

McKIE v. K.V.P. CO. LTD.

[\[1949\] 1 D.L.R. 39](#);

CASE-HISTORY: Affirming with variation

[\[1948\] 3 D.L.R. 201](#); Affirmed with

variation [\[1949\] 4 D.L.R. 497](#)

**Ontario Court of Appeal
Robertson C.J.O., Laidlaw and Aylesworth JJ.A.**

NOVEMBER 22, 1948

Water & Watercourses II A, E — Right of riparian owner to uninterrupted flow of water — Injunction against pollution.

A riparian owner has a usufructuary right, incident to his land and independent of ownership of the solum to the free flow of water in its natural state, both in quantity and quality; and if this right is interfered with, as by pollution of the watercourse by an upper riparian owner (who has not acquired a prescriptive right so to interfere), he may maintain an action without proof of actual damage and can claim an injunction.

It is no defence to the person who pollutes to show that the waters were already polluted by other persons. Nor is it a defence that the pollution is the result of business operations carried on in a proper manner and that the business is important to the community.

Fisheries II — Profits a Prendre — Fishing rights of owner of solum — Rights of riparian owners.

Generally speaking, fishing rights are mere profits of the soil over which the water flows and hence belong to the owner of the solum.

Assuming that riparian owners have a right to fish in a navigable river their rights are no higher than those of any other members of the public; and hence, where fishing is interfered with by reason of the pollution of the river by an upper riparian owner, lower riparian owners have no remedy by action unless they have suffered special and peculiar damage beyond that suffered by other members of the public. The fact that such lower riparian owners are operators of tourists camps whose business suffers by reason of the interference with fishing

does not provide them with a ground for claiming that they suffered special damage.

An owner of the solum, even if he has not suffered actual damage by reason of pollution of the river to the detriment of fishing, is nevertheless entitled to equitable relief by way of injunction. He has the right to a free passage for fish in his fishery and is entitled to catch as many fish as he can, provided he does not interfere with the rights of persons above or below him or riparian owners.

Nuisance II — Water & Watercourses II E — Pollution of river — Nuisance to riparian owners — Right to injunction — Suspension of injunction.

Riparian owners, who, as such, are entitled to maintain an action by reason of the pollution of a river by an upper riparian

owner may also maintain an action for nuisance where, because of the pollution, the river gives off a smell which renders their property much less desirable as tourist resorts. It is no answer to the claim for nuisance that the solum of the river is vested in the Crown. Nor is it any defence that the person who commits the nuisance has an agreement with the Crown entitling him to carry on his objectionable operations.

The appropriate remedy for violation of common law rights, as in this case, is an injunction as well as damages. The injunction may, however, be suspended for a period to enable defendant to provide some means of carrying on his operations without nuisance; but on condition of his paying damages suffered from the date of trial to the date the injunction becomes effective.

APPEAL by defendants from a judgment of McRuer C.J.H.C., [\[1948\] 3 D.L.R. 201](#), awarding damages and injunctions against them in respect of pollution of a river to the detriment of riparian owners. Affirmed with a variation.

J. J. Robinette, K.C. and James Worrall, for appellant.

D. R. Walkinshaw, for respondents.

The judgment of the Court was delivered by

ROBERTSON C.J.O.

ROBERTSON C.J.O.:—This is an appeal by the defendant from the judgment of the Chief Justice of the High Court, [\[\[1948\] 3 D.L.R. 201](#). O.R. 398] dated April

15, 1948, in five separate actions brought against the defendant by different plaintiffs.

The actions were brought by the owners and occupants of parcels of land located on the Spanish River, in the District of Sudbury, for damages for injury suffered through the pollution of the water of the Spanish River by the defendant, and for an injunction to restrain the continued pollution of the river by the defendant. The actions were all tried together, and the reasons for judgment delivered by the learned Chief Justice covered the five cases. Damages were awarded the several plaintiffs in separate amounts, and in each case an injunction was granted restraining the defendant from depositing foreign substances or matter in the Spanish River, which alter the character or quality of the water washing the lands owned or occupied by the plaintiffs. In the case of one plaintiff who has a grant of a water lot on the Spanish River, the injunction also applies to the water flowing over his lands.

The appeals were all argued together. At the opening of his argument counsel for the appellant conceded that he must, for the purposes of the appeals, accept the finding of fact of the learned Chief Justice. He complained, however, that the injunction granted is in terms that are too broad and are unreasonably severe. He complained also of the award of damages to the several plaintiffs, and contended that only nominal damages should have been awarded.

Dealing first with the matter of damages, I would not interfere with the damages as found by the learned Chief Justice, in the case of any of the plaintiffs. They are all men trying to make a living by such means as are afforded in the locations in which they live. The waters of the Spanish River in an unpolluted condition were of importance to them. The operations of the appellant were of such a character and were conducted in such a manner as to destroy any value the river had to the plaintiffs, and to make it impossible even to live in comfort near it. The learned Chief Justice maintained the actions against the appellant both on the ground that there had been a violation of the rights of the plaintiffs as riparian proprietors, and on the ground that the pollution of the waters of the Spanish River by the appellant constituted a nuisance, for which the several plaintiffs were entitled each to maintain an action.

I have read the evidence of the several plaintiffs, and I can see no ground for disturbing the assessment of damages made by the learned Chief Justice in the case of any plaintiff.

The terms of the injunction order, as contained in the formal judgments entered, are the same in each case. I quote the clause as it appears in the judgment in the case of the plaintiff Earl McKie:

THIS COURT DOTH ORDER AND ADJUDGE that the Defendant be and it is hereby restrained from depositing foreign substances or matter in the Spanish River which alter the character or quality of the water washing the lands owned or occupied by the plaintiff.

The appellant urges that the injunction is not confined to alterations in the character or quality of the water that are injurious. Appellant's counsel further asked that the injunction order should be confined to such alterations of the character or quality of the water as create a nuisance. While I think the terms of the injunction order should be somewhat altered. I do not think the injunction should be confined to the creation of a nuisance. The plaintiffs, as riparian owners, had the right to use the water of the river for drinking and for other domestic purposes, as well as for watering their livestock, and there might well be pollution of the water to a degree and of a character that would seriously interfere with its use for these purposes and yet not amount to an actionable nuisance. I think that there should be, in lieu of the present para. 1 of the judgment, a paragraph in the following terms:

THIS COURT DOTH ORDER AND ADJUDGE that the Defendant

be, and it is hereby, restrained from discharging or permitting to be discharged from the Defendant's works mentioned in the pleadings, into the waters of the Spanish River, any substance or matter that, to the injury of the Plaintiff, affects the quality or character of the waters of the said River where the Plaintiff's lands border upon it, or that causes the said waters to become less pure than otherwise they would be.

In the case of the plaintiffs Vance, the changes in wording necessary to provide for two plaintiffs, one of whom is the owner and the other the occupant, should be made in the above.

Subject to this alteration in the injunction order, the appeals should be dismissed with costs.

Appeals dismissed with

variation in injunction orders. [\[1949\] 1 D.L.R. 39](#); [1949 1 DLR 39](#)