

Claim for riparian rights to access Lake Erie dismissed

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Rivers and lakes in Ontario are Crown lands and the public generally has the right to use and 'navigate' the waterways. However, the public does not generally have the right to traverse privately-owned property to access the water. Disputes may arise between property owners as to where the boundaries of private lands end and the publicly-useable waterways begin.

In *Donnelly et al v. Guyconhud Inc.*, 2022 ONSC 1774 (CanLII), the plaintiffs and the defendants bought adjacent properties in Port Burwell on the northern shore of Lake Erie. The plaintiffs' land was separated from Lake Erie by a 'tongue' of land extending along the lakeshore from the defendant's property. There was a breakwall on the defendants' property but the high water mark of the lake fluctuated at times. Periodically, the lake flooded onto the plaintiffs' land and ponded there.

As noted by the court, since the neighbours purchased their properties around the same time, one might have thought that they would get along as mutual newcomers to the neighbourhood. However, that was not to be. Initially, the defendants granted permission to the plaintiffs to access the lake for swimming but then rescinded their consent due to an alleged breach of their conditions. "No trespassing" signs were erected along with a fence that prevented the plaintiffs from accessing Lake Erie from their property.

The plaintiffs commenced an action on the basis that the defendants were prohibited from obstructing their access to Lake Erie under the Canadian Navigable Waters Act (the "CNWA"). The plaintiffs further claimed that the defendants were in breach of their statutory and common law riparian rights. "Riparian rights" are the rights governing the use of and access to the water by the properties that are adjacent thereto.

On a motion for summary judgment, the court noted that there was much evidence filed about the allegedly abusive behaviour between the parties, none of which was relevant to the issues to be determined. The case was not about which party was being rude to the other nor whether erecting a fence was a neighbourly thing to do. Rather, it was about whether the plaintiffs had the legal right to direct access to Lake Erie from their property.

There was no question Lake Erie is a "navigable water" subject to the provisions of the CNWA. However, the court found that the CNWA does not give anyone other than the Minister of Transport with the right to apply to a court to enforce compliance with its terms. Accordingly, the plaintiffs could not use the CNWA as the basis for their private claim against the defendants.

In the court's view, there were two questions to be answered which had nothing to do with the CNWA. Firstly, whether the lake water, when it periodically flooded onto the plaintiffs' land and ponded there, caused the portion of the defendants' land which would then be underwater to become vested in the Crown; and, secondly, whether these circumstances give rise to riparian rights in favour of the plaintiffs.

Essentially, the plaintiffs argued that at the times of high lake water levels, when the water flooded over the tongue of land owned by the defendants, that land became part of the bed of Lake Erie. Since Lake Erie is a navigable waterway, title to the flooded land became vested in the Crown, giving the plaintiffs riparian rights since their land now bordered the shore of Lake Erie. Thus, the plaintiffs argued, they acquired riparian rights, including the right of direct access to the lake.

The plaintiff's argument was undermined by the undisputed fact that high water conditions on Lake Erie were only a periodic and temporary condition. The water levels move up and down, depending on the season, the waves and weather conditions. Sometimes there was a beach and sometimes not. The water from the lake seldom reached the plaintiffs' property.

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At best, there was periodic flooding of water from the lake, over or through the breakwall, onto the plaintiffs' land. That did not mean the plaintiffs' land actually formed the shore of the lake.

Further, there was no question that the Crown did not own any of the land bordering the lake. Without an express reservation of the land between the high and low water mark, that land belongs to the owner of the shorelands, not the Crown: *Ontario (Attorney General) v. Walker* (1970), 1970 CanLII 953 (ON SC). There was no express reservation in favour of the Crown on title to the defendants' property.

Based on the evidence filed, the court was satisfied that the edge of the water, in its natural condition at low water, was south of the breakwall on the defendants' property. It followed that this represented the southerly boundary of the defendants' land. Since the breakwall was south of the plaintiffs' land, it could not be said that the plaintiffs' land abuts the water's edge. Instead, the tongue of land owned by the defendants separated the plaintiff's land from the lake.

Since the plaintiffs could not access Lake Erie directly without traversing the defendants' property, it did not matter whether or not Lake Erie was a navigable waterway. The defendants, not the Crown, owned the tongue of land that lies between the southerly boundary of the plaintiffs' land and the edge of Lake Erie in its natural condition at low water. This ownership remained operative even when the lake is at high water levels and some of that land is under water.

One cannot pass over the land of another without leave in order to exercise access to a navigable waterway. The defendants denied leave for the plaintiffs to access the lake across their property. Accordingly, the plaintiffs had no right to access the lake from the southerly boundary of their land.

The court rejected the plaintiffs' creative argument that the ponds or puddles that occur on their land at times of high water might, themselves, constitute a navigable waterway. The plaintiffs argued that a boat or canoe could be launched from several points on those occasions. In the court's view, however, the "puddles" could not begin to meet the definition of a navigable waterway. The plaintiffs would need to drag their vessel across rocks on the defendants' property in order to launch it into the lake. They could not do so without trespassing on the defendants' land. The plaintiffs had no direct access to the navigable part of Lake Erie without doing so.

In the result, the court determined that the plaintiffs had no right of direct access to Lake Erie from their property and no valid claim to any riparian rights. The plaintiffs had no legal right to demand that the fence erected on the defendants' land, be removed.

The case demonstrates the principle that the public does not have the right to go across private land to get onto a navigable waterway, but must access the waterway from a point of public access. Similarly, the public does not have a right to go across private land upon leaving the navigable waterway. Absent proof of those two points of public access, a waterway between those points, no matter how wide or deep, has no practical value to the public as a means of transport and can serve no public utility. Lake Erie, fortunately, has many points of public access and the plaintiffs will presumably be able to find another way to use the lake.

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