TREES & THE LAW

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Valuing loss of privacy and screening

If removal of vegetation involves trespass, any legal action regarding loss of privacy is more likely to be successful

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One of the commonly claimed injuries in tree damage cases is loss of privacy and screening.

Loss of privacy relates to the actual or potential and non-consensual intrusion into what was formerly a secluded or 'private' area. The intrusion does not necessarily have to be by physically entering the area. It may be that the change in screening now permits a person to easily see into the formerly secluded area. Conversely, loss of screening may mean that the plaintiff can now look out and see buildings or other people that they do not want to see, and prior to the damage, did not have to see. Privacy then, is the ability to exclude others from the premises (see *R. v. Edwards,*1996 at [49]).

If privacy is determined by a person's ability to see into or out of an area, it follows that the area affected must relate to the line of sight between a person's eyes and the area under scrutiny. On that basis, claims for loss of privacy and screening have to be predicated on that line of sight which might be a straight line or a cone of view. But, importantly, if tall trees that once provided screening are removed, they should not need to be replaced with similarly tall trees if screening is the issue. All that is required is to provide a new vegetative screen that blocks lines or cones of sight; a solution that may have radically different cost implications.

"...[I]t is the absence of trees, not the potential height of the new trees, that is the major cause of the loss of privacy." (*Trans-Alta Utilities Corp. v. Kube* 1987).

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Claims for loss of privacy/screening have to be carefully laid out. As noted in *Barnstead v. Ramsey* 1996, while there was undoubtedly a loss of screening associated with trespass, some of the lost screening came about as a result of the legitimate activity on the other side of the boundary. In other words, even if no trespass had occurred the screening provided by the trees would have changed anyway. The same principle applies in instances where neighbours have pruned back branches overhanging property lines.

As long as the pruning work did not cause a trespass, any loss of privacy would be unfortunate but not actionable. Once trespass does occur, the court could consider loss of privacy as part of the final award of damages. Similarly, if the location of the damage is remote or distant from the house, awards for loss of privacy are likely to be rejected or greatly reduced. (See *Arbuckle et al. v. Owen et al.* 2014 at [29]; *Bosch v. Smolik* 2007 at [44]; *Gburski v. Healey* 2012; Graw v. Rockwell, 2010 at [38]; *Konno v. Harrison-Jones* 2011; *Kranz v. Shidfar* 2011; *Oran v. Westwood Fibre et al.* 1996 at [22].)

Valuing loss of amenity

Regardless of the appraisal approach used, valuation of amenity, intrinsic, intangible or environmental values is often captured in some form of punitive awards on top of general damages. (See *Voss v. Crooks* 2002:

[35] The appropriate method to utilize in this case is similar to that utilized in Kates, which is to compensate the plaintiff with trees of similar nature, although not in the size of the trees removed. Any additional loss the claimants suffer between the size of the trees replacing the ones lost can be addressed in compensation for loss of enjoyment or amenities.)

Loss of amenity is noted in many cases: examples include *Craig v. North Shore Heli Logging Ltd.,* 1997; *Gburski v. Healey* 2012; *Glasshutter v. Bell* 2001; *Kranz v. Shidfar 2011; Perdue v. Vanderham* 2004.

The Supreme Court of Canada case *B.C. v. Canadian Forest Products* 2004 provides an excellent, if rather lengthy review of these issues, and established precedent by explicitly recognizing that a well-argued case for the valuation of environmental values should have standing and traction.

When seeking to prove a claim for loss of privacy or loss of amenity the plaintiff has to have credible evidence and be able to clearly demonstrate how the damage has affected privacy and loss of amenity. It may not be enough to feel aggrieved about the damage. The claim has to be persuasive.

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.*