

TREES & THE LAW

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Easements The importance of having more than legal input

There are many forms of easement across Canada. Typically they grant someone, other than the land owner, one or more rights to do something otherwise prohibited on the landowner's land. That may be as simple as the right to cross the land and the right to build a road or trail to do so; the right to install power lines, other utilities or buried pipelines; as well as the right to have access needed to check and maintain such infrastructure.

Easements confer rights on the land which are attached to the land title, and these rights bind the land and successors to comply with the terms of the easement. In all cases the easement document should be very clearly worded, and the land and activities contemplated spelled out in some detail to avoid ambiguity and subsequent misunderstandings.

Clearly, that ideal is not always accomplished.

A recent case illustrates why the easement document may need more than just legal input when it is created. *Fredericton International Airport Authority v. O'Toole* 2017 NBQB 125 deals with an easement on land adjacent to the airport in Fredericton, New Brunswick. The original easement, executed in 2005 was clear enough in its concept. The airport authority wished to ensure that vegetation at the end of the runway was managed to create "an approach surface." The wording quoted in the case is as follows;

The Grantor hereby grants and conveys an easement to the Grantee, its successors and assigns and its and their contractors, servants, employees and workmen by foot and by vehicle, together with all machinery and equipment required in exercising the rights and privileges herein granted over, across, under and along the specified parcel for the purpose of removing any object, either of natural growth or manmade, excluding the existing split-entry house and garage from the specified parcel, either in whole or in part and whether existing as at the date hereof or not, so that the highest point of any such object does not exceed in elevation at the location of that point any

approach surface, outer surface or transitional surface of the Fredericton Airport, all for the benefit of the Fredericton Airport Lands and the operation of an airport thereon.

At first blush it seems straightforward enough, and indeed for the first few years there was no problem. Airport staff requested and received permission to enter the land and trim back any vegetation that penetrated upwards in the defined airspace to be kept clear. No trimming was undertaken from 2005 to 2012. Then in 2012 trimming was undertaken without any problem.

In 2016 another request was made but this time the airport authority requested permission to trim two metres below the line of the approach surface. The justification for the request was that trimming to the approach surface alone was not enough. Because the plants kept growing upwards it would seldom be long after the trimming, before the approach surface was again non-compliant with Transport Canada regulations. Rather than try to constantly trim, the intent was to prune a lot lower and thus extend the time between pruning cycles. In principle, this would make sense. The defendant objected on the grounds that the easement did not allow for pruning that far below the line defined by the approach surface.

That "line" was defined in the Fredericton Airport Zoning By-Law as: *Approach surface means an imaginary inclined plane that extends upward and outward from each end of a strip, which approach surface is more particularly described in Part III of the schedule; Part III defines the slope at two per cent.*

The airport authority argued that "it is not practical or a reasonable exercise of its Easement rights to require it to maintain constant surveillance of the trees in question or to constantly trim the tree daily or more often than a reasonable maintenance interval, which it suggests is approximately two years."

Further they argue that working strictly to two per cent slope as defined would be unreasonable, but pruning to two



No matter what type of easement is at issue, all parties will benefit if there is input from a variety of experts, not just lawyers.

metres below that line was "a commercially reasonable exercise of its Easement rights." The trial judge disagreed. "The reasonableness requirement is an obligation on the part of the grantee to act reasonably in the exercise of its Easement rights. It applies to the manner in which the rights are exercised but does not create rights per se.

While the Aerodrome Standard imposes obligations on the Airport it does not confer any rights to enter upon the premises of third parties.

[22] *Having regard to the unambiguous language of the Easement and specifically the incorporation of the 2% slope definition contained in the Airport Zoning By-law, the Airport may enter upon the lands of the O'Tooles to remove in whole or in part any tree which protrudes into the 2% slope line but no more. While the Aerodrome Standard imposes obligations on the Airport, it does not bind the O'Tooles and cannot be relied upon to expand the Airport's rights specified in the Easement. Furthermore, the reasonableness requirement governs the exercise of granted rights but cannot be relied upon to create or expand easement rights."*

A further issue was that the easement allowed for the removal of vegetation "in whole or in part." In effect the airport authority had the right to remove the entire tree that penetrated upwards above the approach surface. But, the trial judge noted "In my view, the Airport has the right to entirely remove any tree which penetrates into the approach surface. However, as stated previously, the Airport must exercise its Easement rights in a reasonable manner. Arguably, the complete removal of a tree

which could reasonably be trimmed so as not to encroach into the approach surface may be considered unreasonable."

Both parties sought injunctions and both were granted, but not perhaps as envisaged. The airport authority was granted an injunction that allowed them to enter the property to trim the trees and the defendant was barred from preventing that work. But, the defendant was granted an injunction prohibiting such tree trimming from occurring below the surface approach line, since this was never anticipated in the original easement document. In the end, the original approach to the work was upheld.

The case is instructive in several ways. It seems likely that the original Fredericton Airport Zoning By-Law was written by someone who failed to appreciate that trees grow upwards, and they failed to think about how the required pruning would actually be accomplished. That lack of forethought carried over into the easement document, and from there into the actual onsite management of the trees.

If the original by-law had received some input from an arborist or forester, they might have suggested that pruning to a set distance below the line defined by the surface approach would be a very reasonable thing to do. It would extend the pruning cycle and reduce costs. By failing to get this input from someone with experience in managing trees the bylaw is flawed, and the airport authority is now encumbered with the need to prune far more often in order to remain compliant.

The lesson for anyone writing bylaws or easements is that they need to thoroughly understand if the intended rights can be implemented as contemplated. That may require third party review and input so that the intent is in fact achievable in practice.

Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. The above is extracted from his forthcoming book Trees and the Law in Canada which is scheduled for publication in the fall of 2017.



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