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Good fences make good neighbours but bad lawsuits

Back in 1915, poet Robert Frost penned the line "Good fences make good neighbours." Last year, in a bitter dispute involving the owners of adjoining cottage properties, Justice Joseph W. Quinn echoed Robert Frost in the first line of his judgment.

"A good fence may make a good neighbour," he wrote, "but does it make a good lawsuit?"

The answer, of course, requires a reading of three separate court decisions, and depends on whether the reader sides with the plaintiff or defendant.

Anthony and Catherine Suprun own a cottage property at Turkey Point, not far from Long Point on Lake Erie. Several members of the Sloat family own a similar cottage next door.

Back in 1981, Norfolk County passed a zoning bylaw defining a "boundary fence" as "any fence, hedge, free standing wall ... intended to delineate a property boundary." The bylaw limits the height of boundary fences in residential areas to a maximum of two metres (6.6 feet).

A separate bylaw, the fence bylaw, prohibits virtually all fences in Norfolk county from exceeding two metres in height.

The fence bylaw allows the county to remove a nonconforming fence, and provides for a fine of up to \$2,000 for any contravention.

In early 2001, the local building inspector advised the Sloat family orally and in writing that they could construct a retaining wall between their property and the Suprun property.

Three months after permission was granted, the inspector wrote to the Sloat family's lawyer to recommend construction cease until the county resolved a complaint about the fence. By that time, however, the fence had been completed.

Justice Quinn described the barrier as 213 feet long, consisting of railway ties stacked horizontally to a height of four feet to retain an earthen berm. A total of 57 juniper shrubs were planted on top of the berm, covering 195 of the 213 feet. When originally planted, the shrubs were 10 feet high, but by the time the case got to court, they were 18 feet high. Together with the retaining wall they formed a solid barrier about 23 feet in height.

Eventually, the Supruns sued the Sloat family for a court order declaring that the barrier was subject to the county zoning and fence bylaws, and that it be brought into compliance or removed.

In raising 10 separate objections to the Supruns' court case, the Sloat family "rained issues down upon the court," according to the judge.

After a very lengthy analysis of the issues, Justice Quinn decided last July that the barrier was a fence within the meaning of the fence bylaw and that it contravened the legal height limit.

He ordered the Sloats to remove the fence or alter it so that it complied with the bylaw.

The parties were back in court again last December, and in a 59-paragraph judgment, Justice Quinn awarded the Supruns costs of \$14,210 payable by the Sloats.

But the case didn't end there. The Sloat family appealed and the matter was heard and decided by the Ontario Court of Appeal in February.

The Sloats argued before a three-judge panel of the Court of Appeal that the region's zoning bylaw superseded the local fence bylaw. The court ruled that there was no basis to challenge the validity of the local zoning bylaw, which didn't apply to the cottage area in any event.

The fence bylaw applied to the cottages, and the barrier was in violation of it. The court dismissed the appeal.

In a rather puzzling move, the court awarded \$6,000 in costs to the Sloat family which lost the appeal. This may have been a typographical error, but it stands in the court record.

To answer Justice Quinn's original question, this case involved neither a good fence nor a "good" lawsuit. The Sloats had to remove the barrier at their own expense, and pay costs at trial for the Supruns' counsel. The lawyers were paid for three court appearances each, totalling perhaps \$50,000 or more. The case emphasizes how much time and money can be spent on neighbour disputes. In my view, mediation or arbitration might have produced a cheaper and faster result.

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References:

Trial <http://www.canlii.org/en/on/onsc/doc/2007/2007canlii56089/2007canlii56089.html>

Costs <http://www.canlii.org/en/on/onsc/doc/2007/2007canlii57098/2007canlii57098.html>

Appeal <http://www.canlii.org/en/on/onca/doc/2008/2008onca94/2008onca94.html>