

CANADA / JUDGMENT

Lynds v. Runge

2002 BCSC 1579

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC1579

Citation:	Lynds v. Runge
Date:	20021114 2002 BCSC 1579
Docket:	10029 Registry: Quesnel IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	ROBERT LYNDY AND ERIKA LYNDY PLAINTIFF
AND:	GORDON RUNGE AND HEATHER RUNGE DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE McKINNON

Counsel for the Plaintiffs:

R.M. Stewart

Counsel for the Defendants:

S. Hutchison

Dates and Place of Trial:

March 14, 15, 18-21, 2002

Written Submissions:

Quesnel, BC

June 6, 2002

and August 1, 2002

- [1] The parties own adjoining property in a relatively remote area southwest of Quesnel, British Columbia. Each is several miles from another neighbour. There is no telephone nor hydro service in the area.
- [2] The plaintiffs purchased their 40 acre parcel in 1993 with the intention of developing a portion of the bottom land for commercial vegetable and hay crops. They reside year round on the property and, since purchase, have attempted to develop these commercial crops as a means to supplement income from other sources.
- [3] The defendants also purchased their property in 1993, several months after the plaintiffs' purchase. It comprises approximately 160 acres and was purchased as recreational property. It has never been the defendants' primary residence; rather they reside there at various times of the year and for various periods. They enjoy its natural state, intending to keep it that way insofar as possible.
- [4] The plaintiffs' property is mostly cleared. Much of it is high ground where the house and outbuildings are located and where they have a market garden. The land slopes down to a large flat area which could be generally described as bottom land, most of which forms part of the defendants' property.
- [5] The plaintiffs own about 15 acres of this bottom land which they have cultivated for both hay and potato production. The defendants have at times produced some hay from the area but generally they have no interest in any commercial use of this land. In any event, a large portion of the area is occupied by a naturally formed pond or lake. A stream drains this pond, running across the defendants' land in a southwesterly direction to adjoining Crown land where it meanders for many miles.
- [6] Beavers, as they are wont to do, regularly erect dams at two sites on the defendants' property, one near the pond (the lakehead dam), and the other closer to the defendants' home (the main dam).
- [7] The plaintiffs maintain that the actions of the beavers cause flooding to portions of their bottom land, approximately five acres, which adversely affects their ability to grow potatoes and hay. They claim damages in nuisance and negligence and seek as well injunctive relief.
- [8] The defendants say that they cannot be held responsible for the actions of beavers that have come onto their property through the forces of nature. If there is "interference", it is, they say, interference by the beavers, not by them. They maintain that there is no obligation at law, either in nuisance or negligence, requiring them to remedy natural blockages.

- [9] Between 1993 and 1998 the parties enjoyed an accommodation that permitted the plaintiffs access to the defendants' property for the purpose of controlling the beaver dams. During this time, no flooding that could be attributed to the dams occurred.
- [10] Regrettably, minor problems arose that festered to a point where the plaintiffs were denied access to the dams. The plaintiffs say that when access was denied, the defendants agreed to assume responsibility for the dams but have been negligent in the discharge of that duty. They allege that in the years since 1998 there has been flooding attributed to the beaver dams for which they claim relief.
- [11] There is no issue that the plaintiffs have suffered flooding to a portion of their bottom land comprising approximately five acres. There is an issue that this has adversely affected their ability to harvest hay and potato crops but the primary issue is whether the defendants have any responsibility at law for that flooding.
- [12] The primary issue requires a consideration of the law in respect to a natural water course.

THE HISTORICAL POSITION AT LAW

- [13] At least to 1980, a landowner had no duty at common law to do anything with regard to a natural water course. This became known as the "natural watercourse exception" and is set out in *Neath Rural District Council v. Williams*, [1951] 1 K.B. 115, where at 120 the court stated:

A landowner is not at common law under any liability to do anything with regard to a watercourse if it is a natural watercourse which flows through his land

- [14] In *Edwards v. Rural Municipality of Scott*, [1934] 1 W.W.R. 33, aff'd. [1934] S.C.R. 332, Martin J.A. for the Saskatchewan Court of Appeal defined "watercourse", at p. 38, as follows:

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 other 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 which 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

- [15] The defendant cited *Caplin v. Gill*, (1977) 5 B.C.L.R. 115 (S.C.) for the proposition that in British Columbia a lower landowner is also under no obligation to accept surface water from an upper occupier of land, and that an owner has the right to prevent such water from flowing onto his land. However that statement should be read in conjunction with the comments of Berger J. at p.117 where he determined that "if the water had been running in a natural channel, the defendants would have had no right to divert it."

- [16] In *Kraus v. Fech*, 2002 BCSC 714 Humphries J considered the *Caplin* case and *Graham v. Lister* (1908), 14 B.C.L.R. 211 (C.A.). Madame Justice Humphries commented at para. 29 as follows:

At common law, until surface water reaches a watercourse, the lower of two proprietors owes no servitude to the upper to receive the water naturally draining off the latter's land. He is at liberty to protect his own land, and is not liable for damage which the other suffers from the exercise of such right.

- [17] The plaintiffs cited many authorities in support of their position, but most can be distinguished either on the basis that they do not address the natural watercourse exception or because they involve circumstances in which defendants have actively altered their property. The "changes" in the case at bar were made by industrious beavers, not by the defendants, nor by anyone acting on their behalf.

HAS THE COMMON LAW EXCEPTION BEEN ERODED IN CANADA?

- [18] The "natural watercourse exception" may no longer prevail in England given the decision in *Leakey v. National Trust*, [1980] 1 Q.B. 485 (C.A.). Megaw L.J. (re)defined the duty owed commenting at p. 524 as follows:

The duty is a duty to do that which is reasonable in all the circumstances, and 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. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? 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 which 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? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required him to do anything, and, if so, what.

- [19] *Leakey* was applied by the majority in *Hayes v. Davis* (1991), 54 B.C.L.R. (2d) 350(C.A.), leave to appeal to the Supreme Court of Canada refused [1991] 3 S.C.R. vi. The case did not involve a natural water course but rather trees uprooted and blown down onto a neighbour's property during a windstorm. Legg J.A. summarized *Leakey* at pp. 357-358 as follows:

In *Leakey* the defendant owned and 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. The plaintiffs owned two houses at the base of the hill which rose in a steep bank from a narrow strip of land behind the houses so that the bank formed part of the defendant's property. After a prolonged summer drought followed by unusually wet autumn weather, the plaintiffs pointed out to the defendant that a large crack had opened up in the bank above the plaintiff's houses and that there was a grave danger of a collapse of the bank on to the houses.

Some weeks later there was a large fall from the bank on to the land of the plaintiff extending up against one of the houses and putting the house at risk of further falls. The plaintiffs asked the defendant to clear away the fallen rock and debris but the defendant refused. The plaintiffs brought action for the cost of cleaning away the debris. The trial judge held the defendant liable in nuisance [1978] Q.B. 849, [1978] 3 All E.R. 234. The Court of Appeal dismissed the defendant's appeal on the basis that the defendant owed a duty, if it 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 the other person on its property and was liable in nuisance if it did not.

[20] Insofar as a natural water course is concerned, there is a dearth of authority in Canada. In *Nykyforak v. Hillsburg (Rural Municipality)* (2001), 158 Man. R. (2d) 298, 2001 MBQB 227, the plaintiff argued that *Leakey* applied thus eliminating the exception. However, the trial judge concluded that it was unnecessary to decide that issue as the defendants had not brought themselves within the application of *Leakey*.

[21] In *Canadian Tort Law*, 7th ed, (Markham, Ont.: Butterworths, 2001), Mr. Justice Linden, commenting upon the application of *Leakey* in Canada, states at p. 539:

Indeed, it may now be the law in England, at least, that there is a duty imposed upon occupiers to safeguard their neighbours against hazards arising on the occupier's land, whether by human agency or natural causes.

In footnote 172 to that statement, the author goes on to make the following comment:

It may be that an exception still exists with regard to water. It still appears to be a generally-accepted principle that there is an immunity from damage caused by water, naturally on the land, whose flow is not interfered with. See *Neath Rural District Council v. Williams*, [1951] 1 K.B. 115; *Loring v. Brightwood Golf & Country Club Ltd.* (1974), 44 D.L.R. (3d) 161 (N.S.C.A.) 270233; *Ont. Ltd. v. Weall and Cullen Nurseries Ltd.* (1993), 17 C.C.L.T. (2d) 176 (Ont. Gen. Div.) (per Spence J.)

[22] Professor Fleming in his text, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998), offered the following comment at pp. 480-481 about the natural watercourse exception:

It is still unclear whether the preceding reform will also affect liability for water, which in the past tended in many respects to go its own way. The older cases certainly recognized an immunity for damage by water that was naturally on the land and whose flow had not been interfered with, such for example as the natural and gradual silting up of a river or the collection of rainwater in a gravel pit. But doubts have been raised concerning their authority in the future.

[23] Professor Fleming said he was moved to express "doubts" about the older authorities on the strength of the *Leakey* decision. This uncertainty is evident in other English cases decided since *Leakey*.

[24] In *Home Brewery Co. Limited v. William Davis & Co. (Leicester)*, [1987] Q.B. 339 Mr. Piers Ashworth Q.C., sitting as a deputy High Court Judge held, at 346:

On the other hand, an occupier is under no obligation to prevent water that has come naturally on to his land and has not been artificially retained there or artificially diverted from passing naturally to his neighbour's land: see *Smith v. Kenrick* (1849) 7 C.B. 515. Indeed, in that case it was held that the occupier was not liable even if he had himself removed the barrier between his and his neighbour's land, thereby permitting the water to flow naturally from one land to the other. However, it is perhaps doubtful whether the principle laid down in that case is still good law in its widest application, or can stand with the decision of the Court of Appeal in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485: see in particular, p. 520 per Megaw L.J.

[25] Others offer a more definitive view of the effects of *Leakey* such as the comments of A.M. Dugdale, ed. Found in, *Clerk & Lindsell on Torts*, 18th ed. (London): Sweet & Maxwell, 2000) at paras. 19-82. He suggests that at least in England, *Leakey* has overruled the natural watercourse exception found in *Neath RDC v. Williams*. He states:

A riparian proprietor is under a duty of care, as defined in *Leakey v. National Trust*, to keep the bed of the stream clear, by cutting weeds which have grown in the bed or by removing silt or stones which have accumulated.

[26] A more conservative view of the effects of *Leakey* in Canada can be found in *Nicholls v. Hennion* (1989), 49 C.C.L.T. 105 (Ont. H.C.J.). In that case Maloney J. held that it is not entirely clear that *Leakey* is good law in Canada. That case considered the existence of a duty on a government landowner to investigate Crown lands for beaver dams and to ensure that those dams bear no threat to the public. The washout of a highway had been caused by the breakage of beaver dams. The court went on to find that there was not enough evidence before the court on the issue of expense and effectiveness of inspection for beaver dams on land adjoining highways to determine whether the scope of duty of the Crown landowner was established, if *Leakey* were found to apply.

[27] Perhaps the Canadian authority most directly on point is *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.). In this case, the plaintiff had experienced run-off water, mud and silt from

the defendant's farm onto the plaintiff's golf course necessitating substantial clean-up costs. Neither party had disputed that the natural use of land represents an exception to, or enjoys immunity from, the ordinary principles of nuisance. As a result, the court found that the plaintiff could not recover in nuisance because the defendant's use of the land fell under the natural user exception established in *Rylands v. Fletcher* (1868), L.R. 3 H.O.L. 330. But turning to negligence, the court went on, at para. 64 to ask whether "it is coherent to conclude that a party has no liability (in nuisance) for natural waterflow over a neighbour's property but may have a duty of care in respect of that waterflow?" The court suggested that the defendant could be found liable in negligence, subject to a modified duty of care. Spence J. held, at para. 72:

To hold that an owner of land can be liable in negligence for damage caused by natural waterflow from the property of the owner affected by the owner's natural use of the 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. Certainly it would seem incompatible with any view of the law of negligence as a law of general application concerning the civil responsibilities of persons in our society to one another. Some assistance in developing an intermediate position may be found in the *Nicholls* case above concerning the degree of the precautions to be taken, and in the suggestions in the cases on nuisance that in some cases it is necessary to recognize a "give and take" or "live and let live" principle. In the light of the status of the natural user exception and the other considerations, it seems reasonable that the defendant in this case should be held liable in negligence, if at all, only if it has failed to meet a standard of care which is modified or adjusted in some measure to take account of the natural user exemption. Thus, I would suggest that the defendant should not be liable for the alleged damage to the plaintiff's property unless and until it was in position to foresee damage of that type. I consider that the defendant was not in that position until after it was brought to the attention of one of his employees by Mr. Diggins. I would also suggest that the defendant's responsibility at that stage was to take, in a reasonably timely way, those steps that are consistent with the proper care and maintenance of its own property and do not involve a fundamental or substantial change in use. With respect to the prospective costs of such measures to be taken, I think it is necessary to take into account the circumstances of the plaintiff's property and the measures that may be available to be taken on that property and their comparative cost. It is appropriate to expect the adjacent owner to undertake some part of the cost of the measures, at least where it can be said that circumstances on its property contributed to the damage. This is consistent with the principle of contributory negligence on the part of an injured party. With respect to the continuing incremental damage from the run-off which it is said still occurs from the defendant's property, some additional considerations should come into play. That damage should be clearly attributable in large measure to the defendant's conduct and should be materially greater than the damage that would be reasonably expected if the defendant's land were vacant or were used in a way that was known not to produce the injurious consequences complained of.

THE FACTS IN THE CASE AT BAR

- [28] Mr. Ernst Geier testified that he sold the land to the defendants, having owned it from 1990 to 1993. He said that when he purchased the property the lower land was flooded and it was evident that beavers were causing the problem. He described the main dam as "huge", 20 to 30 meters in length and clearly visible from the main house.
- [29] Mr. Geier opened up this dam with the help of Paul Kalinsky. Mr. Kalinsky and his wife Maxine then owned the plaintiffs' property. Mr. Geier stated that, with the help of Mr. Kalinsky, they inserted a 4x4x2 foot steel culvert to drain the bottom land as he hoped to grow hay there.
- [30] Initially, Mr. Geier said that he just kept pulling the dam about every ten days until he got advice that a culvert might alleviate this onerous task. According to Mr. Geier (and others), beaver are extremely industrious animals that begin work immediately upon hearing the sound of flowing water.
- [31] Mr. Geier said that his efforts "definitely" got the lake to a normal level. The area around the lake dried up and he believes it also dried up on Kalinsky's land. According to Mr. Geier there was no problem with flooding in the years 1990 to 1992 for during that time, often with the help of the Kalinskys, he kept the dams open and the "problem" under control.
- [32] Mr. Geier did not live on this land. He said that his wife was "totally opposed" to living there because "there was no hydro" but he was frequently at the property and active in controlling flooding caused by beaver. However, eventually, given his wife's position he decided to sell and was introduced to the Runiges.
- [33] Sometime before selling his property and probably in the summer of 1993, Mr. Geier said that he learned a trapper had been on his property, trapping beaver. On checking he discovered that the plaintiffs had obtained approval from the Conservation office in Williams Lake to trap beaver and it was they who sent the trapper onto his property. Apart from being annoyed that he was not consulted, Mr. Geier did not pursue the issue and soon thereafter sold to the Runiges.
- [34] Mr. Geier stated that, although he walked the property with the Runiges once or twice, he could not recall any discussion about flooding or beaver activity. He said that the dams were clearly visible to anyone who examined the property.
- [35] Heather Runge said that Mr. Geier had told them of the beaver dams prior to their purchase but that it was just "general" talk. She recalled that he mentioned he kept the dams open so that the fields did not flood. According to Mrs. Runge, although they had visited the Lynds prior to purchase, it was merely to obtain another view of the property they intended to purchase and there was no discussion about flooding or beaver dam control work.

- [36] The defendants resided in Vernon at the time of the purchase and for the rest of 1993 and all of 1994 they visited the property irregularly and mostly in good weather. It was during 1994 that they learned Mr. Lynds was coming onto their property to control the beaver. They did not object and actually gave the plaintiff's permission to do this work each year to 1998.
- [37] Although no disagreements arose until 1998, I am satisfied that over the course of several years, commencing in about 1996, the relationship between the parties was deteriorating. The defendants were spending more time on the property by then. They were taking a much more active interest in their land than they had in the early years and they did not like what they perceived as cavalier treatment they were receiving from the plaintiffs.
- [38] Robert Lynds had obtained permits from the Conservation office in Williams Lake to trap beaver for several of the years between 1994 and 1997 without any consultation with the defendants. He conceded that on occasion he misled the officer into believing that the permits related to his land, when in fact they related to the defendant's land. He characterized this as "a little bit sleazy" but justified it by commenting that he had permission to come onto the defendants' land.
- [39] The defendants came to resent Mr. Lynds coming onto their property with his tractor at any time he felt he needed to attend to the dams and some words were exchanged. A chance meeting in Quesnel between Erika Lynds and the defendants resulted in Gordon Runge prohibiting Robert Lynds from accessing the dams with his tractor. Upon hearing of this restriction, Robert Lynds attended the Runge farm house where an unpleasant meeting occurred.
- [40] Although Mr. Lynds denies waving his trapping permit in front of Mr. Runge, I accept that he did so. Words were exchanged and Mr. Runge then flatly denied the plaintiffs further permission to enter upon the land. Thereafter, the defendants employed different trappers and workers to control the beaver and the dams which the plaintiffs claim was entirely inadequate to control flooding.
- [41] On at least two occasions after being banned, Robert Lynds admitted he came onto the defendant's property. He complained that the defendant's son Jason threatened on one occasion to shoot him. Threats of lawsuits were bandied about and unpleasant comments were spoken and written by both sides.
- [42] Consequent upon what the plaintiffs allege was the failure or refusal of the defendants to adequately control the beaver dams, their bottom land flooded in the spring and summer of 1998, causing loss of potato and hay crops. There was also flooding in 1999 causing loss of hay crop in particular.
- [43] Considerable evidence was given about the actual work done by persons hired by the defendants and in both cross examination and submissions it was suggested that this work was grossly inadequate to solve the problem.

- [44] The plaintiffs claim \$76,423 for their lost crops and for remedial work they say would be necessary to control flooding. They also seek an injunction to restrain the defendants from further flooding of the plaintiffs' land and "an order that the Defendants forthwith clear the obstructions in the water course and to keep same clear at their expense".
- [45] In my respectful view, what the plaintiffs are seeking to do is to co-opt the defendants into participating in a land reclamation project in which the defendants have not the slightest interest.
- [46] The Lynds bought their property in the hopes of growing commercial crops and indeed were able to do so on higher land. The bottom land had been the source of some problem for Mr. Geier and Mr. Kalinsky who then owned it before the litigants at bar. They cooperatively attempted to control the dams in hopes of creating hay meadows but without much success.
- [47] The plaintiffs simply hoped that in time they could reclaim these bottom acres and make them productive. They might have been able to do so had they secured the cooperation of the defendants in some scheme that was to their mutual satisfaction and advantage. There are many examples of cooperative neighbours who secure agreements and easements designed to achieve a common goal.
- [48] Alas, at bar, there was no common goal. The Runge wanted to retain the land in its natural state; the Lynds wanted to drain it. The Leakey case does not assist the plaintiffs. Assuming that case can be applied to Canada, one cannot equate the Lynds' 5 acres of bottom land with the houses under threat in Leakey.
- [49] To accede to the plaintiffs' claims would, with all due respect, create great havoc in a country like Canada where beaver abound. A developer, eyeing some swampy land bordering either private or Crown land, could enforce an expensive and burdensome duty upon such an owner with no benefit whatever to that owner.
- [50] The beaver dams at bar are 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.
- [51] When the plaintiffs purchased their property in 1993, they set about to reclaim the bottom lands and for a few years had the co-operation of their neighbour. Gradually, the plaintiffs came to rely upon some notion of duty owed them by the defendants and they made increasing demands which ultimately caused the defendants to stop their cooperative efforts.

[52] The plaintiffs' project to reclaim the land was done without securing the necessary ownership of the adjoining land or agreement with the owner. Rather, the plaintiffs chose to rely upon some notion of "duty" resting upon an uncooperative neighbour. In my respectful view, 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.

[53] The plaintiffs' claims in nuisance and negligence are dismissed. Costs follow the event.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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