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Who owns air above our homes?

Reader requests local no-fly zone

Property rights are lower than ever

Noisy neighbours and noisy neighbourhoods continue to be a matter of considerable concern to Toronto-area homeowners.

One Star reader recently emailed me with an unusual type of noise grievance. Instead of complaining about frisky neighbours, he was agitated about the noise from aircraft flying over his house.

"Can I enforce a no-flight zone over my house?" he asked. No doubt he had in mind a well-known principle of land ownership, which originated in the Middle Ages: Whoever owns the land also owns whatever is above and below it.

Apparently the reader lives under the flight path to a runway at Pearson airport, and is super-sensitive to the noise of aircraft thundering over his roof all day, every day.

If he had lived in Europe in the 13th century, he would have had no trouble enforcing a no-flight zone over his house (not just because there were no airplanes at the time). The law was that a landowner owned everything "to the heavens" and "to the depths."

Times have changed, as courts and legislatures have whittled away at the rights that once accompanied land ownership.

A huge swath of land surrounding the Pearson runways is governed by airport zoning regulations, which are actually registered on the property titles. They provide written notice to purchasers that their land is under or near a flight path, and that the government has assigned air rights over the properties to the airlines and airport operators.

And even in the absence of zoning rules, the courts have reduced the rights of property owners from the heavens to something a little closer to the ground.

Back in the 1980s, Alberta Power Ltd. constructed a power line along a municipal roadway adjacent to Kenneth Didow's farm. The cross-arms of the transmission lines and the wires attached to them extended about six feet over the Didow property, interfering with spraying, seeding and other farm activities.

The Alberta Court of Appeal was asked to declare the cross-arms a trespass on the Didow land.

In a well-reasoned and researched judgment, the court reviewed the law of air rights in the United Kingdom, Canada and the United States, going back to 1610.

Historically, anything overhanging a property whether it was trees, signs, telephone wires or even an adjacent building was considered by the courts to be either a trespass or a nuisance.

Gradually, however, the courts began to acknowledge the realities of air travel.

In Britain, back in 1977, Lord Bernstein of Leigh sued a company that flew over his lands to take aerial photographs. The court denied his claim and proposed a balance between the rights of the landowner and the public air space. Beyond the height necessary for the landowner's use, the court said the air space becomes public domain.

This rule was adopted in the Didow case, and the cross-arms were ruled to be a trespass because they interfered with the use and enjoyment of his land.

Air-space rights are not restricted to the aviation industry.

Several years ago, a client of mine was approached by a Toronto developer who wanted to build a tall condominium next door to her house. A huge crane was necessary to construct the building, and it would have to rotate above her house. As well, the developer wanted to insert steel tieback rods under the house, in order to support the foundations during the excavation.

Without my client's co-operation, construction costs would have been significantly higher, and we negotiated what I thought was a generous agreement.

Subsurface mineral rights are another story. Historically, when the Crown transferred land to original Canadian settlers, it reserved for itself all mines and minerals below the surface. If there's gold under your house, you don't own it.

There are separate rules for gas and oil, which can migrate back and forth below ground. Simply stated, the rule is that you don't own the gas or oil under your property until you bring it to the surface.

As for the Star reader who wants to stop planes flying over his house, he's out of luck.

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Didow v. Alberta Power Ltd. (Alta. C.A.)

Between

Steve William Didow, Kenneth W. Didow, Stewart Charles Knox
and Mary Ann Knox, Applicants (Appellants), and
Alberta Power Limited, Respondent

Alberta Court of Appeal
Haddad, Foisy JJ.A. and Andrekson J. (ad hoc)

July 11, 1988

Alberta Judgments: [1988] A.J. No. 620

Appeal from Cavanagh J.A. dated May 7, 1986.

J.D. Carter, for the Appellants.

B. O'Farrell and D.S. Parlow, for the Respondent.

REASONS FOR JUDGMENT

HADDAD J.A. (for the Court, allowing the appeal): The single issue in this appeal is to determine, on the particular facts which follow, whether the respondent has trespassed the airspace above the appellant's land.

The material facts are not in dispute. The respondent, an electrical utility company, constructed a power line on the municipal road allowance along the east side of the appellants' land. The distance between the centre of the base of four power poles, each approximately 50 feet in height, to the boundary of the appellants' land is two feet. The cross-arms conductors and attaching wires at the top of each pole (collectively called the "cross-arms") protrude six feet into the airspace above the appellant's land.

The appellants in these proceedings, commenced by originating notice of motion, seek a declaration that the cross-arms amount to a trespass. The following paragraph from the affidavit of the appellant, Kenneth W. Didow, sets forth the appellants' concerns:

"There is an old farm yard with a residence on the land. The power line overhangs the east side of the farm yard and we consider it to be unsightly. Since Alberta Power Limited cut down the existing trees under the overhang, we would be reluctant to plant trees in any other area of the overhang. We are also concerned about the danger associated with the lines and the location and operation of tall machinery and equipment such as steel augers or metal granaries under the overhang. In addition, the overhang will restrict the use of aerial spraying and seeding on the land."

The learned chamber judge considered a series of authorities and concluded that the protrusion did not interfere with the appellants' possession of the airspace or its right to possession. He applied the following test:

"Clearly the question is, is it an interference with possession or even the right to possession?"

Here the Applicants do not claim any diminution in their right to full enjoyment of their property. Indeed, the facts are that they are not making use of the air space occupied by the cross arms and wires and they have no intention of doing so."

With respect, that statement does not take into account the problems, actual or potential, referred to in Kenneth W. Didow's affidavit. Moreover, I have read the relevant authorities and applying the principles and tests I extract therefrom I arrive at a conclusion contrary to that reached by the learned chambers judge. Accordingly, I would allow the appeal.

The character of a trespass was not put in controversy. In essence, it is an unjustifiable interference with possession. The appellants are the registered owners of the land below the airspace and their status to bring this action is not in dispute.

A resolution of the issue before the court turns on the extent of the rights acquired by the appellants to the column of air above and within the boundaries of the land.

The jurisprudence in this area of the law has developed from early English cases, before the advent of air traffic, where decisions were influenced by the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* (referred to hereafter as the "latin maxim") which in simple language means that the owner of a piece of land owns everything above and below it to an indefinite extent.

The authorities cited can, generally speaking, be divided into two groups:

1. Cases involving permanent structural projections into the airspace above another's land;
2. Cases involving a transient invasion into the airspace above another's land at a height not likely to interfere with the land owner.

With respect to cases in the first group, the weight of authority favours the view that a direct invasion by a permanent artificial projection constitutes a trespass.

The appellants, as have all claimants to airspace, rely in the main on the latin maxim. This maxim has been the subject of constant attack in airspace litigation over the years and if not discredited has been qualified in its application. Some of the older cases cited by the respondent were aimed at establishing that an overhanging encroachment will have nuisance value only and is therefore not actionable in trespass. This theory is no longer viable, according to recent authority, at least insofar as it applies to structures of a permanent nature.

The first of the early decisions cited is *Baten's case* (1610) 77 E.R. 810 where a portion of the defendant's new home was found to overhang part of the plaintiff's home. Notwithstanding reference to the foregoing maxim the court characterized the overhang as a nuisance. Today, by the application of modern concepts, the overhang, in my view, would be treated as a trespass.

In *Pickering v. Rudd* (1815) 171 E.R. 70 and *Fay v. Prentice* (1845) 135 E.R. 769 it was said that the appropriate remedy in each case was an action in nuisance. Each dealt with projections over an adjoining property.

In *Pickering*, the alleged overhang consisted of a board and Lord Ellenborough did not "think it a trespass to interfere with the air superincumbent on the close". Caution led him to reject trespass by reasoning that to hold otherwise "an aeronaut is liable to an action in trespass *quare clausum fregit*, at the suit of every occupier of a field over which his balloon passes in the course of his voyage". Subsequent judicial pronouncements and existing laws regulating aircraft have now removed Lord Ellenborough's concern. His decision has been supplanted by more recent authority. (see *Kelsen v. Imperial Tobacco Co.* *infra*).

The encroachment of overhanging tree branches litigated in *Lenmon v. Webb* (1894) Times L.R. Vol. 10, 467 was also actionable only in nuisance - on sound reasoning. Lindley, L.J. found no analogy between an artificial projection and the consequential interference caused by the branch of a tree which could be severed.

Corbett v. Hill (1870) L.R. 9 Eq. 671 sustained an action in trespass and acknowledged an owner's right to air space - at least to the vertical column of air over a building.

The decision in *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904, although rejecting a plea of trespass on the facts, confirmed a land owner's rights to air space without explicitly defining the extent of those rights. Telephone wires strung above a street was held not to be a trespass because, by statute, the surface was vested in the board, not as absolute owner, but for the purpose only of maintaining a street. Accordingly, it acquired no right to the air above the street. Their Lordships distinguished between that kind of ownership and that of owners of land vested by ordinary conveyance. The tenor of the three judgments delivered is that absolute ownership of the surface in the Board

would have created rights to the air space to justify a finding of trespass by the placement of overhead wires. This case has received recognition for the characterization given by Brett M.R. to the latin maxim as a "fanciful phrase" to diminish its application in a literal sense.

I come now to cases decided after the turn of the century. In *Gifford v. Dent* (1926) W.N. 336 and *Kelsen v. Imperial Tobacco Co.* [1957] 2 All E.R. 343 the court in each case leaned on the latin maxim in concluding that an overhanging sign amounted to a trespass of airspace.

McNair, J. in the *Kelsen* case refused to follow the decision in *Pickering v. Rudd*. In holding that a trespass had been committed as opposed to a nuisance he adopted the reasoning of cases which followed later in time. He referred, with approval, to both *Wandsworth Board of Works v. Macartney* and *Gifford v. Dent*. In rejecting *Pickering*, he thought it significant that in the Civil Aviation Act "the legislature found it necessary expressly to negative the action of trespass or nuisance" arising from an airplane overhead. He interpreted that to mean that the legislature did not share Lord Ellenborough's view in *Pickering*. He said "Accordingly I reached the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's airspace by this sign".

The facts recited by McNair, J. disclosed that the presence of the sign in his airspace caused the plaintiff no harm or inconvenience and did not diminish his enjoyment. Moreover, His Lordship put no value in the argument that the plaintiff did not require the use of the airspace. I particularly mention these facts because the test employed by the learned chambers judge, based on similar circumstances, according to the excerpt from his judgment quoted at the outset of these reasons, led to a verdict adverse to the appellants.

The learned chambers judge distinguished *Kelsen* on the ground that the litigants were tenants within the same building. With respect, that only clouds the issue. As McNair, J. discussed and disposed of the defendant's reliance on the terms of its lease, the ratio of the case did not turn on the tenancies nor was this aspect argued by counsel before this court.

Counsel for the appellants argues, with some justification, that *Kelsen* and the case at bar are indistinguishable.

Plowman, J. presided over the case of *Ward v. Gold* (1969) 211 EG 155 [1969] EGD 630 where the offending intrusion consisted of overhanging eaves. There is nothing distinctive about this case except to say that in the opinion of Plowman, J. the *Kelsen* case was in point and he upheld the action taken in trespass.

The authorities to which I have referred following *Fay v. Prentice* establish that the right to use land includes the right to use and enjoy the airspace above the land. These cases cautiously fall short of saying that ownership of land includes ownership of all airspace above the land. In any event, they serve to make clear that intrusion by an artificial or permanent structure into the airspace of another is forbidden as a trespass.

Cases which fall into the second group involve transient invasion of airspace at a height unlikely to effect the landowner. The cases in this group to which the respondent is attracted deal with airplanes. Predicated on sound logic and common sense both case law and statute law now decree that a landowner cannot object to air traffic which does not interfere with the use and enjoyment of his property.

The respondent's strongest submission is that actionable trespass only occurs when the intrusion into air space actually interferes with a landowner's use and enjoyment of that space. Its submissions follow the statements leading to the decision reached by the chambers judge. The argument is directed to convince the court that a landowner cannot object to an intrusion into air space over his land which he is not actually occupying and using for the time being. Counsel points to public policy principles developed by the courts to permit the use of aircraft in airspace and then argues that analogous public policy considerations apply to airspace intrusion by overhead electrical installations. As an extension of that argument he says that tens of thousands of miles of transmission lines across Alberta occupy private property.

The analogy is hardly appropriate. Aircraft which are transient and invade space at a height beyond the contemplation of reasonable and ordinary use by the landowner cannot be equated with a low level intrusion of a permanent nature. I agree with the opinion stated of Griffiths, J. in the *Bernstein v. Skyviews* case (infra), that low flying aircraft might very well commit a trespass.

Moreover, if there are many miles of transmission lines already trespassing the airspace above private property without any leave or licence, they will not transform an unlawful practice into a lawful one.

The respondent cited *Lacroix v. The Queen* [1954] Ex. C.R. 69 to advance the proposition that the landowner's rights to the airspace over his property were limited to what he could possess or occupy. This case arose out of a claim for compensation for an easement to provide lighting for the purposes of aerial navigation of aircraft using the Dorval Airport as well as a claim for damages. It was alleged that the airspace over the claimant's land was used by aircraft as a flightway to and from the airport. Fournier, J. referred to the latin maxim as a maxim not suited to meet the development and invention of today's world. In its application, its interpretation in his view, has to be restricted without depriving the landowner of full enjoyment of his property—a principle which he endorsed. That portion of his judgment which lends support to the respondent's position is to be found at page 76 where he said:

"It seems to me that the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.

... I need go only so far as to say that the owner of land is not and cannot be the owner of the unlimited air space over his land, because air and space fall in the category of *res omnium communis*. For these reasons the suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails."

The second case which gives the respondent comfort is *Air Canada v. R.* [1978] 2 W.W.R. 694 cited to expound the proposition that ownership of air space cannot be claimed by anyone as it falls under the category of *omnium communis*. This case is distinguishable on the facts as the claim to jurisdiction to air space is made by the Province of Manitoba. It unsuccessfully asserted its right to levy a sales tax against Air Canada in respect of goods and services provided by it while occupying airspace over the Province. Moreover, the case is not founded in trespass. However, the comments of Monnin, J.A. (now C.J.M.) are relevant and of some significance. After accepting a statement made by the trial judge, which is of no account here, he said at page 697:

"... I would rather rest the case on the basis that air and airspace are not the subject of ownership by anyone, either state or individual, but fall in the category of *res omnium communis*."

Later in his reasons, Mr. Justice Monnin (at page 699) quoted an extract from the judgment delivered in *Lord Bernstein of Leigh v. Skyviews & Gen. Ltd.*, [1977] 2 All E.R. 902 at 907 - in which Griffiths, J. qualified the application of the latin maxim by suggesting "a balance" in compromising the rights of land owners against the general public. Monnin, J.A. then added these remarks:

"The maxim cannot go further than to direct the owner or occupier of land in his enjoyment of the land and also to prevent anyone else from acquiring any title or exclusive right to the space above such land so as to limit a person to whatever proper use he can make of his land"

After giving due consideration to the judgment in *Bernstein* I find the reasoning of Griffiths, J. most persuasive. He reviewed the earlier decisions which found favour with the latin maxim and the circumstance in each instance in which it was applied. At page 905 of his reasons, he said:

"The plaintiff claims that as owner of the land he is also owner of the air space above the land, or at least has the right to exclude any entry into the air space above his land. He relies on the old Latin maxim *cujus est solum ejus est usque ad coelum et ad inferos*, a colourful phrase often on the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century. There are a number of cases in which the maxim has been used by English judges but an examination of those cases shows that they have all been concerned with structures attached to the adjoining land, such as overhanging buildings, signs or telegraph wires, and for their solution it has not been necessary for the judge to cast his eyes towards the heavens; he has been concerned with the rights of the owner in the air space immediately adjacent to the surface of the land.

That an owner has certain rights in the air space above his land is well established by authority."

Following a reference to *Gifford v. Dent* Mr. Justice Griffiths discussed the judgment of McNair, J. in *Kelsen*. He quoted the words used by McNair, J. in reaching his final conclusion and then made this assessment relevant to that decision at page 907:

"I very much doubt if in that passage McNair J was intending to hold that the plaintiff's rights in the air space continued to an unlimited height or 'ad coelum' as counsel for the plaintiff submits. The point that the judge was considering was whether the sign was a trespass or a nuisance at the very low level at which it projected. This to my mind is clearly indicated by his reference to *Winfield on Tort* in which the text reads: ... it is submitted that trespass will be committed by [aircraft] to the airspace if they fly so low as to come within the area of ordinary user.' The author in that passage is careful to limit the trespass to the height at which it is contemplated an owner might be expected to make use of the airspace as a natural incident of the user of his land. If, however, the learned judge was by his reference to the Civil Aviation Act 1949, and his disapproval of the views of Lord Ellenborough in *Pickering v. Rudd*, indicating the opinion that the flight of an aircraft at whatever height constituted a trespass at common law, I must respectfully disagree.

I do not wish to cast any doubts on the correctness of the decision on its own particular facts. It may be a sound and practical rule to regard any incursion into the air space at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance. Adjoining owners then know where they stand; they have no right to erect structures overhanging or passing over their neighbours' land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours about which there may be much room for argument and uncertainty. But wholly different considerations arise when considering the passage of aircraft at a height which in no way affects the user of the land."

Griffiths, J. makes a valid distinction between permanent structures which interfere with air space and transient invasions by aircraft to demonstrate that differing considerations apply. At the same time, his remarks convey approval of the decision reached by McNair, J. in *Kelsen*. In my view the approach he pursues is both reasonable and practical. Lord Wilberforce took the opportunity to trace the latin maxim's origin and to attack its literal application in *Commissioner for Railways et al v. Valuer-General* [1974] A.C. 328 (1973) 3 All E.R. 268. The maxim found its way into a dispute regarding the valuation of land for rating purposes. At page 351 (A.C.) Lord Wilberforce described the maxim as:

"... so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the common law mind. At most the maxim is used as a statement, imprecise enough, of the extent of the rights, *prima facie*, of owners of land ..."

The criticism levelled at the latin maxim by Lord Wilberforce and others no doubt influenced the reasoning of Griffiths, J. in *Bernstein v. Skyviews*. Recognizing that the maxim must be given limited application, Griffiths, J. conceived the idea of striking a "balance".

The quotation from the *Bernstein* case at page 907, which appears in the reasons delivered by Monnin, J.A. in *Air Canada* provides a reasonable test in determining the rights of a landlord to the airspace above his land. He said:

"... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures on it, and declaring that above that height he has no greater rights in the air space than any other member of the public."

Fournier, J. in *Lacroix* limited the land owner's rights to what he could possess and occupy. Griffiths, J. in *Skyviews* took a broader view by recognizing the landowner's right to enjoy the use of air space above his land without limitation except as to height. Beyond the height necessary for the land owner's use, the air space becomes public domain.

The Supreme Court of the United States has also considered the land owner's rights in air space in *United States v. Causby* (1946) 328 U.S. 256. While rejecting the latin maxim as having no place in the modern world - it preserved the land owner's rights to this extent at pp. 264 - 265 which, in my view, is consistent with the views of Griffiths, J. in *Bernstein v. Skyviews*.

"The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. ... The fact that he does not occupy it in any physical sense by the erection of buildings and the like - is not material. ... While the owner does not in physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

The two concepts which become apparent are firstly that the courts will not give literal effect to the latin maxim and secondly, the proper remedy for interference with a land owner's air space with a permanent fixture is in trespass as opposed to nuisance.

In my opinion, the balancing criterion formulated by Griffiths, J. is a logical compromise to the rights of the landowner and the general public. It is a test I adopt. I view this test as saying a land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land. The cross arms constitute a low level intrusion which interferes with the appellant's potential, if not actual, use and enjoyment. This amounts to trespass.

For the sole purpose of comment I refer to the cases of *Woolerton and Wilson v. Richard Costain Ltd.* [1970] 1 All E.R. 438 and *Lewest Ltd. v. Scotia Towers* (1981) 126 D.L.R. 239, where, in each instance, it was held that an overhanging crane used in the construction of a building trespassed a land owner's air space, notwithstanding that the cranes were not permanent intrusions. In light of the distinction now recognized in encroachment cases between nuisance and trespass my inclination would be to characterize the overhanging cranes as a nuisance.

I would allow the appeal and grant the appellants the declaratory relief sought by them. The appellants are entitled to costs throughout.

HADDAD J.A.

FOISY J.A.: I concur.

ANDREKSON J. (ad hoc): I concur.