Law and the Appraiser

Airy stories—how high is up?

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At common law, the owner of land was deemed to own not only the surface but also everything above and below the surface. This principle was expressed in a Latin maxim "*cujus est solum, ejus est usque ad coelum et ad inferos,*" which, roughly translated, means "whoever owns the soil also owns up to the heavens and down to the lower world."

The enforcement and protection of subsurface rights have not caused legal problems. The same cannot be said about rights in the airspace above the surface. As long ago as 1815, in *Pickering v. Rudd* 171 E.R. 70, Lord Ellenborough said that an interference with the airspace above someone's property would not amount to trespass and so would not be actionable by the owner unless he would be able to prove he had suffered some particular damage. In Lord Ellenborough's opinion, it was inconceivable "that an aeronaut is liable to an action of trespass at the suit of the occupier of every field over which his balloon passes in the course of his voyage."

However, the court went on to say that, if the owner could show that the balloon caused damage in passing through the airspace, it might constitute a nuisance for which damages could be recovered and, if necessary, an injunction obtained to prevent future incursions. In practice, either damage cannot be proved in most cases or it constitutes a public nuisance with respect to which there is usually no private right of action.

In *Lord Bernstein of Leigh v. Skyviews General Ltd.* (1977) 2 All E.R. 902, another English court dismissed a trespass action brought by Lord Bernstein against a company which had flown over his residential estate and taken an aerial photograph. Mr. Justice Griffiths agreed that it was well established by case law that an owner has certain rights in the airspace above his land.

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However, those rights were not unlimited. He thought that an intrusion into the airspace would constitute a trespass only if it was at a height which might interfere "with the ordinary user" of the land.

In *Lacroix v. The Queen* (1954) 4 DLR 470, the owner of agricultural land near Montreal's Dorval Airport claimed compensation from the federal crown for the alleged use of his airspace by aircraft using a flightway to and from the airport Mr. Justice Fournier of the former Exchequer Court rejected the claim. He stated that "the owner of land has a limited right in the airspace over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land." He concluded that airspace cannot, in fact, be owned by an individual because it falls into the category of property owned by the general public (*res omnium communis* lit., i.e., "community owned property"). Accordingly, even if a landowner exercises his right to erect buildings or other structures, he does not take possession of the airspace.

The *Lacroix* and *Lord Bernstein* cases formed the basis of the rejection by the Manitoba Court of Appeal of the claim by the Province of Manitoba to levy a sales tax against Air Canada in respect of goods and services provided by it in aircraft flying across the province. The court said 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.*"

The courts have had little difficulty in upholding a surface owner's claim to ownership of the airspace when the alleged trespass is caused by some structural projection over the property line. Thus, in *Kelsen v. Imperial Tobacco Co.* (1957) 2 All E.R. 343, the company was ordered to remove an advertising sign affixed to adjoining property which projected 20.32 centimeters into the airspace of Kelsen's leased shop premises.

In *Wandsowrth Board of Works v. United Telephone Co. Ltd.* (1884) 13 Q.B.D. 904, the English Court of Appeal held that the board only had title to the surface of a street over which the company had placed its wires. However, the court said that had the wires been placed over privately owned land, they would have justified a finding of trespass. In both England and Canada, it has been held that construction boom cranes swinging over adjacent property constitute a trespass in the adjoining property owner's airspace (*Woollerton and Wilson Ltd. v. Richard Costain Ltd.* (1970) 1 All E.R. 483; *Lewvest Ltd. v. Scotia Towers Ltd.* (1981) 126 D.L.R. (3d) 239).

These and other cases were reviewed and analyzed by the Alberta Court of Queen's Bench and the Alberta Court of Appeal in *Didow v. Alberta Power Ltd.* (1986) 36 L.C.R 139 (Alta. Q.C.) reversed (1988) 40 L.C.R. 26 (Alta. C.A.) where landowners claimed that the company's powerline trespassed over their land. The line was on a municipal road allowance along the east side of the owner's land. The base of the power poles, each approximately 15 meters in height, were .6 meters from the property line. However, at the top of each pole was a cross arm conductor and attached wires which projected 1.8 meters into the airspace above the owner's land. The lowest wires hanging from the cross arms were 10 meters above the surface. The owners were

not using the airspace into which the cross arms and conductors projected and had no intention of so doing. The relevant local land use bylaw provided for a minimum setback for buildings and structures of at least 40.85 meters from a municipal road. There was no evidence that any farm machinery likely to be used on the land exceeded 7.3 meters in height.

At trial, Mr. Justice Cavanagh dismissed the owners' application for a declaration that the projecting portion of the line constituted a common law trespass. He noted that trespass to land is essentially injury to possession and the issue was, therefore, whether the landowners could be said to possess the airspace some 10.36 meters above the surface of their land as distinct from the surface of the land itself which, without doubt, they did possess.

Mr. Justice Cavanagh reviewed the English and Canadian authorities, agreed with the principle stated by Mr. Justice Fournier in *Lacroix* considered above, and concluded that:

1. The landowners had not suffered any loss in their right to fully enjoy their land. On the facts, they were not using the airspace occupied by the cross arms and had no intention of so doing.
2. The landowners could not take possession of the airspace 10.67 meters above the surface by constructing buildings of that height at the building line because of the land use bylaw.
3. In the absence of any building restrictions, if the owners chose in the future to build below the cross arms, at that point in time the cross arms would become a nuisance and the owners could require their removal because they would be damaging in preventing the owners from exercising their rights. Pending such future developments, the cross arms constitute neither trespass nor nuisance.

On appeal, the trial judge was reversed and the Court of Appeal granted the declaration sought by the landowners, namely that the construction of powerlines over their lands constituted a trespass. Mr. Justice Haddad delivered the judgement of the court. He disagreed with the conclusion of the trial judge that the owners had not claimed any diminution in their right to full enjoyment of their property. He noted that one of the owners had testified as to problems, actual or potential, caused by the overhang, namely (1) an inability to plant trees in the area of the overhang, (2) the danger associated with the lines, (3) the location and operation of farm machinery and equipment such as steel augers or metal granaries, and (4) restriction on the use of aerial spraying and seeding.

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Mr. Justice Haddad adopted the balancing criterion formulated by Mr. Justice Griffiths in *Bernstein* when 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 airspace. This balance is, in my judgement, best struck in our present society by restricting the rights of an owner in the airspace 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 airspace than any other member of the public.

He considered this to be a logical compromise to the rights of the landowner and the general public and provided a test which he adopted.

> I view this test as saying a landowner 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.

The Court of Appeal was unimpressed with the argument that, just as the courts have countenanced the intrusion of aircraft into airspace not actually used for the time being by the surface owner, so analogous public consideration should apply to airspace intrusions by overhead electrical installations, having in mind that "tens of thousands of miles of transmission lines across Alberta occupy private property."