



Bob Aaron bob@aaron.ca

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## No flying maple leaves in Markham on Canada Day

*Restriction is in subdivision agreement*  
**Compromise reached in U.S. case**

If you're in the town of Markham this Canada Day weekend, don't expect to see many displays of patriotism in front of local residences. For tens of thousands of Markham homeowners, it's illegal to fly the Canadian flag on their properties.

Last week, I was closing a new home purchase in Markham for a young couple. I told them that the land their home was built on was subject to the terms of 1997 restrictions imposed by the subdivider in the town of Markham. The restrictions that apply to all the homes in this and many other Markham subdivisions.

One clause reads:

"No television antenna, radio antenna, satellite dish of a diameter greater than 24 inches, *mast or flagpole*, windmill..., aluminum awning or shade, (or) outside clothesline... shall be permitted on any lot except inside a dwelling unit..." (The emphasis is mine.)

For years, this clause has appeared in most Markham subdivisions. It sets out what are known as restrictive covenants which can be enforced against the owner of any affected home. From the straightforward wording of the restriction, it's clear that those Markham homeowners are prohibited from having a mast or flagpole of any description on their lots. This, of course, makes it illegal to fly a Canadian flag on Canada Day or at any other time, since it is problematic to fly a flag without a mast or flagpole to support it.

Personally, I find this restrictive covenant extremely offensive, and I doubt it would survive a constitutional challenge under the freedom of expression clause of the Charter of Rights and Freedoms. Nevertheless, the clause is there in black and white on the title to tens of thousands of Markham homes.

Last week I exchanged e-mails with John Mascarin who was, for many years, the town solicitor for Markham. (He recently returned to private practice with Aird Berlis in Toronto.)

Mascarin acknowledged that the restrictions are enforceable against all owners of affected lands. The real issue, he said, is whether one resident in the same subdivision could enforce it against another. Since the restrictions bind all the properties in a subdivision, there is no reason why one homeowner could not ask a court to enforce it against another.

Ray Saelens knows what it is like to have a neighbour complain about a flag on his property. The resident of Chesterfield Township in Michigan spent \$4,000 (U.S.) to put a flagpole behind his house after the terrorist attacks of Sept. 11, 2001. The flagpole is 50 feet tall, and supported a massive 18 by 12 foot American flag.

The problem was that the noise of the flag's flapping kept his neighbours awake at night. When neighbour Mark Gruz complained to local authorities earlier this year, a police officer cited Saelens for violating the local noise ordinance. Facing a ticket, which carries a \$500 fine and 90 days in jail, Saelens became a celebrity overnight.

For Saelens, the sight and sound of an American flag in the wind has special meaning.

"To me," he told a newspaper reporter, "the noise of the flag is the voices of everyone who's died for this country. Never in a million years did I think I would bother someone by flying a flag."

His story was featured in newspapers and on Web sites across the United States, and Saelens appeared on a number of radio interviews, including one with the British Broadcasting Corp. in London. His flag was the subject of jokes on a number of TV talk shows.

Saelens was flooded with calls and letters of support, and returned many cheques from people offering to help with his legal bills.

Ultimately, township attorney Bob Seibert brokered a settlement. Rather than take the flag down at night, Saelens switched to a smaller, 15 by 10 foot nylon flag, and his neighbours agreed to the compromise.

If you're visiting the Anchor Bay area of Lake St. Clair north of Detroit, keep an eye out for Saelens' Stars and Stripes.

But if you're in Markham, don't expect to see a lot of the red and white Maple Leaf.

Before the municipal elections this fall, Markham politicians should admit that the restrictions that prohibit masts or flagpoles on private property are offensive to Canadians.

Markham council or the provincial legislature should void property restrictions which prohibit the flying of Canadian flags.

Something's wrong with this country if Canadians can smoke marijuana on their front lawns with their same-sex spouses, but can't fly a Canadian flag.

What do you think? Should Markham developers maintain uniformity in its subdivisions by prohibiting masts and flagpoles? Is this restriction unconstitutional? Should Canadians be prohibited from flying the flag on their properties?

If you live in Markham, will you be flying the Maple Leaf on Canada Day?

Fax the Star at (416) 865-3635, or e-mail [newhomes@thestar.ca](mailto:newhomes@thestar.ca).

Happy Canada Day!

**Bob Aaron** is a Toronto real estate lawyer. Send questions to Bob Aaron, 10 King Street East, #1400, Toronto, Ontario M5C 1C3, or by e-mail to [bob@aarons.ca](mailto:bob@aarons.ca), phone 416-364-9366, or fax 416-364-3818.

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