

Nasty Neighbours IV:

THE NEIGHBOURS NEXT DOOR

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The Neighbours Next Door

1 INTRODUCTION

A man's home truly is his castle and infringements on the boundaries thereof both real and perceived are frequently the basis of long term feuds between neighbours. Some of these infringements include fences, retaining walls, party walls and shared driveways. The courts are frequently adjudicating actions between neighbours involving adverse possession, encroachments, easements or rights of way disputes as well as overhanging trees. This paper will highlight the current law as it relates to feuding neighbours.

2 FENCES¹

The location of a fence in relation to a lot boundary can be the catalyst for a dispute especially if it creates a right to a claim for possessory title.[the original *Limitations Act* gave property ownership rights to persons who established a possessory interest in land which was unchallenged for 10 years-This does not apply to land in Land Titles and one should look at the *Real Property Limitations Act*].

Fences can also create problems because of their height and composition, i.e. a spite fence.

Municipalities have jurisdiction over fences under the following statutes:

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|----|---|---|
| 1 | <i>Municipal Act, 2001</i> , S.O. 2001, c.25 formerly | <i>Municipal Act</i> , R.S.O. 1990, c.M.45
(the "Old Municipal Act") |
| a) | Subsection 11 (3), para. 7 (structures, including fences and signs) | a) Section 210 para. 25 (height); |
| b) | Section 98 non applicability of <i>Line Fences Act</i> | b) Section 210, para. 25 (along highway) |
| c) | Section 132 municipal power of entry for repair or alteration of fences or other structures | c) Section 210, para. 27 (division fence) |
| d) | By-law powers subsection 10(2) paragraph | d) Section 210, para. 28 |

¹ See Nasty Neighbors II : Fences – Neighborhood Friends or Foes, M. V. MacLean, May 5, 2000
Nasty Neighbours III Boundaries:Where to draw the Line M.V. MacLean June 10,2004

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(barbedwire);

e) Subsection 15(5) power to pass a by-law under sections 9,10 and 11 no affected by section 15 restrictions

e) Section 314, para. 4 (fences on highway)

2 *Line Fences Act*, R.S.O. 1990 c. L. 17

- a) Section 2 (fence viewer appointment);
- b) Section 8 (fence viewer award);
- c) Section 18 (fees), and;
- d) Section 22 (tree across line fence).

3 *Planning Act*, R.S.O. 1990 c.P.13;

- a) Section 34 (zoning by-law);
- b) Section 41(site plan control).

4 *The Building Code Act*, R.O. 1992, c. 23.

5. *The City of Toronto Act, 2006* (not yet proclaimed) s 8(2), 12(4), and s 109

6. *Bill 130 Municipal Statute Law Amendment Act, 2006* s 11(3)

2.1 MUNICIPAL ACT BY-LAWS

The *Municipal Act, 2001* is much less specific than the former Act in articulating the municipal by-law powers relating to fences. Fences are a sphere of jurisdiction under subsection 11 (1), para. 7, being, “structures, including fences and signs.” .The right to pass a by-law with respect to fences under section 9,10 and 11 of the Act is not affected by section 15 of the Act with respect to procedural and other requirements. Therefore, the *Municipal Act, 2001* enables municipal by-laws to be passed to cover all aspects of fences covered under the Old Municipal Act and more.

Section 98 of the *Municipal Act, 2001* gives the local municipality discretion to provide that the *Line Fences Act* does not apply to all or part of the municipality except if it was a former railway line.

Fence by-laws passed under the former Act continue until they are repealed unless the municipality ceased to exist in which case the by-law has a three year limitation

period(see s 457.1(1)). Some municipalities have passed new by-laws under the *Municipal Act, 2001*. Others have retained their existing by-laws with amendments. The broader powers under the new Act allow prior fence by-laws to continue under the *Municipal Act, 2001*.

An example of a by-law passed under the old Act with amendments is the City of Mississauga's fence by-law (copy attached). The by-law covers all of the matters identified under the old Municipal Act and appears to have been amended to dovetail with the City's Encroachment By-law.

The City of Burlington passed a division fence by-law under *Municipal Act, 2001*, (a copy of the by-law is attached). This by-law functions in a manner similar to the *Line Fences Act* and includes provisions that are part of the *Line Fences Act*, for example the responsibility of a tree owner for any damage caused by that tree to a division fence.

Swimming pool enclosures are fences which may be included under the municipal fence by-laws or be a free standing by-law. Most municipalities have swimming pool enclosure by-laws which regulate not only the height and type of fencing but also the number of locking gates and the climbability of the enclosures.

Section 132 of the *Municipal Act, 2001* enables the municipality to authorize and owner or occupant of one property to enter upon the land of his neighbour at any reasonable time to make repairs to "any building, fence or other structures" to the extent necessary to do the repairs subject to the conditions enumerated in subsection 2 which includes the duty to compensate for any damages caused. This section which was previously section 210 paragraph 64 of the *Municipal Act R.S.O. 1990 c, M.45* has been included in a City of Toronto By law and used effectively to facilitate the repair of neighbouring houses built so close together that it is only possible to inspect by walking on both properties (see the endorsement in *Parla v. Pleasants*, 2006 Can LII 32061 (ON S.C.)).

2.2 LINE FENCES ACT

Much has been written and litigated under this statute which was in existence prior to the establishment of the Province of Ontario.² The current *Line Fences Act* was revised substantially in 1979 to make it more user-friendly. This statute sets out a procedure for constructing and paying for fences on lot boundaries.

When considering whether or not to use the *Line Fences Act* as a basis for adjudicating the cost of construction or reconstruction of a boundary fence, first determine whether the proposed boundary fence is one to which the Act applies. Section 23 makes the *Line Fences Act* applicable to lands owned by a municipality, a local board including a conservation authority. Section 24 of the *Line Fences Act* binds the Crown in right of Ontario except, "lands of the Crown that at no time have been disposed of by the Crown

² See *Fences and the Law*, Michael J. Smithers.

in right of Ontario by letters patent, deed or otherwise.” The *Line Fences Act* does not apply to land that constitutes a public highway including the lands abutting a public highway held as a reserve by the municipality. The *Lines Fences Act* does not apply to lands that are subject to a municipal by-laws relating to division fences.

Section 98 of the *Municipal Act, 2001* enable a local municipality to determine whether or not the *Line Fences Act* should apply to all or part of a municipality. Section 109 is an identical provision in the *City of Toronto Act, 2006*. To use this provision, the municipality must state in the by law that the *Line Fences Act* does not apply. Where a municipality has a division fence by-law, the *Line Fences Act* does not apply. The *Line Fences Act* will only apply if a municipality has a by-law passed under section 2 of the *Line Fences Act*, appointed fence viewers to carry out the provisions of the Act and has fixed their remuneration.

The fence viewer making an award under section 8 of the *Line Fences Act* must specify the location of the fence, description of the fence including the materials to be used in the construction, date of construction, and the cost of the fence viewing. The height and description of the lawful fence must be in conformity with the municipal fence by-law, if there is one.

Some features of the *Line Fences Act* are:

- ◆ The fence viewers’ award must address fence location, contribution of owners, materials to be used in fence construction and date of commencement and completion of construction.
- ◆ Subsection 8(4) of the *Line Fences Act* enables the fence to be located either wholly or partially on the land of one of the adjoining owners where “the formation of ground by reason of streams or other causes” makes it “impractical to locate the fence between the lands.”
- ◆ The award of the fence viewer is appealable to a referee and the decision of the referee is final.
- ◆ The award and a certificate respecting the award may be registered and are charge against land (section 15).
- ◆ An agreement between the land owners in the prescribed form respecting a line fence may likewise be registered with the same effect (section 16).
- ◆ The fence viewer’s fee is collectable in the like manner as municipal taxes (section 18).
- ◆ The provisions of section 22 of the *Line Fences Act* require the owner or occupant of land with a tree which has fallen on a line fence to remove the tree.

The regulations under the *Line Fences Act* prescribe the fees on appeal, the forms of notice and the forms and regulations for land and territory within a municipal organization.

2.3 THE PLANNING ACT

Some municipalities include fencing requirements in the zoning by-laws passed under section 34 of the *Planning Act*. Also, site plans approval, under section 41 of the *Planning Act*, frequently addresses fencing. It is usual to exempt from the general fence by-law any fence requirement made under section 41 as a condition of site plan approval. Frequently, depending on the nature of the special site plan requirements, site plan fencing may be in excess of the height requirements in the general fence by-law.

An advantage of including the fence provisions in the zoning by-law is the ability to obtain variances before the Committee of Adjustment and with the subsequent right of appeal to the Ontario Municipal Board.

2.4 THE BUILDING CODE ACT

Subsection 1 (1) of the Building Code Act, O. 1992, c.23 defines "building" as:

- (a) *a structure occupying an area greater than 10 square metres consisting of a wall , roof and floor, or any of them , or a structural system serving the function thereof including all plumbing, works, fixtures and service systems appurtenant thereto,*
- (b) *a structure occupying an area of 10 square metres or less that contains plumbing including the plumbing appurtenant thereto,*
- (c) *plumbing not located in a structure,*
- (c. 1) *a sewage system; or*
- (d) *structures designated in the Building Code.*

The Building code designates structures in section 2.1.2. Among the designated structures is:

- (a) *a retaining wall exceeding 1,000 mm (3' 3") in exposed height adjacent to:*
 - (i) *public property,*
 - (ii) *access to a building, or*
 - (iii) *private property to which the public is admitted.*

A fence can be a retaining wall or vice versa. A building permit may be required for the construction of a fence which is a retaining wall.

Therefore, when constructing a retaining wall it is important to check whether a building permit is required by the municipality.

2.5 OTHER SOURCES FOR FENCING REQUIREMENTS

Many plans of subdivision require the developer to construct noise attenuation and other barrier fences. Some subdividers were required to erect reverse lot frontage fences where houses back on busy arterial or other roads. Many of these fences required to be constructed were not in accordance with the height requirements of the municipal fence by-law. Many of these fences are now aging and deteriorating. Some concrete noise barrier fences are crumbling. Some municipalities have not considered who is to be responsible for the maintenance of fences especially, if the fence is now on freehold privately owned property. These fence problems are not simple. The subdivision agreement and conditions of subdivision help when determining responsibility for fences. If the fence is on municipal property there should be no problem but, some are on the lot line. Are there restrictive covenants respecting fences? If so, are they legally enforceable i.e. true restrictive covenants with dominant and servient tenants?

2.6 SUMMARY OF REMEDIES

When confronted with a fence problem, consider the following:

The problem	Disposition
♦ Height and type of fencing	♦ Check the fence by-law and contact the by-law enforcement office.
♦ Erection of a new fence along the lot line, and the owners cannot reach an agreement	♦ Check to see if the <i>Line Fences Act</i> applies in the municipality; if not, is there a division fence by-law?
♦ An existing fence is not on the lot and the owner will not remove it	♦ This is a civil matter; an injunction may have to be sought or application under Rule 14.05 (3) (e) for possessory title.
♦ A fence on a commercial site plan is falling down.	♦ The fence may be a condition of site plan approval and the onus will be to restore the fence as set out on the site plan. Contact the municipal staff.
♦ A retaining wall is falling down	♦ Check with municipal building department

3 TREES

Most municipalities have by-laws to protect trees by requiring permits for the injury or destruction of trees. Such by-laws were first passed under section 223.2 of the old Municipal Act and can be passed under section 135 of the new Municipal Act. However, such by-laws usually do not apply to the pruning of tree or the removal of dead branches.

Over hanging branches can be the source of neighbour disputes. Overhanging branches are clearly a civil matter involving the two owners and municipalities have no jurisdiction unless the tree obstructs municipal property. Similarly, the roots of trees, which cross lot lines and cause damage, are the responsibility of the owner of the tree. It is interesting to note that with respect to overhanging branches that there is no prescriptive right to the use of light. Section 34 of the *Real Property Limitations Act*, R.S.O. 1990, c.L.15 states that,

No person shall acquire a right by prescription to the access and use of light...for any dwelling, house, workshop, or other building, but this section does not apply to any such right acquired by 20 years use before 5, March 1880.

Therefore, if the parties cannot agree on the removal of the branch, the damages claimed would be limited to real damages that have occurred as a result of the overhanging branches or roots, i.e. sewer back-ups, property damage, etc.

Two interesting British Columbia decisions relating to the cutting down of overhanging trees are set out in Appendix “A”. *R. v. Toma* relates to the trimming of willow branches where permission was granted and the neighbour cut down the entire tree. The *Strata Plan NW1102 v. Lee* decision relates to an action for damages for trespass relating to the removal of trees. In both cases it appears that the aesthetics of the trees were not appreciated by the neighbour who wanted to remove the entire tree, not just the overhanging branches.

The *City of Toronto Act, 2006* sections 49 and 50 enable the City to enter on private property along a highway to inspect, to test and to remove trees or branches which may be decayed or damaged and pose a danger “to the health or safety of any person using the highway”. A court order can be obtained by the city under section 50 to require the owner to remove the tree.

4 ADVERSE POSSESSION / POSSESSORY TITLE

Where a fence is erected, not on the lot line, so that it encloses land which was previously the land of the neighbour, a claim may be made for that land by way of adverse possession or possessory title.

The appropriate means of making this determination to the Court is an application under 14.05 (3) (e) of *The Rules of Civil Procedure*. Some decisions of the Courts on adverse possession are set out in Appendix “A” attached hereto.

In *Kreadar Enterprises Limited v. Duny Machine Ltd.*³ on application for an order enjoining a defendant from remaining an occupation of the plaintiff's lands and requiring removal of a fence, Connor J. considered the leading decisions on adverse possession. He stated that the test for a possessory title, a three fold test, namely: actual possession; the intention of excluding the paper owner from possession; and, effectively excluding the paper owner from the use it intended to make of the property. To succeed, all three parts of the test must be met and the ten year period under section 4 of the *Limitations Act*, (as it was then) would commence to run.

Actual possession was held to mean, "visible, open, notorious and continuous" and it must be continuous for every inch of the disputed property (*Elias v. Coker* (June 7, 1990) (Ontario Division Court) [D.L.C. York 323454/88, LANG D.C.J.]).

The onus of establishing title rests with the complainant and the onus is a stringent one.

The Superior Court in *Frugal v Angel*, 2005 CanLII 51847 (ON S.C.) considered whether or there was a prescriptive right by adverse possession to a .75m by .6m parcel of land .The land was between a garage and a 30 year old fence. The court found in favour of the plaintiff under section 4 of the *Real Property Limitations Act* and in doing so relied on the test in the case of *Teis v Ancaster(Town)* (1997),35 O.R.(3rd) 216 (C.A.) . This is the same test that was referred to earlier in *Kreadar Enterprises* discussed above.

The statutory authority under which adverse possession is now claimed is section 4 of the *Real Property Limitations Act*, R.S.O. 1990, c.L.15 (formerly section 4, *Limitations Act*).

With the conversion from Registry system to Land Titles, there will be fewer and fewer claims for possessory title. Section 51 of the *Land Titles Act* provides:

51. *Despite any provision of this act, the Real Property Limitation Act or any other act, no title to and no right or interest in land registered under this Act adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired hereto for by any length of possession or by prescription.*

In addition, there are properties that are afforded protection against adverse possession claims. Federally owned property is not subject to claims because of the *Federal Real Property Act*, S.C. 1991 c.50, section 2. Section 16 of the *Real Property Limitations Act* exempts waste or vacant land of the Crown from such claims as well as road allowances vested in the Crown and in the municipal corporation and commissions or other bodies.

5 ENCROACHMENTS

Encroachments can be recognized through encroachment agreements. For instance, if the eaves of a property of a roof of a house cross the lot line it may be possible for the owners to enter into an encroachment agreement that would address the non-applicability of possessory title, maintenance of the encroachment, as well as liability. Such

³ (1994) 42 R.P.R (2d) 274.

agreements have been entered into with municipalities to address porches and stairs which encroach on municipal sidewalks and roads. Other examples of encroachments are air conditioners, porches, decks, bay windows, fire escapes, balcony and wheel chair ramps.

Some municipalities have passed by-laws to address encroachments. For instance the City of Mississauga has an encroachment by-law (a copy attached hereto) which prohibits encroachments on City land generally but allows certain encroachments subject to an agreement and the payment of an applicable fee.

In *Wigle v Vanderkruk*, 2205 CanLII 25104 (ON S.C.) the court addressed a fact situation in which the neighbour had crossed over the boundary of the plaintiff's land with a poly greenhouse structure to the extent of 7.75 acres or about 40% of the plaintiff's land. In its decision the court addressed among other issues whether the defendant was negligent in encroaching without justification and whether the defendant had knowingly and wrongfully occupied the plaintiff's land. This decision also addressed the application of section 51 of the *Land Titles Act* referred to above and contains a very interesting opinion on adverse possession. In paragraph 108 the court states:

Adverse possession is and anachronistic doctrine in our law with decreasing relevance given modern survey procedures, registration and the **Land Titles Act**. This is not a fence-line run askew for 20years; this is a 7.75 acre advantageous land occupation. There is nothing peaceful about cheating one's neighbour. It is as violent as it is sinister. There is no place for adverse possession here.

The plaintiff received a punitive damage award in addition to general damages and the total award was \$639,650.00

6. RIGHT OF WAY / EASEMENTS

The reservation of the right of way or easement can be a source of contention between neighbours. The wording of many of the older rights of way is often a source of disagreement. Does an easement to repair the overhanging eaves permit the neighbour to install other conduits under the eaves? Does a right of way simple and plain permit the entry for the purpose of construction in the rear yard if there is no other access? An interesting Court of Appeal decisions also address the scope of the right of way (*MacKenzie v Matthews*, (1999),46 O.R. (3rd) 21). *Wiltshire v McGill*, 2005 Can LII 18714 (ON S.C.) involved an unsuccessful application for an order for the removal of a right of way claim.

Surface water run off has been the cause of many a neighbour dispute in the urban environment of small lots. Sutherland J. in *Di Gregorio v Osborne* 2004 Can LII 34423(ON S. C.) provides an excellent summary of the law in this area. The action involved water runoff and trespass. The action was framed in nuisance, negligence and trespass. The court found that the defendant did not have the right to block the surface water coming onto his land and that the law of nuisance should be applied to such surface

water disputes because of “it integral elements of reasonableness and balancing of competing interests”.

7. THE MUTUAL DRIVEWAY / THE PARTY WALL

The proximity of neighbours especially where there is a degree of cooperation required to facilitate their day to day living becomes a real problem in the situation of mutual driveways and party walls. The resolution of the disputes is frequently before the court in the form of nuisance or trespass actions and before the by law enforcement officer in the form of noise complaints. Some municipalities assist in the noise complaints and can if they have MOE type by laws gather evidence and lay charges although most by law enforcement staff are reluctant to intervene in such disputes where the noise only affects the immediate neighbour. The mutual driveway necessitates cooperation. Whether the driveway is really mutual is another issue and another area of dispute frequently resulting in various actions including nuisance and trespass.

8 CONCLUSION

With the exception of spite fences, the majority of issues that cause neighbour disputes are ultimately resolved by the Courts.

The location of a lot boundary is fundamental to many disputes. The *Boundaries Act*, R.S.O. 1990, c.B.10 is available, “where doubt exists as to the true location on the ground of any boundary of a parcel.” Parcel is defined in the Act as, “an area of land described in an instrument by which the title to an interest in land is or was established or an area of land shown on the plan and includes a public highway or any part thereof.” The application is made to the Director of Titles under the *Land Titles Act* and municipalities can also use the Act for the determination of the boundaries.

In conclusion, as long as people live in close proximity to each other which they will continue to do as development intensifies, civil actions between neighbours alleging infringements of their property rights will continue. These are not charter protected rights but this will not stop the tortious actions or the complaints to the municipalities. Neighbour peace, unfortunately, is as difficult to attain as world peace.

APPENDIX A – List of Cases

- 5 *Albuquerque Development Limited v. Etobicoke (Borough)* (1980), 12 O.M. B.R. 105
- 6 *Barber v. Cleave* (1901), 2 O.L.R. 213 (C.P.)
- 7 *Canoe Ontario et al. v. Reed et al.* (1989), 60 O. R. (2d) 494 (H.C)
- 8 *Delamatter v. Brown* (1908), 13 O.W.R. 58 (H.C), varied (1909), 13 O.W.R. 862 (Div. Ct.)
- 9 *Dorval (Ville) v. Provost* (1994), 20 M. L.R. (2d) 131
- 10 *Grey-Bruce Snowmobile Trails Inc. v. Trustees of Morris Estate* (1993), 19 M.P.L.R. (2d) 91 (Ont. Gen. Div.), affirmed (1997), 35 O. R. (3rd) 398 (C.A.)
- 11 *Griffin v. Catfish Creek Conservation Authority*, [1968] 1 O.R. 574 (Co. Ct.)
- 12 *Guerrercac. St. Sauveur-Des-Monts (Village)* (1988), 40 M. L.R. 129 (C.S. Que.)
- 13 *Hillyard v. Grand Trunk Railroad Company* (1885), 8 O. R. 538 (C.A.)
- 14 *Joyce v. Corner Brook (City)* 108 Nfld. & P. E.I.R. 155
- 15 *Koper et al. v. City of Toronto Committee of Adjustment* (1997), 34 O. R. 407
- 16 *Lac-Oux-Sables (Municipalita) C. Julien* (1989), 49 M. L.R. 181 (C. S. Que.)
- 17 *Re Davies and Forest Hill (Village)* (1965), 1 O. R. 240 (H.
- 18 *Turner v., Piccione* (1998), O.J. No. 2980 (Nfld. Prov. Ct.)

Adverse Possession

- 19 *Beaudoin et al v. Aubin* (1981) 21 R.P.R. 78, 33 O.R. (2d) 604, 125 D.L.R. (3d) 277
- 20 *Giouroukos v. Cadillac Fairview Corp.* (1983), 29 R.P.R. 224
- 21 *Gualtieri Farms Ltd. v. Seech* (1999) unreported decision of the Ontario Court of Appeal but can be found on eCarswell citation 1999ONT 3379
- 22 *Household Realty Corp. v. Hilltop Mobile Home Sales Ltd.* (1982), 37 O.R. (2d) 508 (C.A.)
- 23 *Hurren v. Hurren* (1995), 11 R.F.L. (4th) 12 (Ont.Gen.Div.)
- 24 *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680

- 25 *Keli v. 762098 Ontario Inc.* (1992), 24 R.P.R. (2d) 244, 91 D.L.R. (4th) 752, 56 O.A.C. 310 (C.A.)
- 26 *Kreadar Enterprises Ltd. v. Duny Machine Limited*, (1994), 42 R.P.R. (2d) 274
- 27 *Longo v. C. H. Lager Ltd.* (1998) 20 R.P.R (3d) 128 (Ont. Gen. Div.)
- 28 *Lutz v. Kawa* (1980) 13 Alta. L.R. (2d) 8, 112 D.L.R. (3d) 271 (C.A.)
- 29 *Raso v. Lonagan* (1996) 5 R.P.R. (3d) 65 (Ont. Gen. Div.)
- 30 *Frugal v Angel*, 2005 CanLII 51847 (ON S.C.)
- 31 *Teis v Ancaster(Town)* (1997),35 O.R.(3rd) 216 (C.A.) .

Trees

- 32 *R. v. Toma* (2000) C.C.C. (3d) 252
- 33 *Strata Plan NW1102 v. Lee*, 2001 CarswellBC 1658

Encroachments, rights of way easements

- 33 *Parla v. Pleasants*,2006 Can LII 32061 (ON S.C.)
- 34 *Wigle v Vanderkruk* , 2205 CanLII 25104 (ON S.C.)
35. *MacKenzie v Matthews*, (1999),46 O.R. (3rd) 21)
- 36 *Wiltshire v McGill*, 2005 Can LII 18714 (ON S.C.)
- 37 *Di Gregorio v Osborne* 2004 Can LII 34423 (ON S.C.)