Canoe Ontario v. Reed

[1989] O.J. No. 1293, 69 O.R. (2d) 494, 6 R.P.R. (2d) 226, 16 A.C.W.S. (3d) 396

DOHERTY J.:—

I. The Issues

In this case, the interests of the plaintiffs ("the Canoeists") collide with those of the defendants, Julian Reed and Laurie Reed ("the Reeds"). The collision occurs along the stretch of the Credit River which runs through the property owned by the Reeds ("the property"). There are three issues:

i. do the canoeists have any right to canoe along the part of the river which passes through the Reeds' property?

ii. if the canoeists have that right, do they have the right to demand the removal of the temporary barriers constructed across the river by the Reeds?

iii. if the canoeists have that right, do they have the right to enter upon the Reeds property in order to portage around a dam built in 1825 and presently used and owned by the Reeds?

I must decide to what extent, if at all, the Reeds' interest in maintaining the privacy of their home, and the effective operation of their farm must yield to the interests of those who wish the satisfaction and pleasure of canoeing along this scenic part of the river.

II. The Scene

The Reeds own a one hundred acre farm just west of the Town of Norval, Ontario. Norval is situated east of Georgetown, Ontario on Highway No. 7. The property on which the farm is located was originally sold by the Crown in two parts: the first in 1821, and the second in 1822. For present purposes, the grants can be taken as being identical. Robert Noble, Mr. Reed's maternal great-grandfather, purchased the property in 1868 and operated the farm and a mill for many years. The property fell out of the family's ownership for several years but was subsequently re-acquired by Mr. Reed and his mother. Mr. Reed has lived on the property all of his life and has owned all or part of the property for over 25 years.

The river travels through the property in a north to south direction. The exact course of the river varies somewhat from year to year. The property is located on both sides of the river for a distance of about one and a quarter miles. Mr. Reed grazes his cattle on both sides of the river and from time to time, it is necessary for him to take his cattle across the river.

In about 1825 a dam was built across the river at about the mid-point of the property. Just upstream from the dam a pond developed. That pond varies in size, shape and depth from year to year and from season to season. On occasion, parts of the pond area will be dry. A bridge crosses the river on the property south of the dam. Every spring, Mr. Reed strings barbed wire fences across the river in order to keep his cattle from wandering up or down the river when crossing the river. One of the barbed wire fences runs across the river just north of the bridge but south of the dam. The other fence is strung across the most northerly boundary of the property. These fences are removed every fall and replaced in the spring. Both fences obstruct anyone attempting to canoe along this part of the river. In addition, canoeists wishing to travel the entire length of the river which passes through the property must portage around the dam. The most convenient portage takes them across the property. The Reeds consider those who take this portage to be trespassers and have posted appropriate signs.

III. The Parties and These Proceedings

Canoe Ontario is a non-profit corporation composed of a number of groups with a mutual interest in canoeing in Ontario. Mr. Greenacre is a canoeist who has canoed on the part of the river which passes through the Reed property, and wishes to do so in the future. The canoeists' standing has not been challenged by the Reeds.

The Reeds own and operate the farm described above. In opposing the canoeists' application, the Reeds are not motivated by petty selfishness. They live on this property and it is their firm belief that some of those individuals who choose to recreate along the river do not pay proper heed to the needs of those who live and work on the property adjoining the river. I accept Mr. Reed's evidence that his fences have been damaged, garbage has been left on his property, and on occasion, his family has been verbally abused by a small minority of those who use the river for recreational purposes. I am completely satisfied that the Reeds take the position that they do in a genuine effort to preserve the use and enjoyment of their home and farm.

I must also stress that there is no suggestion that Mr. Greenacre or anyone affiliated with Canoe Ontario has engaged in the discourteous and disorderly conduct described by Mr. Reed.

The Attorney General was joined as a defendant because of his potential interest in the issues to be determined. He has taken no position in the litigation save to support the canoeists' contention with respect to the approach to be taken in defining the phrase "navigable waterway".

On the trial of the issue before me, the parties adduced evidence in the form of a joint document brief and certain video tapes. It was agreed that I could receive all of this material as

evidence. It was also agreed that, with certain specified exceptions, the facts referred to in the material should be accepted by me as proved. In addition to the document brief and the video tapes, several affidavits were filed by the canoeists with the consent of the Reeds. Mr. Reed also testified.

IV. The Position of the Parties

The Reeds contend that the part of the river which runs through their property is not a navigable waterway and that they own the riverbed by virtue of the terms of the original Crown grants. They say they are entitled to exercise control over access to that part of the river, and to construct fences, complete with fence posts sunk into the riverbed, across the river.

The canoeists assert that they are entitled to canoe along the river because it is a navigable waterway and is not subject to any proprietary interest on the part of the Reeds. The canoeists contend that the Reeds have improperly obstructed their right to navigate the river by the erection of the fences. They also argue that as the Reeds choose to keep and use the dam which is situated across the river, they are obligated to allow the canoeists reasonable access to their property so as to permit them to portage around the dam.

V. Is the River a Navigable Waterway?

This case turns on whether the part of the river which passes through the Reeds' property is a "navigable waterway". The Reeds only have a proprietary interest over the river and its bed if the river is not a navigable waterway. This is so for two reasons. First, the Crown grants, which are the root of the Reeds' proprietary claim, reserve to the Crown all rights in all navigable waterways which pass within the lands. If the part of the river which passes through the Reeds' property is navigable, then title to the riverbed did not flow with the Crown grants. Secondly, s.1 of the *Beds of Navigable Waters Act*, R.S.O. 1980, c.40 provides:

> s. 1 Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

Subject to certain exceptions which are not applicable here, the Act applies to land which was granted prior to its enactment. If the river is navigable, then this Act provides that the Reeds have no proprietary interest in the riverbed since the grants did not expressly grant the riverbed to their predecessors.

To determine whether the part of the river which passes through the Reeds' property is a navigable waterway, I must first review the historical information provided to me. By the latter part of the eighteenth century, the river served as a meeting ground for French traders and local Indians. Both travelled at least part of the river for trading purposes. By the turn of the nineteenth century, most of the river was reserved for the use of the Mississauga Indians. The land demands caused by immigration from the United States following the War of 1812 led to the surveying of lands adjoining the river, and to settlement along the river. In 1820, the Mississauga Indians gave up their rights to exclusive use of the river. During the next thirty years, the river was a focal point for a variety of commercial activities. Several dams were built to supply power for the flour mills, saw mills, and other enterprises which thrived along the river.

There is some indication that during the first part of the nineteenth century, logs for the saw mills were floated down various parts of the river. Apart from the logging business, it does not appear that the river was used for commercial traffic during this period of significant commercial development. The early proliferation of dams along the river, combined with the quick development of an effective system of roads, precluded the use of the river as a means of commercial transportation.

By the early part of the twentieth century, the commercial activity along the river had subsided. Gradually the dams fell into desuetude. Today, only the dam on the Reeds' property, which is used to generate electricity for the Reeds' personal needs, serves any functional purpose. All but one or two of the other dams have been removed either by nature or by man.

Apart from commercial activity, the river has been the focal point of various recreational pursuits over the years. At least two references to the use of the river for recreational canoeing are found in the material provided to me. In the brochure entitled "The History of the Credit River", the author writes

> Since the 1920's the Credit has been used extensively for recreational purposes. Canoeists have used the river in spring and summer months and snowmobilers have used it during the winter.

The brochure does not indicate what part of the river is being referred to in the extract quoted above.

A second brochure entitled "The Credit: Canoeing in Suburbia" contains the following passage

> For canoeists, the Credit is a springtime river. In the first flush of mouth water, its rapids and swifts can put up standing waves that will quicken the pulse of even an experienced

> white water paddler. In late March, white water kayak enthusiasts flock to the river at Streetsville for competition.
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> ...
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> By mid-April, the Credit has settled down to a more leisurely pace with enough ripples to provide good training for beginning river Canoeists. The most serious danger is the chilling effect of icy spring water. By mid-May, as the waters warm, the Credit is reduced to bouldery shallows and the canoeing season is virtually over. Summer trips are possible on parts of the river but be prepared to wade occasionally. ...

This brochure contains a detailed description of a canoe trip along the entire length of the Credit River including the part which passes through the Reeds property. This author obviously considers the entire river suitable for canoeing during part of the year.

The affidavits filed by the canoeists attest to the suitability of the river for canoeing. Most of the affiants have canoed along the part of the river which passes through the Reeds' property at some point during the canoeing season. Most of them indicated that this part of the river was very suitable for canoeing in spring; while others indicated that it was suitable in the spring and fall; and a few indicated that it was suitable during the entire year.

Considering the historical information, the affidavits, the evidence of Mr. Reed, and the technical data concerning the rate of water flow and similar matters, I conclude that the part of the river which passes through the property provides enjoyable canoeing from late March through most of May; the possibility of limited and mostly unsatisfactory canoeing from June through September; and for the particularly hardy, some canoeing in October and November.

In summary, the material provided to me shows that the river has had various uses at various times. It was used as a mode of transportation in the latter part of the eighteenth century and in the early part of the nineteenth century. It was, for a brief time, a log floating route. By 1835, the river had no value as a commercial highway. By the early part of this century, it was used extensively, although seasonally, by recreational canoeists. They continue to use the river to this day.

I must now turn to the applicable law. The legal meaning of the phrase "navigable waterway" received considerable judicial attention in the late nineteenth century and in the early part of this century. Those authorities are carefully considered and analysed in the scholarly judgment of Henry J. in *Coleman et al. v. The Attorney General for Ontario*, (1983), 27 R.P.R. 107 at 110-112 (Ont. H.C.). I have found his judgment most helpful as it deals with a waterway (the Bronte River) which is similar in many ways to the Credit River. I accept the following conclusions drawn by Henry J. from the earlier authorities:

(i) navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort.

(ii) navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts or booms.

(iii) a river may be navigable over part of its course and not navigable over other parts.

(iv) to be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used.

(v) a river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (e.g. fishing).

(vi) navigation need not be continuous but may fluctuate with the seasons.

(vii) where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grants (in this case, 1821 and 1822).

If a waterway is held to be navigable then, absent valid legislative action to the contrary, the ownership of the riverbed does not rest in a private individual but in the Crown, and the public is entitled to travel the waterway, *R. v. Moss* (1896), 26 S.C.R. 322 at 311-334. The concept of navigability is premised on the notion that certain waterways are akin to public highways and are viewed as being within the public domain, *Rainy River Navigation Co. v. Watrous Island Boom Co*. (1914), 6 O.W.N. 537 (Ont. S.C. App. Div.) and *R. v. Stephens and Mathias*, [1954] O.R. 133 at 143 (Ont. S.C.). In a young country like Canada, where river routes are numerous, and were of central importance to the exploration, settlement, and commercial development of the country, it is not surprising that claims of public access to these rivers have fallen on sympathetic judicial ears, e.g. *A.G. Quebec v. Kenneth Gordon Fraser* (1906), 37 S.C.R. 577 at 596-598; aff. (1911) A.C. 489 and *Fort George Lumber Co. v. Grand Trunk Pacific Railway Co*. (1915), 24 D.L.R. 527 at 529-531 (B.C.S.C.). In essence, the test for navigability developed in Canada is one of public utility. If a waterway has real or potential practical value to the public as a means of travel or transport from one point of public access to another point of public access, the waterway is considered navigable, *Gordon v. Hall and Hall* (1958), 16 D.L.R. (2d) 379 at 382-383 (Ont. S.C.), *Welsh v. Marantette et al*. (1983), 44 O.R. 2d 137 (Ont. H.C.) and *Coleman et al. v. A.G. Ontario et al.*, (1983), 27 R.P.R. 107 at 114-115.

Many authorities, particularly those emanating from the province of Quebec, *A.G. Quebec v. Mireault* (1987), 46 R.P.R. 95 (Que. C.A.), and the United States, *U.S.A. v. State of Utah*, 283 U.S. 64 at 76 (1931), limit the public utility test for navigability to situations where the transport

is in the nature of commerce. It is not surprising that commercial usefulness has played a central role in determining the public utility of a waterway, since at one time water transport was almost entirely commercially motivated. I agree with Henry J. in *Coleman et al. v. The Attorney General for Ontario et al*., (1983), 27 R.P.R. 107 at 119-120, that commercial utility is not a sine qua non to navigability, although evidence of commercial use will be determinative of the question. If the purpose underlying the recognition of a public interest in certain waterways is analogous to that which recognizes the public interest in certain highways, then that purpose is not served by limiting navigability to cases involving commercial usage. A public highway may serve many public purposes other than a purely commercial one. For example, it may provide a valuable social and communication link between communities. Rivers on which people can readily travel can potentially provide the same link.

A distinction between public commercial use and public non-commercial use is also unrealistic. Many non-commercial uses can readily be turned into commercial endeavours. This case provides an example. If several individuals, for recreational purposes, canoe down the river, then their purpose is entirely non-commercial; however, if one individual, perhaps more experienced than the others, purports to operate a tour down the river and to charge individuals for canoeing the river with him, then the exact same trip becomes a commercial endeavour. Navigability should not depend on such personal considerations. Navigability should depend on public utility. If the waterway serves, or is capable of serving, a legitimate public interest in that it is, or can be, regularly and profitably used by the public for some socially beneficial activity, then, assuming the waterway runs from one point of public access to another point of public access, it must be regarded as navigable and as within the public domain.

I do not intend to hold that any body of water which, at some point for some brief instant, can be used by some segment of the public, for some legitimate public purpose is thereby a navigable or public waterway. If, however, the use is regular and has practical value, then seasonal limitations, or limits on the type or nature of the public utility do not remove that waterway from the public domain, *Harrison et al. v. Fite et al.* (1906), 148 F. 781 at 783-784 (C.A. 8th Cir.), and *Ne-Bo-Shone Association v. Hogarth et al.* (1934) 7 F. Supp. 885 at 889-890 (dist. Ct.); aff. in result 81 F. Supp. 70 (C.A. 6th Cir.).

On the evidence before me, the part of the river which runs through the Reeds' property was a public or navigable waterway as of 1822. Prior to that date, it was used for commercial traffic and logs were floated down the river. There is nothing in the evidence before me to suggest that it could not be used for commercial purposes in 1822. Whether it was in fact so used is not determinative. I am also satisfied that the river could have been used for legitimate recreational purposes as of 1822. That it was not so used until several decades later does not

detract from the finding that it could have been so used. The river had public utility as of 1822. That public character remains to this day although the particular use to which the public puts the river has changed from commercial use prior to 1822 to a purely recreational use in the present day. Since the Crown grant excluded title to navigable waterways, the Reeds did not acquire title to any part of the river which runs through that property, and they have no proprietary interest in the riverbed. The application of s.1 of the *Beds of Navigable Waterways Act, supra*, effects the same result.

The plaintiffs are entitled to a declaration that the part of the river which runs through the Reed property is a navigable and public waterway and that the Reeds have no proprietary interest in the riverbed. It follows from this finding that the Reeds have no right to construct or maintain fences on the river which deny public access to the part of the river which runs through their property. The plaintiffs are entitled to a declaration to that effect. Having made that finding, I hasten to add that this does not prevent the Reeds from erecting structures designed to keep their cattle on course when crossing the river. My finding only precludes the erection of fences or similar structures on the river in a way which effectively denies public passage along the part of the river. It would not seem an insurmountable task to devise a structure which permitted canoeists to gain entry to the part of the river which runs through the property while at the same time limiting the movement of the cattle as they passed across the river. A well-marked fence with an appropriate gate or gates seems a possibility.

VI. Do the canoeists have a right of portage across the Reeds' property?

I have held that the canoeists and other members of the public have the right to travel by boat along the river as it passes through the Reeds' property. Their passage is blocked by a dam constructed in 1825 and presently owned and operated by the Reeds. The canoeists seek an order declaring that they are entitled to go ashore onto the Reeds' property in order to pass around the dam. The canoeists do not suggest any specific route but presumably would be content with an order permitting them to enter upon the Reeds' property to the extent that it is necessary to go ashore on one side of the dam, pass around the dam and re-enter the river. The canoeists maintain that without a right to travel onto the Reeds' property to portage around the dam, they are effectively barred from using that part of the river.

The material provided to me does describe portage routes around the dam which do not involve going onto the Reeds' property; however, these are long and somewhat onerous. If these portage routes are followed, the canoeists also lose the opportunity to paddle along the river for a distance both above and below the dam.

It is clear that the order sought by the canoeists will constitute a significant intrusion on the Reeds' property rights. The order would grant access to the Reeds' property to an unlimited

number of persons who could use the route at any time. Indeed, the order would not necessarily create one route, but would presumably leave it open to individual canoeists to determine what portage route was reasonable. The appropriate route may vary with the season, the rainfall, or the expertise and the energy of the individual canoeist. It could also vary with the type of craft being used. Nor does the order requested contemplate any compensation to the Reeds for this substantial interference with their property rights. It also leaves open the question of any responsibility or potential liability which may fall upon the Reeds if I declare that their property is subject to the right-of-way sought by the canoeists. The order requested would create a nebulous easement over the property which would doubtless lead to uncertainty.

There is no statutory provision which the canoeists can call in aid to support their contention. In the course of argument, reference was made to s.62(4) of the *Public Lands Act*, R.S.O. 1980, c.413. This section has no application since the property was not a "public land over which a portage had existed" prior to the sale of the land to the original owners.

There is no case law directly on point which supports this part of the canoeists' claim. The canoeists have not attempted to mount an action in nuisance as was the case in many of the authorities relied on by them.

As I understand the canoeists' argument, they claim a right to portage across the Reeds' property exists because it is a necessary part of the right to navigate along the river and that without a right of portage, the right of passage or navigation cannot be fully enjoyed. They also argue that as the Reeds enjoy the benefit of the dam, it is just that they be required to surrender their property rights to the extent that it is necessary to allow canoeists to go around the dam.

Their argument amounts to a contention that the public right of navigation carries with it a right to enter upon private property to avoid obstructions to navigation even where the obstruction is not unlawful, and is not the responsibility of the property owner whose land will be entered and crossed. Certain public rights have been held to flow from or to exist with the public right of navigation. The right to anchor, to go ashore in an emergency, and perhaps the right to fish are examples of rights which have been found to co-exist with the right to travel along a navigable waterway, *Gann v. Free Fishers of Whitsable* (1865), 11 H.L. Cas. 192 at 207 (H.L.), Coulson and Forbes on Waters and Land Drainage, 6th ed. (1952) at 68-71, and *Ne-Bo-Shone Association v. Hogarth et al*. (1934) 7 F. Supp. 885 at 887 (Dist. Ct.); aff. in result (1936) 81 F. Aupp. 70 (C.A. 6th cir.), but see *R. v. Robertson* (1882), VI S.C.R. 52 at 114-115. None present the potential for intrusion on the rights of a property owner which the right claimed by the canoeists does.

Other cases recognize a limited right resting in individuals to access and cross another's property situated on a navigable waterway. These include cases where the property owner has consented to the access, or where he has created an obstruction which denies another riparian landowner access to the waterway, or where the claimant has acquired the right to access and cross another's property by prescription, *McNeal v. Jones* (1985), N.S.R. 299 at 303-304 (N.S.C.A.), *Rice Lake Fir Co. Ltd. v. McAllister* (1925), 56 D.L.R. 440 at 449 (Ont. C.A.), *Marshal v. Ulleswater* (1871), L.R. 7 Q.B. 166, *Wood v. Esson* (1883), 9 S.C.R. 239 at 252-254, and *Iveagh v. Martin*, [1961] Q.B. 232. These are cases of rights acquired by specific individuals. None produce the general right of way argued for in this case.

These same cases by implication deny any general right to enter the property of another in every case where entry is necessary to facilitate one's right of navigation. In *Iveagh v. Martin*, Paull J. considered the rights of certain landowners whose passage to a navigable river was blocked by a quay which had been constructed on the navigable waterway. His Lordship held:

> These being the rights of those who navigate vessels, one next has to consider the position if the owner of the foreshore erects on the foreshore and therefore at a place where there would otherwise be navigable water at certain states of the tide a permanent building such as a quay. It seems to me that the rights of navigation which the public possess result in their having two rights in relation to such quay. In the first place in a proper case, they may have the right in an action properly constituted to obtain a mandatory injunction ordering the owner of the quay to remove the quay on the ground that it seriously interferes with the rights of navigation. ... With regard to the second right, one has, I think, to consider the land which lies beyond the quay. A part of the right of navigation is, in my judgment, the right to land on or embark from any part of the land adjoining the foreshore but only if there is a right to go upon the land. If the quay on the foreshore obstructs that being done, then there is the right to go upon the quay on payment of a reasonable toll in order to reach that land or reach the vessel, *Iveagh v. Martin*, [1961] Q.B. 232 at 273-274.]

In this passage, Paull J. premises the right to access another's property on an individual's private property rights and not on any implied right flowing from the public right of navigation.

In *Ne-Bo-Shone Association v. Hogarth*, the trial judge, quoting from an earlier decision of the Supreme Court of Michigan, said:

> Pine River is navigable. In its waters, the people have the common right of fishing. The plaintiff, though owner of the soil, has no greater fishing rights than any other citizen. The rights are equal and correlative. So long as water flows and fish swim in Pine River, the people may fish at their pleasure in any part of the stream, subject only to the

> restraints and regulations imposed by the state. ... Of course in exercising this right, people cannot go upon the uplands of riparian owners in order to gain access to the water. If they do that, they are guilty of trespass, *Ne-Bo-Shone Association v. Hogarth*, (1934) 7 F. Supp. at p. 887.]

In *Lyon v. Fishmongers Co*., Lord Cairns clearly drew the distinction between rights which rest with the public as a result of the navigability of a waterway and rights which may rest with an individual landowner:

> Unquestionably, the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him qua owner or occupier of any lands on the bank, nor is it a right which per se he enjoys in a manner different from any member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land the disturbance of which may be vindicated in damages by an action or restrained by an injunction, (1876), 1 App. Cas. 662 at 671.]

Similarly, in *Marshall v. Ulleswater Co*., Blackburn J. said:

> It is well established law that where there is a public highway, the owners of the land have a right to go upon the highway from any spot on their own land. They cannot, of course, pass over the soil of another without his leave ... *Marshall v. Ulleswater* (1871), L.R. 7 Q.B. 166 at 172.] [emphasis added]

I conclude that the public right of passage does not carry with it a public right of portage across another's property. The public right permits passage along the river to the extent that passage is possible. If a natural obstruction temporarily or permanently prevents passage, the right of public passage remains although it may not be exercisable. Frustration of the ability to pass along the waterway cannot give rise to a separate and distinct right to go onto the property of a private landowner. One might well respond that the obstruction in this case is not a natural one but is a man-made one. It is, but I have no evidence before me from which I could conclude that the dam was unlawfully constructed, constitutes a nuisance, or that the Reeds are in contravention of any law by operating the dam. Indeed, as I understand the canoeists' position, they do not claim any right to have the dam removed; nor do they suggest that the Reeds' maintenance and use of the dam is actionable or unlawful. The silence of the Attorney General on this aspect of the case is also instructive. Given the record before me and the position of the parties, I see no reason for treating the dam any differently than I would a rapid

or a beaver dam. Absent a successful attack on the Reeds' right to maintain and operate the dam, the canoeists' argument comes down to a contention that the Reeds should be made to sacrifice part of their property rights so the canoeists can more fully enjoy their public right of navigation. I can see no reason for such court imposed largesse.

I decline to make any order declaring a right of portage across the Reeds' property.

A declaration in terms consistent with these reasons may issue. Counsel did not address the question of costs. In light of the result, I propose to make no order as to costs, subject to any submissions counsel may wish to make before taking out the formal order.