

CANADA / JUDGMENT

Schriemer v. Harris

2021 BCSC 1490

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1490 Schriemer v. Harris

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schriemer v. Harris,

2021 BCSC 1490

Date: 20210730

Docket: S129330

Registry: Kelowna

Between:

Ronnald Schriemer and Lientje Cornelia Jacoba Schriemer

Petitioners

And

Stephen Kenton Harris, Denise Louise Harris, Joel Bradley Lindsay,

Lindsay Colleen Lindsay, Glenn Arthur Barbour,

Christine Ingeburg Ella Barbour, Murray Douglas Dawes,

Carla Richelle Dawes, Cindy Robyn Moore-Mulcahy, Kenneth John Ewert,

Monica Ruth Ewert, Lisa Allison Buriak, Jianwen Zhang,

Michael Joseph Murray, Barbara Ann Smith-Murray, Mark Robert Shukla,

Elfe Elaine Shukla, Antonio Padula, Cherie Ann Padula, Scott Brian Vigar,

Leeann Catherine Vigar, Elizabeth Christine Warawa,

Peter Henry Adam Koning, Jaana Hannele Koning, Sheila Alana Dietrich,
Dean De-Willy Dietrich, Mark Hasek, Maria Hasek, Zdena Zuydervelt,
Willem Frederik Zuydervelt, Gagan Suri, Sarah Suri, Mark Douglas Rothery,
Stacy Alana Rothery, Robert Craig Wozniak, Marianne Lee Wozniak,
Harold Hans Axel Goetz, Marita Gertrud Goetz, Xiuli Duan, Gys Op De Beek,
Angela Op De Beek, Robert Paul Eger, Doreen Louise Marleau-Eger,
James Campbell Zannet, Elizabeth Jean Zannet, Kenneth Sorensen,
Olutoyese Oyelese, Denise Marie Oyelese, Mile Savic, Dusanka Diana Savic

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Petitioners:

G. Alfonso

Counsel for the Respondents,

Stephen Harris and Denise Harris:

A.P. Prior

K.R. Ellison

No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 10, 2021

Place and Date of Judgment:

Kelowna, B.C.

July 30, 2021

Introduction

- [1] The petitioners apply under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377 for an order cancelling a statutory building scheme ("Building Scheme") registered against a subdivision in the Upper Mission area of South Kelowna on the basis that it is vague and obsolete.

- [2] The petitioners are owners of one of 29 lots comprising a subdivision that overlooks Okanagan Lake. The respondents are the registered owners of the other lots in the subdivision. Save for Stephen Harris and Denise Harris (collectively, the "Harrises"), none of the other respondents took a position on the petition. The Harrises own a nearby lot uphill from the petitioners' lot.

Background

- [3] On October 27, 1997, the developer of the subdivision registered the Building Scheme over all of its lots. The Building Scheme set out various restrictions including yard setbacks, accessory buildings, fence height, minimum residence sizes, and vehicle parking. Many of the restrictions related to the construction of homes, all of which have since been completed. The subdivision can now be considered mature.

- [4] One of the restrictions (the "Tree Restriction Clause") provided:

No trees now standing on Lots 1 to 7, inclusive, on Tanager Drive shall be cut or removed except with the written consent of the Design Approval Authority. Trees destined for removal must be plotted and noted on drawings submitted to the Design Approval Authority. The portion of any Lots lying between the Building Line of the Principal Building and the lot line of any adjoining street shall not remain unlandscaped beyond twelve (12) months from the date of commencement date of construction; no shrubs or trees shall be planted which will grow to a height of more than 7.62 meters (25'.0) at maturity or unduly restrict the view of adjacent owners or occupants.

- [5] The petitioners bought Lot 28 in 2001. Their lot is downslope from Lot 5, which was purchased by the Harrises in 2007. The petitioners' home and the Harrises' home are kitty-corner and across the street from each other.
- [6] Trees on the petitioners' lot have grown over the years and now allegedly obstruct the Harrises' view of Okanagan Lake. The Harrises' attempts to have the petitioners keep the offending trees trimmed to below 25 feet, while initially successful, have now failed. In 2020, the Harrises again attempted to persuade the petitioners to trim/remove their trees. Relying on the Tree Restriction Clause, Mr. Harris hand-delivered a letter to the petitioners on August 6, 2020 requesting that the trees blocking his view be trimmed and/or removed. He volunteered to contribute \$500 towards the cost. The petitioners ignored that request prompting the Harrises to have their lawyer follow it up with an October 26, 2020 letter stating that the petitioners' failure to address the issue would result in an application for a mandatory injunction.
- [7] The petitioners responded by filing this petition on November 13, 2020 seeking the cancellation of the Building Scheme. Specifically, they seek:

1. An Order that the Declaration of Building Scheme registered on October 27, 1997 in the Kamloops Land Title Office as KL117549 (the "Building Scheme") against lands and premises in Kelowna, B.C. and legally described as:

Lots 8-29 Section 23 Township 28 ODYD District Plan KAP60402, and

Lots 5-11 Section 23 Township 28 ODYD District Plan EPP27701

(the "Subdivision Lots")

be canceled pursuant to Section 35 of the Property Law Act, R.S.B.C. 1996, c. 377 as a charge against the Subdivision Lots;

2. Upon presentation of a court-certified copy of the order sought, the Registrar of Titles in the Kamloops Land Titles Office shall forthwith cancel registration of the Building Scheme as against the Subdivision Lots;
 3. Alternatively, a Declaration that paragraph 3.(j)(vi) of the Building Scheme is void on the basis that it is too uncertain to be enforceable;
 4. Costs; and
 5. Such other relief as this Honourable Court may deem just and appropriate in the circumstances.
- [8] The Harrises filed a Response to Petition on December 18, 2020 seeking to have the Building Scheme enforced against the petitioners with a mandatory injunction or, alternatively, if the Building Scheme is held to be unenforceable, seeking minor modifications to it to uphold its intent to protect the views and character of the neighbourhood.

The Petitioners' Position

- [9] The petitioners' position is that the entire Building Scheme is obsolete and should be cancelled pursuant to s. 35(2)(a) of the Property Law Act. Even if the entire Building Scheme is not obsolete, they contend that the Tree Restriction Clause is vague, ambiguous, and has so many possible interpretations that it cannot be understood. Citing s. 35(2)(e) of the Property Law Act, they say that it is unenforceable and should be cancelled.
- [10] Respecting obsolescence, they say that the subdivision is a built up, mature community and has been for years. Considering the nature of the Building Scheme itself and the circumstances of its use, they say it is out-of-date, impractical and has been ignored by the owners of the subdivision's lots for years. Besides, they say, the City of Kelowna has bylaws in place that duplicate or adequately cover many of the issues the Building Scheme is intended to address.
- [11] Respecting the Tree Restriction Clause, the petitioners argue that one interpretation of it is that it only applies to the area between the Principal Building and the Building Line and the lot line of an adjoining street. They also say there is no way to make sense of its last three

lines which stack ambiguity on top of ambiguity. They argue it is not clear what is meant by "adjacent owners or occupants". They contend that a plain reading would be that the clause is limited to restricting views of adjacent properties. Because the Harrises' lot is not adjacent to the petitioners' lot, they say the Harrises cannot force them to trim or take down their trees in any event. Lastly, they argue that the phrase "unduly restrict the view" is entirely subjective. "View" is not defined and could mean a "view" of anything. There is no reference to "view" meaning the view of Okanagan Lake.

- [12] In short, they argue that the Tree Restriction Clause is void and unenforceable. In support of their position, they rely on: *Hofer v. Guitonni*, 2011 BCCA 393 [Hofer]; *Goodwin v. Ridley*, 2006 BCCA 581 [Goodwin]; *Jabs v. Good*, 2009 BCSC 320 [Jabs]; and *Cole v. Paterson*, 2019 BCSC 45 [Cole].

The Harrises' Position

- [13] The Harrises argue that the Tree Restriction Clause is neither vague nor unenforceable. They say that in the context of the subdivision's construction, the Building Scheme must be considered as a whole. They contend that the cases upon which the petitioners rely are distinguishable because they mainly relate to restrictive covenants not building schemes and there are important differences between them. In particular, they say that restrictive covenants are typically registered against one property for the benefit of another (usually adjacent) property and are to be construed according to the ordinary rules of contractual interpretation, whereas building schemes are registered on title for the mutual benefit of all owners of a subdivision. In other words, building schemes, they say, involve a community of interests among all the owners. They argue that building schemes are not subject to the same strict rules of construction as restrictive covenants are, but rather, are to be interpreted using a "purposeful" approach, meaning, that they are not to be construed so strictly that it has no practical or enforceable effect.
- [14] Using the purposive approach, the Harrises assert that the Building Scheme was intended to create and preserve the character of the subdivision neighbourhood by requiring its lot owners to maintain their yards in a certain manner, including not obstructing views of neighbouring properties. Viewed in this context, the Tree Restriction Clause is not so vague as to be unenforceable. The Harrises assert that although the Tree Restriction Clause contains language that does not apply to the present circumstances (including the provision regarding removal of trees on Lots 1 to 7), the phrase "no shrubs or trees shall be planted which will grow to a height of more than 7.62 meters (25 feet) at maturity" is clear and unambiguous. They say it was intended that all trees in the subdivision must not be allowed to exceed 25 feet so as to preserve the character of the neighbourhood. Further, they argue, that the phrase "unduly restrict the view of adjacent owners", in the context of what the Building Scheme was attempting to accomplish, is not so vague as to be unenforceable.

[15] In support of their position, the Harrises rely on: *Suomalainen v. Jernigan*, 2004 BCSC 465 [Suomalainen]; *Paterson v. Burgess*, 2017 BCCA 298 at paras. 28 and 31 [Burgess]; *Swiatlowski v. McFaul*, 2006 BCSC 742; and *Marshall v. Rosas*, 2017 BCSC 1860 [Marshall] at para. 28.

Issues

[16] There are two issues:

- a) Is the Tree Restriction Clause vague to the point of being unenforceable?
- b) Should the Building Scheme be cancelled due to obsolescence?

The Property Law Act and Legal Principles

[17] Section 35(1) of the Property Law Act, provides that the court may modify or cancel various charges or interests in land including statutory building schemes. The relevant portions are:

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land,

- (d) a statutory building scheme;

[18] Section 35(2) sets out what is required before the court may do so. The relevant portions are:

- (2) The court may make an order under subsection (1) on being satisfied that
 - (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete;
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[19] Section 35 has been referenced in a number of decisions to which I have been referred. The principles that emerge are:

- i. The Court's authority under s. 35(2) of the Property Law Act to cancel or modify the Building Scheme is discretionary;
- ii. Obsolescence, under s. 35(2)(a), requires a consideration of the nature of the charge itself in the circumstances of the use of the subject property and a determination of whether on those facts the charge or interest is obsolete (*Chivas v. Mysek*, 1986 CarswellBC 1259 at para. 16 (C.A.); *Vandenberg v. Olson*, 2010 BCCA 204 at paras. 27-33; *NBC Holdings Ltd. v. Aarts Nursery*, 2021 BCCA 7 at para. 54 [NBC Holdings]);
- iii. Whether an easement is obsolete depends on the nature of the easement itself and the circumstances of the use of the relevant property; it is not to be decided on a basis of balancing the rights of the parties. An easement cannot be obsolete in circumstances in which it has been in regular use (NBC Holdings at para. 54);

- iv. A restriction against land use becomes obsolete when it has ceased to have currency because of a change in circumstances, or due to disuse (Burgess at para. 28);
- v. A building scheme will not be held to be obsolete simply because the city's zoning bylaws and provincial building codes regulate many of the same things (Marshall at para. 28);
- vi. Whether in a restrictive covenant or building scheme, it is the restriction on land that matters. In either case, it is a contractual document and the general principles of contract interpretation apply. The approach to the interpretation of building schemes is the same as the approach to interpretation of restrictive covenants (Hofer at paras. 14 and 17);
- vii. In order to be enforceable, a restrictive covenant must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed on them (Cole at para. 42, citing 585582 B.C. Ltd. v. Anderson, 2015 BCCA 261 quoting from Newco Investments Corp. v. British Columbia Transit (1987), 14 B.C.L.R. (2d) 212 at 224 (C.A.));
- viii. Restrictive covenants are generally to be construed according to the ordinary rules of contractual interpretation--the words used must be viewed in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as a guide (Hofer at para. 14);
- ix. The restriction on the use of land is to be clearly expressed and is to be interpreted as a contractual term in the context of the factual matrix that existed at the time it was placed. If an ambiguity exists, it is to be resolved in favour of the free use of land (Goodwin v. Ridley, 2006 BCCA 581 at para. 12, see also Hofer at paras. 18-22, 33); and
- x. Restrictions in building schemes must be given effect to the clear meaning of the scheme as a whole, as grounded by the text, and must be interpreted in accordance with the principles set out in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 at para. 57 [Sattva]; see also Burgess at paras. 22-23.

[20] With these principles in mind, I will now consider the Building Scheme and Tree Restriction Clause and whether I should exercise my discretion to modify or cancel them.

Discussion

Issue #1 - Is the Tree Restriction Clause vague to the point of being unenforceable?

[21] Yes, but only partially. In my view, save for the phrase "or unduly restrict the view of adjacent owners or occupants", the Tree Restriction Clause is unambiguous and clear.

[22] The Tree Restriction Clause must be interpreted in light of the Building Scheme as a whole, not in isolation. Its general purpose is an important factor in considering whether ambiguities exist. While the surrounding circumstances are to be considered in interpreting a contract, they are never to overwhelm the words of the contract itself. The interpretation of a contractual provision must always be grounded in the text and read in light of the entire contract. The surrounding circumstances cannot be used to deviate from the text such that

the court effectively creates a new agreement (Burgess at paras. 22-23.)

- [23] In support of their argument that the Tree Restriction Clause is ambiguous and vague, the petitioners break the Tree Restriction Clause down into its components. I will address their argument component-by-component.
- a. "No trees now standing on Lots 1 to 7, inclusive, on Tanager Drive shall be cut or removed except with the written consent of the Design Approval Authority"
- [24] The fact that the beginning of the Tree Restriction Clause identifies only Lots 1 to 7, does not imply that the entire clause is intended to apply only to those lots. Further, the fact that the "Design Approval Authority", identified at the time the Building Scheme was registered, refers to an architectural firm that no longer exists and no successor design approval authority may have been identified, also does not mean the entire clause is obsolete and unenforceable. The dispute between the parties relates only to the last sentence of the Tree Restriction Clause. The rest of it is not relevant to the current dispute. In my view, it cannot be reasonably argued that the tree height restrictions do not apply because the preceding portions of the Tree Restriction Clause may be outdated.
- b. "Trees destined for removal must be plotted and noted on drawings submitted to the Design Approval Authority"
- [25] For the same reasons, despite not knowing who the Design Approval Authority is, which trees are destined for removal, or the process of possible outcomes of submitting drawings to the Design Approval Authority, does not mean that the tree height restriction in the last part of the clause is inapplicable.
- c. "The portion of any Lots lying between the Building Line of the Principal Building and the lot line of any adjoining street shall not remain unlandscaped beyond twelve (12) months from the date of commencement date of the construction;"
- [26] The petitioners point to the words "Building Line" and "Principal Building" that are not defined in the Building Scheme and say there is no way of knowing what those terms mean. I disagree.
- [27] In my view, the plain meaning of this phrase is clear. The portion of lots between the building line of a home and the street must be landscaped within twelve months of the commencement of construction of the home. I am therefore unable to find any ambiguity with this portion of the Tree Restriction Clause.
- d. "no shrubs or trees shall be planted which will grow to a height of more than 7.62 meters (25'.0) at maturity or unduly restrict the view of adjacent owners or occupants."
- [28] In my view, there is no ambiguity with the phrase "no shrubs or trees shall be planted which will grow to a height of more than 7.62 meters (25'.0) at maturity". Further, read in the context of the entire Tree Restriction Clause, that phrase cannot be decoupled from the antecedent restriction requiring landscaping the portion of the lots lying between a home

and adjoining streets within 12 months of the commencement of construction of the home. The phrases are linked by a semi-colon, which implies that they are connected. In other words, the restriction on tree height referenced in the latter half of the sentence applies only to trees planted between the "Building Line of the Principal Building and the lot line of any adjoining street" ("Restricted Zone"). This restriction does not apply to trees planted elsewhere, for example, in back yards where there is no adjoining street.

[29] In my view, the intent of this phrase is clear and unambiguous. To the extent shrubs or trees are planted on that portion of lots lying between the line of a home and the lot line of any adjoining street, they cannot be the type that grow more than 25 feet at maturity. Shrubs or trees planted elsewhere are not included in this restriction.

[30] The petitioners contend that "unduly restrict the view of adjacent owners or occupants" is vague. Referring to paragraph 12 of Goodwin, they correctly argue that any restriction on the use of land, which the Building Scheme is, must clearly be expressed. If an ambiguity exists, it is to be resolved in favour of the free use of the land. They also rely on the 2009 decision in Jabs and the more recent 2019 decision in Cole.

[31] Jabs was a case involving a building scheme containing restrictions against the height and the limitation of construction to a single-story building. The clause at issue stated:

[4]

3. The Grantee shall not erect or maintain on the said lands, except for Lot 1, any such detached dwelling house which shall consist of more than one story excluding basement and attic, and on Lot 3 of the said lands no such detached dwelling house shall have a height of greater than fifteen feet perpendicularly above the highest point on the westerly boundary of the said Lot 3

[32] Mr. Justice Brooke found that the absence of a stated purpose for the covenant in the Building Scheme together with the restriction placed on Lot 3 created an ambiguity. That ambiguity led him to conclude that the restriction to one story must give way to the specific fifteen-foot height restriction.

[33] Cole involved a restrictive covenant registered on a lakeshore property in Peachland where the petitioners sought to build a residence. The clause in issue stated:

[12]

1. That the Grantor shall not erect or construct any buildings or other structure nor allow the growth of any trees which would obstruct the view from Lot 6 on any part of the said Lot 5 other than the area outlined in heavy black ink on the attached plan.

[34] Madam Justice Donegan found that clause to be vague and unenforceable. After reviewing section 35 of the Property Law Act, she said this at para. 27:

- [27] Restrictive covenants are to be construed according to the ordinary rules of contractual interpretation. The words used must be viewed in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation: *Hofer v. Guitonni*, 2011 BCCA 393 at para. 14.
- [35] She held that while the surrounding circumstances are to be considered, they must never be allowed to overwhelm the words of the agreement, citing *Sattva and Burgess*. Ultimately, Justice Donegan held the clause to be unenforceable on the basis of vagueness and ambiguity. At paras. 60-61 she stated:
- [60] The language used in the present case is even less specific than seen in the above authorities. It is simply "which would obstruct the view". This raises many questions. Does it mean obstruct the view of the water of Okanagan Lake? Or does it mean obstruct the view of the water of Okanagan Lake and the hills across the lake? Or does it mean obstruct the view of the water of Okanagan Lake, the hills across the lake and the sky? Does it mean a complete obstruction of one or more of these things? Or does it mean partial obstruction of one or more of these things? If partial obstruction, how much is too much?
- [61] The use of such vague language runs the risk that the parties would be in constant disagreement over what would be considered as "obstructing the view". The words are simply too subjective and open to interpretation. In the end, any attempt to enforce such vague language would not be possible.
- [36] In answer to the petitioner's reliance on *Cole and Jabs*, the *Harrises* strongly rely on *Suomalainen*, a case involving the plaintiffs seeking to enforce a building scheme with similar and arguably vaguer language than the Tree Restriction Clause. The trial court agreed with the plaintiffs that the phrase "major view lines" was not so imprecise and vague as to be unenforceable.
- [37] Before the appeal was heard, the parties in *Suomalainen* resolved the dispute and the appeal was allowed by consent. The merits of the appeal were not considered, with the court specifically stating it was not expressing an opinion on the correctness of the trial decision (*Suomalainen v. Jernigan*, 2004 BCCA 652).
- [38] The evidence before me suggests that some of the petitioner's trees at the heart of this case are in the petitioner's back yard and thus do not fall within the Restricted Zone. The evidence also suggests that some of the impugned trees may fall within the Restricted Zone.
- [39] Respecting the phrase "or unduly restrict the view of adjacent owners", I agree with the petitioners that it is open to numerous subjective interpretations. Accordingly, the strict construction approach must apply. From an objective standpoint, even considering the subdivision is west facing and overlooking Okanagan Lake, it is not clear what is meant by that phrase. Was it intended to protect views of Okanagan Lake from being blocked, or views of the city to the north or mountains to the east? Further, the term "unduly" is vague and ambiguous. Accordingly, and similar to the finding in *Cole*, I conclude this phrase is too

subjective, open to too many interpretations so that any attempt to enforce it would not be possible.

[40] Therefore, with respect to the phrase "or unduly restrict the view of adjacent owners", the petitioners have established that it is ambiguous and is therefore unenforceable.

[41] With respect to the earlier portion of the Tree Restriction Clause, I conclude that it was intended to ensure that the Restricted Zone would be landscaped within one year of a home being constructed on the lot and that any shrubs or trees planted in that area would not exceed a maximum height of twenty-five feet so that there would be consistency and conformity within the subdivision.

Issue # 2 - Should the Building Scheme be cancelled due to obsolescence?

[42] No.

[43] Given the context of the Building Scheme when it was created in 2007, it was clearly intended to create and preserve the character of a new subdivision neighbourhood including the views and related values of the properties by requiring the eventual owners to create and maintain their yards in a certain manner within the Restricted Zone.

[44] On the evidence before me, the Building Scheme continues to be used and relied on by the owners of the subdivision lots as a method of preserving the character of the neighbourhood, including the view and the values of the properties in it. I am not persuaded that the Building Scheme has fallen into disuse or that a change in circumstance has arisen that would suggest the Building Scheme has ceased to have currency. I conclude the Building Scheme is therefore not obsolete.

Decision

[45] For the reasons given, I have concluded that the Building Scheme is not obsolete.

[46] I have also concluded that the Tree Restriction Clause, save for the phrase "or unduly restrict the view of adjacent owners or occupants", is clear and unambiguous. It relates only to shrubs or trees planted within the Restricted Zone and does not apply to shrubs or trees that may have been planted elsewhere within individual subdivision lots. Accordingly, to the extent any shrubs or trees on the petitioners' property lie within the Restricted Zone and are over 25 feet in height, they must be either removed or trimmed such that they do not violate the Tree Restriction Clause.

[47] I have also concluded that the phrase "or unduly restrict the view of adjacent owners or occupants" and the end of the Tree Restriction Clause is vague and ambiguous.

[48] Relief under s. 35(2) of the Property Law Act is discretionary. I am satisfied that I should exercise my discretion in favour of ordering that the Tree Restriction Clause be amended by deleting the words "or unduly restrict the view of adjacent owners or occupants". The balance of the Tree Restriction Clause is enforceable and shall remain in effect.

[49] In the result, the petition is allowed to the extent that there shall be a declaration that paragraph 3(j)(vi) of the Building Scheme is amended by deleting the phrase "or unduly restrict the view of adjacent owners or occupants" as noted.

[50] The Harrises seek a mandatory injunction requiring the petitioners to trim trees exceeding 25 feet in height. The remedy for an infringement of a building scheme is generally a mandatory injunction (*Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 at para. 55). It is a discretionary order governed by the following factors:

- (a) the character of the interest to be protected;
- (b) the relative adequacy of injunctive relief in comparison with other remedies;
- (c) delay, if any, in bringing the action;
- (d) misconduct, if any, of the parties;
- (e) relative hardship likely to result if the injunction is granted or denied;
- (f) interests of third parties and/or the public;
- (g) the practicality of framing and enforcing the order.

(417489 B.C. Ltd. v. Scana Holdings Ltd, [1998] B.C.J. No. 140, 1998 CanLII 6770 (S.C.) at para. 8).

[51] Having considered these factors, I exercise my discretion in allowing the mandatory injunction sought by the Harrises but only to the extent trees on the petitioners' property fall within the Restricted Zone and exceed 25 feet in height.

[52] Given the divided success, the parties will bear their own costs.

"G.P. Weatherill J."

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