Neighbourly Nuisance: Ontario Court of Appeal Confirms Nuisance Must Emanate from Another’s Land

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A landowner sought to change the law of nuisance by alleging that a prior owner’s remediation of the property was insufficient and therefore interfered with the current owner’s use and enjoyment of the property. The Ontario Court of Appeal disagreed, and instead confirmed that in order to form a tenable claim, the alleged nuisance must originate from somewhere other than on the claimant’s own land.

Background

In *French v. Chrysler* (French), the plaintiffs, the Chippewas of the Thames Land Claim Trust, sued a number of parties, including Chrysler, regarding alleged petroleum hydrocarbon and asbestos contamination at a property in Sarnia, Ontario known as the Holmes Foundry. Chrysler had obtained the property in 1987 and decommissioned the Holmes Foundry in close consultation with the Ontario Ministry of the Environment prior to selling it to a developer in 1989. The plaintiffs purchased the property from this developer in 1999. In 2005, the plaintiffs commenced a claim against the developer and Chrysler, alleging, among other things, negligence relating to the decommissioning of the property. In July 2014, with the matter yet to proceed to trial, the plaintiffs sought leave to amend their statement of claim to add a claim of nuisance against Chrysler. In August 2014, the motions judge denied the plaintiffs’ request on the basis that the proposed amendments did not raise a claim in nuisance that was tenable at law.

Essential Elements of Nuisance

In *French*, the plaintiffs argued, before the motions judge and the Court of Appeal, that Chrysler’s alleged failure to properly decommission the Holmes Foundry resulted in a continuous and ongoing interference with their use and enjoyment of the property, to wit, a nuisance. In examining the caselaw on the essential elements of nuisance, the plaintiffs argued that there was no explicit requirement that the nuisance must emanate from another’s property. Rather, the plaintiffs relied on the Supreme Court of Canada’s decision in *Antrim Truck Centre v. Ontario (Transportation)*, arguing that to support a claim in private nuisance, there must only be a substantial and unreasonable (in all of the circumstances)
interference with a plaintiff’s property. Further, the plaintiffs pointed to the decision *Morguard Real Estate Investment Trust v. ERM Canada Corp.*, where the motions judge noted the following: courts have commented extensively on the difficulty in providing an exhaustive definition of the tort of nuisance; the categories of nuisance are not closed; and the principles of private nuisance are sufficiently elastic to deal with less typical cases of nuisance.

The motions judge hearing *French* did not agree with the Chippewas’ characterization of nuisance, explaining that a basic principle which gives coherence to an otherwise confusing body of caselaw is the maxim “use your own property so as not to injure that of your neighbours.” While the motions judge agreed that there is no requirement that a defendant own or occupy adjoining lands in order to be liable in nuisance, the judge concluded that the nuisance itself must still originate outside the property occupied by the plaintiff.

The Ontario Court of Appeal agreed with the motions judge and rejected what the panel viewed as an attempt by the plaintiffs to fundamentally change the law of nuisance. Instead, the Court explained that nuisance has “certain defined, long-standing characteristics, which courts have considered to be essential to the tort. In particular, the alleged nuisance must originate somewhere other than on the plaintiff’s land.” Because the plaintiffs’ purported claim lacked this “essential characteristic,” it had no reasonable chance of success.

**Discussion**

The Ontario Court of Appeal’s decision provides helpful clarity to an aspect of the tort of nuisance which, to-date, has received very little judicial consideration. Simply put, a nuisance must emanate from a source other than the claimant’s property. As such, a current owner will be hard-pressed to succeed in a claim in nuisance brought against a former owner of the same property, for example, for a previous and allegedly insufficient remediation of contaminants. Had the Court of Appeal ruled otherwise, all former owners of property may have been exposed to a potentially significant avenue of liability if any previous act (or omission) by the former owner could be said to have caused a substantial and unreasonable interference with the current owner’s use and enjoyment of its property - not to mention the significant threat such a ruling would have posed to the principle of *caveat emptor*. The Court’s decision, when combined with the Nova Scotia Court of Appeal’s decision in *W. Eric Whebby Limited*, effectively closes the door to the concept of a “neighbour in time” grounding a nuisance claim as between current and former owners of the same property.

*Certain co-authors of this Osler Update act as counsel for the third-party defendant, NA Water Systems LLC.*
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