Neighbours and summer gardens in a cold climate

OFF THE RECORD

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Opuntia humifusa. That's what the scientists call the prickly pear cactus in my front yard. We just call it "The Cactus." And I have learned a lot from The Cactus over the years, about cacti, but more so about homeland security, reasonableness and the rule of law.

When I bought my *Opuntia*, for three or four dollars, it was no bigger than the palm of my hand. The label on the pot said, "Winter-Hardy Cactus," and I said, not quite to myself, "Yeah, right."

I planted it in my little raised garden, at the little wall adjacent to the sidewalk, where nannies and kids and fatigued shoppers rest on their way home from school or the park or the shopping centre. Eight or 10 years on, it has spread in a mat of "pears" to cover 12 square feet, all the space not otherwise planted, crowding out the poor old hens-and-chickens. Heck, it's even taking on the English lavender.

It turns out that *Opuntia humifusa* is native to Ontario and that native peoples here have used its juices as a poultice. Its parts are edible. But yes, it knows how to take care of itself. It brandishes big thorns that you can avoid if you're careful, but it's covered, even on its flower buds, in unavoidable brown fur, which clusters in your skin and clothes, carpets of arrows tipped with five-alarm chili-poison.

And every winter it sucks the juices out of its "succulent stem segments or pads" (as the scientists put it) and shrinks back in on itself, huddling against the snow and cold.

In early summer, after it has rejuiced, opening its arms again to the sun, spreading and sprouting big, phallic buds, it bursts into blinding yellow flowers with a carmine centre. And the neighbours ooh and ah.

And some of them stand there smiling vaguely while their children kick it or beat it with sticks. Others, full-grown adults, apparently, rip the pads right off it.

I have seen the kids whack at it, perhaps in fear of the thorns. The stealing is more, well, stealthy. Most recently, somebody appears to have brought shears (and probably gloves) and neatly clipped off two pads where they met a main limb, below several other pads, where the thief thought I wouldn't notice.

In a way, this is flattering. People trespass and mutilate The Cactus in acts of robbery because they covet it. But my pride is eclipsed by despair: Whenever neighbours, visitors, complete strangers express interest in *Opuntia humifusa*, I offer to start one for them. This is no saintly gesture; it's vanity, itself. Certainly it's no particular trouble. *Opuntia* is such a remarkable survivor, the pads put down roots almost immediately that they break off, from whatever part of them that hits whatever little bit of organic matter is on the ground – even just a few dried out bits of English lavender.

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So there is no need for mayhem and theft. I have given away five or six cacti started from broken pads. I pot them in whatever soil is handy, and usually they're ready for adoption in a few days. One of them I donated to a community garden in a nearby park. Within a week, someone stole it.

So perhaps the most disappointing thing is what the beating and thieving appear to say about the breakdown of community in at least some of our neighbourhoods. In this particular neighbourhood, which includes houses valued in the millions owned by lawyers and judges and businesspeople, people leave new bicycles and sports equipment and high-end baby carriages worth hundreds lying around in their front yards. Nobody touches them. In the working class neighbourhood where I grew up, in Denver, you couldn't leave a basketball in your *back* yard, if you wanted it to be there in the morning.

Teenagers regularly tee-peed your yard with toilet paper. But nobody, *nobody*, stole the plants. It was beyond the pale. It was not what a reasonable person would do, even though a reasonable person in that neighbourhood might take your basketball, if you were unreasoning enough to leave it outside all night. Them was duh rules and everybody knew it. So there was a reasonableness in operation, even if the law might have viewed it as perverse. This was local, community law, which, even more so than "regular" law, was understandable, predictable, and in its context, fair. So you lived by it.

If anyone caught you ripping out somebody's cactus in that neighbourhood, they would have kicked your behind, and the rest of the neighbours would have joined in. This was not a culture of "everybody's special" where you did whatever took your fancy, having decided, conveniently, that your behaviour wasn't really hurting anyone else. The guy's got more cactus, right? This was a community with standards – internal law.

But of course vigilante justice is inimical to the rule of law, and in real neighbourhoods you don't have to resort to it. Reasonableness is a neighbourhood concept, sacrificing self-gratification to common civility and, thereby, the greater good. As Lord Atkin famously put it, when deciding how the reasonable person acts, the first legal question is the one he takes from Mosaic and Christian morality: Who in law is my neighbour? ■

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an online questionnaire.

Another company, KIIAC (Knowledge Information Innovation and Consulting, pronounced "kayak"), makes software that can analyze a group of contracts, and can automatically determine what clauses they contain, how they are organized and display the standard and non-standard versions of a given clause.

But the language used in any contract must be "rigorous" and contemporary, Adams highlights. "It doesn't make sense to have a 21st-century document-assembly system loaded with 19th-century language, because it's the end product — the contract — that really matters," says Adams, who practised law with Jones Day and Winston & Strawn LLP in New York and Geneva.

"And firms should be able to outsource to a vendor the task of compiling language to articulate the terms of a given deal."

Adams is currently working on a project to develop an online document-assembly repository of contract language.

Yet whether technology is used or not, clean language in contracts allows lawyers and their clients to "better understand" the terms of a deal and avoid possible litigation as a result of "drafting clumsiness," he explains.

For example, should a deal point be expressed as a condition or an obligation? Is a given word or phrase ambiguous?

Or, as Toronto lawyer Lisa Houston points out, does the traditional recital of considerations need to appear at the beginning of a contract?

"There may be circumstances where that's not necessary because a consideration is obvious in the body of a contract, such as the purchase of shares," says Houston, a knowledge management lawyer in the business law group of Fraser Milner Casgrain LLP who attended one of Adams's Toronto workshops, organized by Osgoode Hall Law School's professional development series, last fall.

On the other hand, she says that some contracts, such as guarantees, might have provisions that seem "long and unwieldy," but may need to be included since they are based on hundreds of years of case law.

Houston explains that when she's crafting a contract from scratch or a model agreement for colleagues at the firm, and has "the luxury to think through everything," she strives to use "more plain language and less of the fancy legalese" that might not need to be included.

She believes Adams's idea of a style guide could be a "useful tool" if it established "best practices" for drafting contracts, and lawyers could extract from it general concepts that could apply to any commercial agreement.

Adams's bottom line is that he has yet to read a contract that he cannot "radically overhaul."

In the appendix to his book, he features three versions of a merger-and-acquisition-related termination agreement drafted by a national U.S. law firm. There's the original version; another one accompanied by 190 footnotes illustrating the "shortcomings;" and Adams's version, which has almost 20 percent fewer words than the firm's contract.

It also uses "standard English," not the "mutant form of English that is legalese," which even law practitioners often find confusing and may result in their turning to the bench for clarity.

"The idea is to not write stuff that relies on the court to read meaning into what you're trying to say," explains Adams.

"Contracts are just for stating rules, and there's a limited range of language and fewer rules involved than with regular narrative prose, so you can make things simpler and increase your chances of keeping out of trouble."

He points to an Ontario Superior Court of Justice decision in January in *Stewart Title Guarantee Company v. Zeppieri*, [2009] O.J. No. 322 that addressed the meaning of the phrase "indemnify and save harmless." The court said that "save harmless" is a "broader" contractual obligation than indemnification. Adams and some U.S. court decisions, such as the Dec. 6, 2006 one in Delaware (*Majkowski v. American Imaging Management, LLC*, 2006 Del. Ch. LEXIS 204), believe "indemnify" and "save" or "hold harmless" are synonymous.

According to Adams, it's better to avoid relying on "jargon" and case law "that attempts to make sense of it," and simply say, "indemnify against any losses and liabilities," and deal with defending non-party claims in separate provisions.

Similarly, Canadian and U.S. courts have interpreted the phrase, "best efforts," differently. South of the border, courts have held that all efforts mean "reasonable efforts," an approach Adams thinks "makes sense."

But in the 1994 British Columbia Supreme Court decision in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [1994] B.C.J. No. 493, the court stated that "best efforts" imposes a higher obligation than a "reasonable effort."

Says Adams: "When you surrender to a court the role of giving meaning to your contract language, you don't know what the court is going to do with it."

Still, he admits that he'd like a court to note what he has to say.

"My book has yet to be cited by a judge in an opinion. That's just another group of lawyers to convince." ■