GAUTHIER **et al v** NANEFF **et al**

14 D.L.R. (3d) 513, [1971] 1 O.R. 97

Ontario High Court
Dunlap, Co.Ct.J. (L.J.S.C.).

September 10, 1970

Water and watercourses — Riparian owners — Right of riparian owner to natural flow of water without sensible alteration in character or quality — Whether riparian owner entitled to order restraining speed-boat regatta on small inland lake — Balance of convenience.

Real property — Riparian owners — Right of riparian owner to natural flow of water without sensible alteration in character or quality — Whether riparian owner entitled to order restraining speed-boat regatta on small inland lake — Balance of convenience.

Natural resources — Pollution — Fresh-water lake — Threat to purity and wholesomeness of city's source of drinking water by scheduled speed-boat regatta — Whether regatta enjoinable at instance of riparian owners.

A riparian owner is entitled to the water of his stream in its natural flow without sensible alteration in its character or quality. Accordingly, a riparian owner bordering a lake is entitled to an injunction restraining both the officers of an unincorporated club, and a municipal corporation from holding a speed-boat regatta on the lake when there is reasonable apprehension that the regatta would result in a diminution of the purity, wholesomeness and potability of the water in the lake. Moreover, financial commitments of the club and the municipality arising because of the regatta do not, on the balance of convenience, justify the denying of the owner's application for an injunction.

[Baldwin v. Chaplin (1913), 12 D.L.R. 387, 4 O.W.N. 1574; McKie v. K.V.P. Co. Ltd, [1948] O.R. 398, [1948] 3 D.L.R. 201; affd [1948] O.W.N. 812, [1949] 1 D.L.R. 39; affd [1949] S.C.R. 698, [1949] 4 D.L.R. 497; John Young & Co. v. Bankier Distillery Co. et al., [1893] A.C. 691; Chasemore v. Richards (1859), 7 H.L. Cas. 349, 11 E.R. 140; Imperial Gas Light & Coke Co. v. Broadbent (1859), 7 H.L. Cas. 600, 11 E.R. 239; Barrett v. Harris (1921), 51 O.L.R. 484, 69 D.L.R. 503, *refd to*]

APPLICATION by a riparian owner for an ex parte injunction restraining the carrying out of a speed-boat regatta.

Elmer W. Sopha, Q.C., for plaintiffs.

William T. Rolston, for executive officers of Sudbury Rotary Club and the Sudbury Rotary Club, defendants.

Patrick J. Cull, for Parks and Recreation Commission of the City of Sudbury and the Municipal Corporation of the City of Sudbury, defendants.

DUNLAP, CO.CT.J.:— This is an application launched by the plaintiffs herein against the defendants seeking various restraining orders as set out in paras. (a) to (e) of the notice of motion filed. In support of the application, counsel for the plaintiffs filed the affidavits of Elmer Walter Sopha, with ***[page514]*** exs. (a) to (l) attached thereto. Hazen Gauthier with exs. (a) to (d), Rita Glenn Dixon with ex. "A", John Francis McCullough, Joseph Anthony Pidutti and Paul Falkowski. In addition, with leave of this Court, counsel adduced evidence from Wilfred Lefebvre, Master of Titles for Sudbury District, and Herbert Ronald Akehurst the present City Engineer for the City of Sudbury.

The defendants Nick Naneff, Bruce Mooney, Norman Greene, John Mousseau, Bruce Moore, Laverne Anderson and the Sudbury Rotary Club were represented by counsel on the application, as were the defendants the Parks and Recreation Commission of the City of Sudbury and the Municipal Corporation of the City of Sudbury. Affidavit material, including the affidavits of Andy Greenwood, Nick Naneff, with exs. (A) to (E) inclusive, Breen Keenan with ex. (A), Bruce Mooney with ex. (A) and J. R. Bain with ex. (A), was filed by counsel on behalf of the defendants, and said counsel were permitted to cross-examine the witnesses and were heard in argument.

The following are the facts:

(1) On April 22, 1970, the Sudbury Parks and Recreation Commission by formal resolution approved the use of Bell Park, property owned by the defendant Municipal Corporation, for the Ontario Outboard Championships to be held September 12 and].3, 1970, on Lake Ramsay, and communicated this fact to Bruce Mooney, the president of the Sudbury Rotary Club, by correspondence dated April 27, 1970, signed by George Kormos, the Commissioner of Parks and Recreation.

(2) No publication or effective communication of this resolution was made to the general public of the Sudbury area until an editorial appeared in the Sudbury Star of July 15, 1970.

(3) The plaintiff, Hazen Gauthier, first became aware of the intended motor-boat championship competitions from a report in the Sudbury Star, which report he observed during the first two weeks of August, 1970.

(4) On August 14th the said Gauthier instructed his solicitor, Elmer Walter Sopha, Q.C., to take steps to persuade the Sudbury Rotary Club to abandon

its intention to hold the speed-boat regatta. The said solicitor contacted one Gerry Lougheed, the chairman of public relations for the Sudbury Rotary Club, the same day and carried out the plaintiff Gauthier's instructions but received no response until he initiated a further contact ***[page515]*** on August 20, 1970, which contact revealed that the request had been refused by the president, the defendant, Nick Naneff. On August 18th the said solicitor had requested the co-operation of the Ontario Water Resources Commission to effect the end desired by his client, but no final answer was received from this body until he received a telephoned communication from the Honourable George E. Kerr, Minister of Energy and Resources Management in the Government of Ontario, to the effect that the local authorities had made the decision to hold the regatta and no interference by the Commission seemed warranted.

(5) September 1, 1970, the solicitor for the plaintiffs forwarded by hand correspondence to the president of Sudbury Rotary Club, the Mayor of the City of Sudbury and the Chairman of the Parks and Recreation Commission advising them that, unless they took action by noon, Thursday, September 3, 1970, to abandon or revoke the permit, an action for a restraining order would be commenced. No acknowledgment of these correspondences having been received, an action was launched on September 4, 1970, and this application was filed on September 8th, returnable on September 9th.

I list these facts separately and in chronological order because one of the essential findings I must make relates to the question of delay on the part of the applicants. I am satisfied on this evidence, that I accept, that from the moment he became aware of the intended regatta, Gauthier took all reasonable steps to press his intended course of action and I find that any delay during the material period of time was occasioned solely by the failure on the part of the representatives of the defendants to respond or to respond promptly to communications addressed to them.

My next concern is the question of the propriety of this particular procedure. It is patent that an ordinary application launched by notice of motion returnable before a High Court Judge at Toronto would in serve the purpose of the plaintiffs in view of the time element.

Baldwin v. Chaplin (1913), 12 D.L.R. 387, 4 O.W.N. 1574, stands for the proposition that: "The very reason on which the Court proceeds in making an order for an injunction ex parte is that time will not serve to give notice to the party intended to be affected by it." ***[page516]***

There is no question in my mind that this case is one of emergency and the extra time required to apply in the regular way would definitely have involved a failure of justice.

Let me now proceed to a consideration of the merits so far as the issue presently before me is concerned. Such a venture requires me to outline the salient facts relevant to this aspect of the application. These are as follows:

(1) The plaintiff Hazen Gauthier occupies lands approximately 450 ft. west of the westerly end of Lake Ramsay. The plaintiff Rita Glenn Dixon is an owner of riparian lands on Lake Ramsay, which said lands are located between one-half and three-quarters of a mile from the regatta site. The plaintiff, John F. McCullough, a medical doctor, has occupied, for some 33 years, lands known as Lots 79, 80, 89 and 90, Plan M 124, which said lands are located within the City of Sudbury on the south shore of Lake Ramsay. The plaintiff, Joseph A. Pidutti, is a medical doctor and a ratepayer in the City of Sudbury, being the owner of lands known as Lot 239, Plan M 95, registered in the Office of Land Titles for Sudbury.

(2) Lake Ramsay, located within the limits of the City of Sudbury, is the principal source of water supply for the City of Sudbury. In addition, several hundreds of ratepayers draw their water for domestic consumption directly from the lake, including the families of the plaintiffs, Dixon and McCullough.

(3) The quality of water in Lake Ramsay has been decreasing over the years in respect to its purity, wholesomeness and potability as a source of supply for the inhabitants of the City of Sudbury and more particularly for the owners and occupiers of riparian lands on the lake. This normal deterioration has been aggravated and/or accelerated by an algae infestation in 1965 and the flow of raw sewage into Lake Ramsay provoked by a violent storm on August 20, 1970.

(4) Bell Park, the site of the proposed regatta, is located on the north-west side of Lake Ramsay. It was conveyed to the City by William Joseph Bell in 1926 for the purposes of a public park and recreation ground only and is subject to the control of the defendant Parks and Recreation Commission of the City of Sudbury.

The said lake has a width of approximately two and one-half miles from west to east and of one-half a mile to one and one-half miles from north to south. A 60 in. ***[page517]*** intake pipe located north-westerly from Bell Park draws some six to nine million gallons of water daily into the pumping plant on the north shore. There is no filtration process save passage over a screen of half-inch mesh. No coagulation or flocculation process is in effect. The lake is a catchment basin with a very sluggish flow, generally to the south.

(5) Some 60 hydroplane outboard motor-boats are to compete in the regatta in

> 10 heats to be conducted on both September 12 and 13, 1970. A crowd of approximately 10,000 is anticipated at Bell Park and a large representation of spectator craft can be expected near the course.

The plaintiffs base their application on several counts, including nuisance: re water nuisance: re noise, breach of statutory obligation on the part of the Corporation and sundry others. It is not my intention to deal with each of these in view of the disposition I have determined to make of the first ground.

The plaintiff, Rita Glenn Dixon, is a proprietor of riparian lands and entitled to the rights incidental to that proprietorship. These rights include her entitlement to the flow of water through or by her land in its natural state. If the flow of water is interfered with or polluted so as to affect this right, she has suffered damage in law if not in fact, and may maintain an action for injunction unless the person causing the interference with her rights has a prescriptive right to do so. In support of the above contentions, I refer to Kerr on Injunctions, 6th ed., p. 216, as follows:

> Where a defendant claims the right to use the water of a stream in a unreasonable manner, it is not necessary for the plaintiff to show that he has sustained actual injury in order to obtain an injunction.

I deem it appropriate to interpret the word "unreasonable" in the light of present day knowledge of and concern for pollution problems, at this moment in time, as they apply to the particular circumstances of the water supply of Lake Ramsay and the varied demands made thereon.

Again, at pp. 217-8, the learned author states as follows:

> A riparian owner is entitled to the flow of water past his land, in its natural state of purity undeteriorated by noxious matter discharged into it by others, and anyone who fouls the water infringes a right of property of the riparian owner, who can maintain an action against the wrongdoer without proving that the pollution has caused him actual damage.
> ***[page518]***

And, finally, at pp. 239-40:

> In the case of injury to riparian rights from the pollution of water, the Court does not, except in special cases, award damages in lieu of an injunction.

Our Courts have long honoured such rights. In the reported case of McKie v. K.V.P. Co. Ltd., [1948] O.R. 398 at pp. 407-8, [1948] 3 D.L.R. 201 at p. 211; affirmed with variation

[1948] O.W.N. 812, [1949] 1 D.L.R. 39; affirmed with variations [1949] S.C.R. 698, [1949] 4 D.L.R. 497, McRuer, C.J.H.C., as he then was, quotes with approval the comments of Lord Wensleydale in Chasemore v. Richards (1859), 7 H.L. Cas. 349 at p. 382, 11 E.R. 140:

> "It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour."

Again, reference should be made to this further comment by Lord MacNaghten in John Young & Co. v. Bankier Distillery Co. et al., [1893] A.C. 691 at p. 698, which comment was also quoted with approval by McRuer, C.J.H.C., at p. 408 O.R., p. 211 D.L.R.:

> "Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court."

And again the statement by the said former Chief Justice at p. 409 O.R., p. 212 D.L.R.:

> If a riparian proprietor's rights have been violated, it is not necessary for him to prove damage to maintain his action.

I further deem it appropriate to refer to the words of Lord Chelmsford, L.C., in Crossley & Sons Ltd. v. Lightowler (1867), L.R. 2 Ch. 478 at pp. 481-2, referred to with approval by McRuer, C.J.H.C., at p. 410 O.R., p. 213 D.L.R.:

> "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the Defendants add to the former foul state of the water, and yet are not to be responsible ***[page519]*** on account of its previous condition, this consequence would follow, that if the Plaintiffs were to make terms with the other polluters of the stream so as to have water free from impurities produced by their works, the Defendant might say, 'we began to foul the stream at a time when, as against you, it was lawful for us

> to do so, inasmuch as it was unfit for your use, and you cannot now by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'"

It is trite law that economic necessities of the defendants are irrelevant in a case of this character. It is unfortunate that in the circumstances of this case the rights of a riparian land proprietor come into conflict with the laudable objects of a charitable pursuit formulated and prosecuted with sincerity and dedication by the defendants Naneff and company on behalf of their club and endorsed and supported by the other defendants. None the less, the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners.

I am satisfied on a review of all the evidence that there is a reasonable apprehension of the impairment to some degree of the rights of the riparian proprietor, Rita Glenn Dixon, to the enjoyment of the natural condition of her water supply as it presently is vis-à-vis purity, wholesomeness and potability should this application not be granted. It must be emphasized that the significance of such impairment is not a factor in view of her rights as a riparian proprietor.

In Imperial Gas Light & Coke Co. v. Broadbent (1859), 7 H.L. Cas. 600 at p. 612, 11 E.R. 239, Lord Kingsdown states as follows:

> The rule I take to be clearly this: if a Plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation.

In this instance, the application precedes the violation under circumstances that impel me to grant the relief requested. I make no comment on the other grounds pressed by counsel for the plaintiffs in view of the foregoing.

It was urged upon me by counsel for the defendants that the financial commitments of the defendants were such as to tilt the scales of convenience in support of the rejection of this application. While I am in sympathy with this submission for reasons already expressed, I cannot yield to same in violation of the rights already acknowledged. ***[page520]***

At the outset of this application I invited argument as to the propriety of the plaintiffs joining the Sudbury Rotary Club as one of the defendants. I am satisfied that this club is an unincorporated association, other than a partnership or a quasi-corporation and has no legal existence apart from its members. These proceedings as against it are therefore a nullity and the style of cause is hereby amended to delete its name from the list of defendants. The plaintiffs have joined certain officers of the Sudbury Rotary Club,

including those that the evidence discloses took an active part in the negotiations. No formal application has been made under the provisions of Rule 75 but I deem it appropriate in all the circumstances to authorize the named officers to defend on behalf of or for the benefit of all the members of the said club. In this connection, I rely on the comments of Middleton, J., in Barrett v. Harris (1921), 51 O.L.R. 484, 69 D.L.R. 503.

An order will therefore go restraining the defendants, Nick Naneff, Bruce Mooney, Norman Greene, John Mousseau, Bruce Moore, Laverne Anderson, as officers and representatives of the Sudbury Rotary Club and in their own behalf, their servants or agents or anyone else acting on their behalf, from continuing to hold or organize speed-boat races on Lake Ramsay within the City of Sudbury on Saturday and Sunday, September 12 and 13, 1970, or any other time thereafter. And a further order will go restraining the defendants, the Parks and Recreation Commission of the City of Sudbury and the Municipal Corporation of the City of Sudbury from granting permission to or allowing the defendants, Naneff, Mooney, Greene, Mousseau, Moore and Anderson, on their own behalf or on behalf of the Sudbury Rotary Club, to use Bell Park within the City of Sudbury for the purpose of a speed-boat regatta on Lake Ramsay on Saturday and Sunday, September 12 and 13, 1970, and at any time thereafter. These orders shall remain in force until 12:00 o'clock noon on September 17, 1970. I should like to hear from counsel on the question of costs.

Order accordingly.