as they apply in a particular case, would be weighed in deciding whether the duty of care requires or required the defendant to do anything, and, if so, what.

How does this duty to do what is reasonable in all the circumstances affect the natural watercourse exception? Although *Hayes v. Davis* applied *Leakey*, the case did not discuss the “exception”; it involved trees uprooted and blown down onto a neighbour’s property during a windstorm. It was, however, argued in *Nykyforak v. Hillsburg (Rural Municipality)* (2001), 158 Man. R. (2d) 298, 2001 MBQB 227, that *Leakey* applied and the natural water course exception no longer was good law. The judge sidestepped the issue because it was found that the defendants had not brought themselves within the application of *Leakey*.

Mister Justice McKinnon then considered the opinions of learned authors: Mr. Justice Linden in *Canadian Tort Law*, 7th ed. (Butterworths, 2001) and of Professor Fleming in *The Law of Torts*, 9th ed. (LBC Information Services, 1998). Mr. Justice Linden at page 539 commented that although there is a duty imposed on occupiers to safeguard their neighbours against hazards arising on the occupier’s land, whether by human agency or natural causes, the exception may still exist with regard to water.

In footnote 172, several decisions were cited to support the exception that there is an immunity from damage caused by water, naturally on the land, whose flow is not interfered with. These decisions, however, with one exception, are prior to *Leakey*. And Professor Fleming, at pages 480 – 481, expresses doubts about the old authorities that recognized the natural watercourse exception.

An English author states definitively that *Leakey* has overruled the natural watercourse exception in England at least: A. M. Dugdale, ed. in *Clerk & Lindsell on Torts*, 18th ed. (London: Sweet & Maxwell, 2000). And doubts were expressed in *Home Brewery Co. Ltd. v. William Davis & Co. (Leicester)*, [1987] Q.B. 339, whether the exception was still good law.

What about in Canada? McKinnon J. then looked at Canadian cases. In *Nicholls v. Hennion* (1989), C.C.L.T. 105 (Ont. H.C.J.), Maloney J. held it was not entirely clear that *Leakey* is good law in Canada. This case involved whether there is a duty on the government to investigate Crown lands for beaver dams so as to ensure they bear no threat to the public.

Apparently a highway had been washed out by the breakage of beaver dams. The judge found there was insufficient evidence before the court on the question of expense and effectiveness of inspection for beaver dams on lands adjoining highways to determine whether the scope of duty of the Crown landowner was established, if *Leakey* were found to apply.

In *270233 Ontario Ltd. v. Weall and Cullen Nurseries Ltd.* (1993), 17 C.C.L.T. (2d) 176 (Ont. Gen. Div.), aff’d (1997), 41 C.C.L.T. (2d) 239 (Ont. C.A.), however, a landowner was found liable in negligence subject to a modified duty of care. Here, run-off water carried mud and silt from the defendant’s farm onto the plaintiff’s golf course causing considerable clean-up costs. The court found there was no recovery in nuisance because the defendant’s use of the land fell within the natural user exception.

The court found, however, a duty of care in respect of that natural waterflow.

Spence J., at para. 72, recognized that holding a landowner liable in negligence for damage caused by natural waterflow from his or her property would

potentially eliminate, for all practical purposes, the natural user exception to the law of nuisance with respect to natural waterflow. On the other hand, to preclude entirely the possibility of liability in negligence might seem unduly harsh.

Spence J. suggested an intermediate position concerning the degree of the precautions to be taken and that a landowner be found liable in negligence only when he or she has failed to meet a standard of care that is modified in some measures to take into account the natural user exception. He suggested that the defendant [upper landowner] not be held liable unless it is in a position to foresee damage of the type that occurred. If it is, then it is under a duty to take, in a reasonably timely way, those steps that are consistent with the proper care and maintenance of its property so long as these steps do not involve a fundamental or substantial change in the use of the defendant's property. If these measures prove costly, then it is necessary to take into account the circumstances on the plaintiff's property, and the measures that may be available to be taken on that property to alleviate the damage and the comparative cost of these measures. Spence J. stated it will be appropriate to expect the plaintiff [lower landowner] to pay for some of the expense, especially if it can be found that the circumstances on the plaintiff's property contributed to the damage. This is consistent with the principle of contributory negligence.

If damage to the lower landowner's property still occurred because of the run-off, then Spence J. found additional factors to consider. Is the damage clearly attributable to the upper landowner's conduct? And, is the damage "materially greater" than the damage that would be reasonably expected if the lower landowner's land was vacant or was used

"in a way that was known not to produce the injurious consequences complained of."

So, on the facts before him, are the Runges liable for the flooding caused by the beaver dams on the natural watercourse on their property? Or, does the exception at common law still apply? The previous owner of the Runges' property testified that the beaver dams existed when he owned the land and that he had made considerable efforts to stop the beavers from damming the stream and pond. The lower landowner had arranged for a trapper to enter his property and trap the beaver. He decided to sell the land and when in 1993, he sold it to the Runges, he did not recall any discussion about flooding or beavers. But he stated that the beaver dams were visible to anyone who viewed the property. The Runges did recall some mention of the beavers but merely as "general" talk.

The bottomland had experienced flooding problems before the Lynds bought it.

The Runges did not live on the property. They visited it only irregularly and usually in good weather. In 1994 the Runges learned the Lynds had been coming onto their land to control the beaver. They did not object until 1998, when the relationship between the parties deteriorated. The Runges began spending more time on their land and resented what they perceived the cavalier attitude of the Lynds who, without the Runges' consent, had been obtaining trapping permits from the Conservation Office in Williams Lake to trap the beaver on the Runges' property. Plus they resented that Mr. Lynds drove his tractor onto their land whenever he decided to break down the beaver dams.

Unpleasantries ensued, and the Runges prohibited the Lynds from entering onto their property. Mr. Lynds, however, claimed a right to trap the beaver

under the trapping permit and he hired trappers to control the beaver dams. He even came onto the Runges' land himself and was threatened by the Runges' son.

The Lynds' claim that because of the Runges' failure to control the beaver dams, their bottomland flooded in 1998, causing loss. The Lynds claim damages for their lost crops and for remedial work they claim is necessary to control flooding. The Lynds also seek an injunction to restrain the Runges from further flooding of the Lynds' land and "an order that the Defendants forthwith clear the obstructions in the water course and to keep same clear at their expense."

In McKinnon J.'s view, the Lynds were seeking to co-opt the Runges into participating in a land reclamation project for their benefit. The bottomland had experienced flooding problems before the Lynds bought it. The previous owners of both lands had co-operated in controlling the problem. Here there was no co-operation between the neighbours nor a common goal. The Runges want to keep their land in its natural state whereas the Lynds want to drain it to make their land productive.

What about *Leakey*? McKinnon J. held that it does not assist the Lynds because even if it is good law in Canada, "one cannot equate the Lynds' 5 acres of bottom land with the houses under threat in *Leakey*." According to McKinnon J., to accede to the Lynds' claims would create havoc in Canada where beaver abound. A landowner whose land is flooded as a consequence of a beaver dam on the neighbour's land could "enforce an expensive and burdensome duty" upon the neighbour with no benefit whatever to that neighbour.

McKinnon J. found that the beaver dams were "not the result of a gradual worsening of a 'beaver problem.'" Rather, the dams, absent the years of human intervention, were a yearly and persistent occurrence of relatively uniform severity. This contrasts with the slide in *Leakey* which was not a 'regular occurrence.' Rather, it was an exceptional event, albeit of natural causes."

The judge concluded, “there is no present obligation upon a landowner in Canada to alter a watercourse from its present and longstanding state in order that an adjacent landowner may make use of lands that are subject to historical seasonal flooding.” Therefore, the Lynds’ claims in nuisance and trespass were dismissed.

The beavers remain free to build their dams on the Runges’ property unless, of course, the Runges decide to control them. The Lynds cannot come onto the Runges’ land to control the dams. If they did, they would be trespassers. There is no “duty” owed by the Runges to the Lynds. The Lynds must secure the co-operation of the Runges to resolve the beaver problem.

Lynds v. Runge, 2002 BCSC 1579

Mr. Justice R.A. McKinnon

Quesnel Registry Number 10029,

14 November 2002

Counsel for the Plaintiffs: R. M. Stewart

Counsel for the Defendants: S. Hutchison

Note: It appears that the natural watercourse exception remains good law in Canada at least with respect to a watercourse that is subject to “historical seasonal flooding.” Even if that flooding is caused by beaver dams.

But what if the Lynds had productively grown potatoes and hay prior to the beaver dams flooding their land? Would this then constitute “historical seasonal flooding”? Would *Leakey* then apply, to give the Lynds a claim in negligence, subject of course to a modified duty of care on the Runges? ▲

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