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No beach party for Lake Erie residents

Cottagers fought court battle for waterfront access

One of the most important components of owning a waterfront summer home is the right to access and use the adjoining lake or river. When that right is in dispute, or is in danger of being lost, the cottage owner may find it more important to access a body of law rather than a body of water.

That's what happened to a group of Ontario cottagers in the southernmost part of Norfolk County in the small village of Port Ryerse.

In the early years of the last century, cottage lots were sold along the sand hills above the beach. The vendor who subdivided the land retained ownership of the beach between the lots and Lake Erie. As fate would have it, the beachfront is called Lot 13.

Justice David Marshall, who presided over the dispute I will relate shortly, described the scene: "The lakefront lots are set between a cliff or hillside and the lake. There are large hardwoods on the hill and the cottages are nestled in the hillside behind a broad, yellow sand beach stretching out to the blue water of Lake Erie.

"If you visit in the warm part of the Canadian year," he wrote, "the scene is idyllic, a kind of hidden retreat under the hillside on the lakeshore."

Waxing even more poetic in his ruling, Justice Marshall described the lake's many moods: "Like the yin and the yang or the warp and the woof, the lakefront has another face." He went on to explain that the wind and waves of Lake Erie can turn so violent that a few of the cottages farther down the road had been destroyed.

Over the years, to protect their cottages from the fury of the lake, several of the cottagers placed one-ton concrete blocks on Lot 13, the beach in front of their cottages.

Eventually, the cottagers began to treat the area as their own, although they had no deed to it. They built concrete pads, built and repaired piers and dug water wells. The Depew family, who had bought the beach 50 years earlier, never objected.

Then, said the judge, "like a sudden storm from the south, all this changed." Llewellyn Depew and his mother Doris acquired title to the beach in 1995 and decided to "take the hog by the tail," according to the judge.

He moved the one-ton blocks off the beach and added his own blocks to prevent cottagers from driving or parking on the beach. The cottagers immediately moved their own blocks back onto the beach and dumped Depew's into the lake beside the pier.

In desperation, Depew called a meeting of all the neighbours, but no one came except him and his lawyer. He wrote his neighbours, but there was no response to this either.

Then, the judge says, "the cat was amongst the pigeons." They all wound up in court for a five-day trial last fall. Justice Marshall struggled with a messy fact situation and some ancient and arcane rules of British common law going back to the 1850s.

The defendant cottagers argued adverse possession (squatter's rights), prescriptive easement (right-of-way acquired by the passage of time), implied licence, and finally equitable estoppel. Stripped of its flowery language, this last doctrine was created by an English court in 1877 and allows a judge to fashion a solution when he doesn't like the other available options.

And that's what happened in Depew vs. Wilkes. The judge said the cottagers could retain the use of the wells, pier, concrete pads and blocks and parking areas because it would be "unfair" to deprive them of the use of these improvements.

Although the court would not grant them ownership or rights-of-way over the land, the cottagers could retain use of it by paying the Depews $250 per cottage annually, plus $100 for the pier and $100 for each user of the well. No payment was required for use of the concrete blocks since they protected all the cottages, including the Depew home.

Creating what seems to be a new legal right, the court, in exchange for annual payments to the owners, granted the cottagers an equitable easement - a right-of-way of fairness - in their improvements to Lot 13.

"This case," said the judge, "confirms the old adage that good fences make good neighbours." The flip side is that bad fences presumably make bad neighbours.

BACK TO THE BASEMENT: In my June 23, 2001 column (City takes hit for shoddy Reno), I discussed the story of James Ingles who owns an 80-year-old house on MacPherson Ave. in the Annex area of Toronto.

Ingles contracted to have the basement dug out and the foundations deepened, but the work done by the contractor on the $46,000 job was shoddy. Even though the City building inspectors approved the original but defective job, it had to be completely redone at a cost of $57,000.

Ingles sued the contractor and the City and won, but the City went to the Court of Appeal and had the claim against it tossed out.

Ingles appealed to the Supreme Court of Canada and, after a 10-year fight, won a judgment for more than $49,000 plus interest and costs.

Shortly after the column appeared, Ingles contacted me to reveal something the court decision did not report. Prior to the original trial, he offered to settle with the city for $37,000. The city did not respond. After the final decision, the city wound up with a judgment against it for $185,000.

Ingles credits his lawyers Barbara Murchie and Phil Anisman for the spectacular win. "Sometimes little guys win and make a difference," he says. "Fortunately I had superb lawyers come to my defence. "

Ingles is too modest. It takes a strong will and deep pockets to sustain a case for 10 years all the way to the highest court in the country.

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