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September 17 2011

Is construction crane 'trespassing?'

I received an interesting call earlier this month. A reader lives next to a construction site and the builder's crane is continually passing through the air space above her home. She wanted to know if she was entitled to any compensation.

I discovered the answer in a research paper about crane swing agreements entitled "Can You Swing It?" by Leor Margulies of Robins Appleby & Taub in Toronto. The paper is published on the firm's website at <http://www.robinsapplebyandtaub.com/admin/publications/pdf/68.pdf>.

According to Margulies, an analysis of the neighbour's question begins with a legal maxim attributed to Accursius of Bologna (1182-1260). Known by its Latin short form, *cujus est solum*, it is usually translated to mean, "Whoever has the land itself also owns everything up to the vaults of Heaven and down to the floor of Hell."

Of course, since there were no aircraft or construction cranes in the Middle Ages, the legal principles have undergone some modifications in modern times to balance individual property rights with the public interest.

That balance was best articulated in the 1978 British case of *Leigh v. Skyviews and General Ltd.* The plaintiff sued a company that flew over his land to take aerial photographs.

The British court stated it was necessary to balance the rights of an owner to enjoy the land against the rights of the general public to take advantage of all that "science now offers in the use of airspace." The court ruled the rights of the owner were limited to only that height that is necessary for the ordinary use and enjoyment of the land. Above that height, the property owner has no greater rights than any other member of the public.

That reasoning was adopted in Canada by the Alberta Court of Appeal in the 1988 case of *Didow v. Alberta Power*, but with a different outcome: the cross-arms of hydro transmission towers were ruled to be a trespass because they interfered with spraying and farm activities.

In his research paper, Margulies notes that construction cranes swinging over private property have been consistently held by Canadian courts to interfere with private air space.

The issue for the courts to determine is whether a swinging construction crane should be treated by the law as a nuisance or a trespass.

Unfortunately, Canadian courts have not always been on the same page with this issue. In 1981, the Newfoundland Supreme Court in *Lewest v. Scotia Towers* ruled that a swinging crane constitutes a trespass and the court can issue an injunction to stop the activity. But in the 1990 case of *Kingsbridge Development v. Hanson Needler*, the Ontario High Court ruled the crane could not be a trespass, and the only remedy was damages for the nuisance.

A compromise position from a 1970 British case has now found favour in Canadian courts. In the case of *Vaz v. Jong* in 2000, Justice Robert Sutherland noted there are "circumstances in which to grant an injunction would be to leave one party at the mercy of extortionate demands by the other unless he was to give up his project altogether . . . The discretion to substitute court-determined damages does, however, provide a desirable element of flexibility for those cases where to simply grant an injunction, or to simply refuse one, would work an injustice."

Margulies concludes that the law is not yet settled in Canada whether a property owner whose land is underneath a construction crane can claim an injunction due to the trespass, or damages from the nuisance, or something in between.

The courts, he says, have shown themselves to be open to compromises between the parties on the complicated issues involved in overhead crane activities.

Margulies suggests that property owners should be prepared to accept a nominal but reasonable offer of compensation. If the parties cannot come to an agreement, the court may award fair compensation or grant a delayed injunction to take effect only when construction is complete and the crane is removed.

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