**Real Estate**

# Tree law in Canada: Loss of privacy

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Across Canada, many trespass cases include a claim for damages involving loss of screening and privacy. Screening is a physical barrier, often in the form of a hedge, or groups of plants such as shrubs and trees. The basis for the claim is that the change in screening now permits a person to easily see into the formerly secluded area, or that the plaintiff can now look out and see people or other things — hidden before the damage — that they do not want to see.

On larger properties that may include a claim that the tree damage adversely affects a sense of remoteness and the joy of being able to walk through one's own wooded area without being seen or watched. So, loss of privacy might be defined as the actual or potential non-consensual intrusion of people or unwanted views into what was formerly a secluded or "private" area.

But, if privacy is determined by a person's ability to see into or out of an area with the naked eye, or perhaps with a telescope or binoculars, it follows that the area affected must relate to the line of sight between a person's eyes and the object under scrutiny. On that basis, claims for loss of privacy and screening should be predicated on a line of sight which in practice could be a straight line or a cone of view.

Importantly, loss of tall trees that once provided screening by dint of foliage and limbs at the base of the tree may not need to be replaced with similarly tall trees if screening and privacy can be regained with lower trees. "... it is the absence of trees, not the potential height of the new trees, that is the major cause of the loss of privacy." (*Transalta Utilities Corp. v. Kube* 1987] A.J. No. 54). In which case, the solution to cure the loss of privacy may have radically different implications for the damages to be awarded.

Claims for loss of privacy/screening should be carefully analyzed. As noted in *Barnstead v. Ramsay* [1996] B.C.J. No. 970, 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 once legitimate pruning had been implemented.

An example would be where neighbours have pruned back branches overhanging property lines under a self-help approach. If the pruning work did not occur in trespass, any loss of privacy, no matter how real it is, is unfortunate but not actionable. In *Kranz v. Shidfar* [2011] B.C.J. No. 970 the argument that the tree cutting created "unsightliness and loss of privacy," had to be tempered by reality. "… even if the Kranzs' trees were not cut down by Shidfar, the evidence suggests that there would have been some visible affront on the Kranz's property as a result of Shidfar's removal of his own trees."

If trespass occurs, the court may well consider loss of privacy as part of the final award of damages. But, how should the award for loss of privacy be calculated? Should it be a blanket award, or one based on the increment of privacy lost as a result of the trespass, that is, the difference between what was permissible and the additional loss after trespass?

This incremental loss of privacy may be significantly less than what is being claimed; a principle similar to the loss of amenity enunciated in *Hutton v. Morehouse* [1998] B.C.J. No. 668, where it was noted that even if there had been no trespass, the plaintiff would have suffered some loss of the natural beauty in the area, but none of it would have been actionable. The loss of privacy also needs to be considered in its proximity to where the viewer would ordinarily be located.

If the location of the damage is remote or distant from the house, or primary use area, awards for loss of privacy are likely to be rejected or greatly reduced — *Oran v. Westwood Fibre Ltd.* [1996] B.C.J. No. 2697. Similarly, if the damaged land and loss of privacy claimed is easily cured by natural regeneration, then the final award may be reduced as a new screen is already being formed — *Couture Rouillard c. Camping Guilmette inc.* [2003] J.Q. no 19137.

In all cases the loss of privacy must be proven, and if it can be shown that the pre-existing screening was in fact not that effective in providing privacy, then the damages may be diminished — *Compton v. Hurley* [2011] N.S.J. No. 715.

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