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Tree law in Canada: Loss of views

By Julian Dunster

Julian Dunster

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Claims involving a loss of view typically arise when an existing view is lost or modified by a new intrusion of some form. Outside Quebec, "…the law seems settled that there is no action in nuisance for loss of view." *Becze v. Edmonton (City)* [1993] A.J. No. 679 at [36].

In *Strachan v. Sterling* [2004] B.C.J. No. 1451 the court reinforced this with reference to standard texts and similar cases, all of which failed to prove that the issue was a nuisance. Those tests were upheld in *Webster v. Low*, [2009] O.J. No. 4695 and again loss of view as a form of nuisance was dismissed.

Most cases that succeed require a pre-existing covenant that clearly defined what the view was to be, and how it was to be maintained. For example, *Purdy v. Kneip* [1974] B.C.J. No. 757, a covenant registered on the subdivision stated: "10. No trees, shrubs or other growth shall be allowed to grow up or remain on the premises in such a way or in such a place or places as shall or may interfere with the view of other residents of the said Subdivision."

At trial it was found that the trees blocking the alleged view existed before the subdivision was initiated. The court found that the covenant would only apply to vegetation that grew after the covenant came into effect and a mandatory injunction to remove some trees would adversely affect the value of other properties subject to the same covenant. The claim failed.

In *Cloutier v. Ball* [1995] B.C.J. No. 1301 the covenant stated:

“10. No trees, shrubs or other growth shall be provided to grow, be, or remain on the premises in such a way, or in such a place or places as shall or may interfere with any poles or wires erected for electrical or telephone purposes in the right-of-way immediately adjoining the said premises or interfere with any guy wires to support such pole line which may be placed and maintained on the said premises or with the view or access to light and air from other lots in the said sub-division and without limiting the generality of the foregoing, such trees or shrubs shall in no event exceed 20 feet in height.”

In the intervening years many trees grew taller than the stipulated 20-foot maximum. There had been no complaints in court, and enforcement of the covenant had been irregular. The plaintiffs sued to have their views restored in accordance with the covenant.

The action failed. The plaintiffs took no action to maintain the view they originally had in 1966 when they purchased their lot. In the interim, hundreds of trees had grown up which affected their view, yet they waited over a decade and a half before taking any action. Issues of equity were clearly involved.

Court-ordered compliance against the defendants would be inequitable, since the plaintiff’s view would still be obscured by trees on other covenanted properties, and these people were not cited in the action. The covenant in its original form was a negative covenant; that is, it specified that certain things, such as growing vegetation beyond 20 feet tall, were not to happen.

Requiring compliance decades later would change it into a positive covenant because considerable amounts of money would have to be spent to restore the views if strict compliance was enforced. Under the law in British Columbia, a positive covenant cannot be made to “run with the land.”

As a result, any subsequent owner of any parcel of land affected by the covenant could not be forced into compliance because the people entitled to enjoy views had not sought compliance from the previous owner.

The defendants filed a counter claim seeking to have the original covenant declared obsolete, on the basis that the neighbourhood character had changed sufficiently for the

covenant to now have no meaning. This too was denied by the judge because there was some evidence of compliance in the overall area, and in fact, some residents may have traditionally relied on it as a means of retaining their views. Again, issues of equity would arise by cancelling the whole covenant.

In Quebec, many of the view issues revolve on hedges and rows of trees between properties. In *Boudreau c. Violo* [2007] Q.J. No. 2018, the issue was loss of views resulting from the planting of a high hedge between the two parties. In that case, the local bylaw had a height restriction that had not been met, so it was fairly simple for the court to compel a height reduction on that basis. See also: *Montréal (Ville de) c. Brown* [2008] J.Q. no 12782.

In summary, if there is no enforceable view covenant in the first place, there is no entitlement to a view. Even if there is covenant, it must be carefully worded, the view in question must be well defined, and the provisions in the covenant must have been equitably enforced throughout the life of the covenant.

Julian Dunster *is a consulting arborist, professional forester and professional planner based in Victoria, B.C. He is the author of* Trees and the Law in Canada. *None of the material above shall be considered as legal advice.*

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