Ascertaining a dominant tenement with a right to a view
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***Kolias v. Owners Condominium Plan 309 CDC*, 2007 ABQB 714**
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The small community known as Eagle Ridge occupies the eastern shore of the Glenmore Reservoir in Calgary. In 1971, a restrictive covenant was registered against Lot 10 in the Eagle Ridge community, a lot now owned by the appellants, Ike and Lisa Kolias. In the restrictive covenant, Lot 10 was divided into three areas and height restrictions were imposed on two of those three areas. No structure or hedge over six feet in height could be built or placed in the first of those areas. Nothing over fourteen feet in height (except chimneys or radio or T.V. antenna) was allowed in the second area. Although not specified in the restrictive covenant itself, its purpose arguably was to protect the sight lines of the units in the six storey condominium on the adjacent lot. These units had views in three directions, including views of downtown to the north and, to the west across Lot 10, views of Heritage Park, the Glenmore Reservoir and the mountains to the west.

The Kolias' applied for a discharge of the restrictive covenant on the basis that the deed creating the covenant did not identify the dominant tenement, i.e., it did not describe in any way the parcel of land that benefited from the height restrictions that burdened Lot 10. In December 2006, the Master had refused to order the discharge. This was an appeal from that decision and Mr. Justice Alan D. Macleod upheld the validity of the restrictive covenant and refused to remove it from Lot 10.

The Kolias' application was brought under section 48 of the *Land Titles Act*, R.S.A. 2000, c. L-4, which Mr. Justice Macleod concluded largely codified the common law. Subsection 48(1) allows the registration of a "covenant that the land, or any specified portion of the land, is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land." Subsection 48(5) provides that the registration "of a condition or covenant as running with or annexed to land does not make it run with the land, if the covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land."

There are a number of features a restrictive covenant must possess at common law in order to "run with the land" and thereby be binding upon subsequent owners of the burdened land. The only feature in question in this case was the requirement that the lands benefited by the restrictive covenant must be sufficiently identified in the deed creating the restrictive covenant. There was no dispute that identification of the land to be benefited by the height restrictions on Lot 10 was missing from the deed in this case. Nor was there any quarrel that the leading case is the Supreme Court of Canada decision in *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639. The most often quoted passage from that case, found in the judgment of Judson J. at page 653 (emphasis added), contained the following statement: "[T]here is no evidence anywhere in the record to indicate whether the Club had any such land capable of being benefited. ... This fails to

meet what I think must be regarded as the minimum requirements that *the deed itself must so define the land to be benefited as to make it easily ascertainable*." This case, Mr. Justice Macleod held, turned on the meaning of the words of Judson J. in *Galbraith.* Could evidence extrinsic to the deed creating the restrictive covenant be used to ascertain the dominant tenement, or could it not?

Mr. Justice Macleod noted that there was nothing in section 48 of the *Land Titles Act* that requires the dominant tenement be identified in the deed containing the restrictive covenant. However, that section does require that titles exist for both the dominant and the servient tenement and he acknowledged that this requirement is consistent with the idea that the dominant tenement must be "ascertainable," within the meaning of *Galbraith*. He also acknowledged that the Alberta Court of Appeal, in *Guaranty Trust Co. v. Campbelltown Shopping Centre Ltd.* (1986), 72 A.R. 55, expressly adopted the "easily ascertainable" test set out by Judson J. in *Galbraith*. He noted, however, that the Court of Appeal refused to give effect to the restrictive covenant in that case because, after an investigation into the facts, the extent of the dominant tenement was still in doubt. That Court of Appeal decision, therefore, supported the idea that extrinsic evidence is admissible.

Mr. Justice Macleod also found in section 139(1) of the *Land Titles Act* a strong indication that a restrictive covenant can run with the land where the dominant tenement is *not* identified. Sections 137 to 139 of the current *Land Titles Act* were added in 1988 and deal with who is allowed to withdraw, modify or discharge caveats protecting a number of different interests. Section 139(1) provides that "[i]n the case of a caveat that is registered to protect a restrictive covenant running with or capable of being annexed to land, (a) section 138 does not apply, and (b) where the dominant tenement is not identified in the caveat, section 137(1) does not apply." He concluded at paragraph 23 that the *Land Titles Act* "does not require that the dominant tenement be identified on the document creating the restrictive covenant." Note, however, that section 139(1) refers to the absence of a description of the dominant tenement in the *caveat* and not in the deed creating the restrictive covenant.

Having determined that there was no clear common law requirement that the dominant tenement be identified in the instrument creating it, Mr. Justice Macleod next considered what type of extrinsic evidence was admissible for the purposes of ascertaining the dominant tenement. He looked at two British Columbia Court of Appeal decisions where the court had admitted evidence of the surrounding circumstances at the time the covenant was created. He noted that it was easy to do a search of the state of affairs surrounding Lot 10 and the parcel of land upon which the condominium stood as at the 1971 date of the deed containing the restrictive covenant. Such a search would reveal that the seller of Lot 10 owned only one parcel of land adjacent to Lot 10, namely, the parcel on which the condominium already stood immediately to the east of Lot 10. He concluded that the covenant's references to sight lines would have made it clear that it was the units in the condominium that were to benefit. Thus, the dominant tenement was "easily ascertainable" even though it was not mentioned at all in the deed containing the restrictive covenant.

The reasoning and result in this case are out of step with the weight of authority that requires a dominant tenement be sufficiently identified in the deed creating the restrictive covenant. There

is no support for a change in the common law in the *Land Titles Act*. Section 48 of that Act confirms that a restrictive covenant must be valid at common law. Section 139(1) only states that the dominant tenement need not be described in a caveat filed to protect a restrictive covenant. It makes no change to the requirement of sufficient identification in the deed creating the restrictive covenant.