



TREES & THE LAW

BY JULIAN DUNSTER

Making good How to value damaged or destroyed trees

Many court cases involve damage to, or complete loss of, trees and other plants. Placing a value on the damaged or lost trees can be accomplished in several ways. If the trees have commercial value, a scale of the merchantable timber volume may be an appropriate measure. If they were not big enough to be commercial timber but have firewood value then that may be the correct approach.

But what happens when the trees damaged or lost have no commercial value? In those cases we turn to the *Guide for Plant Appraisal* published by the International Society of Arboriculture in 2000. Now in its ninth edition, the Guide is a publication assembled with input from the Council of Tree and Landscape Appraisers (CTLA). This group of people is comprised of several important industry groups, including the American Nursery and Landscape Association; the American Society of Consulting Arborists; the American Society of Landscape Architects; the Associated Landscape

Contractors of America; the Association of Consulting Foresters of America; the International Society of Arboriculture; and the National Arborist Association (now known as the Tree Care Industry Association).

For some damaged plants, it may be possible to clean up the damaged area, get new plants of a similar size, and simply restore what was lost. This is a cost approach and mimics the concepts used in real estate appraisal that the value of property can be estimated by taking the land value and adding on definable land improvements.

However, there are times when the trees are very large, mature examples and not easily replaced by simply going to a nursery and buying a similar sized tree. For these trees we use a different approach, called the Trunk Formula method. In this approach we use the cross sectional size of the tree trunk as a starting point. Regional groups of arborists, generally serving

within one of the Chapters of the International Society of Arboriculture, sit down and derive typical nursery costs and produce regional costs for local species. Using these, a base value is established by trunk size. That base value is then depreciated by several factors: species, condition, and location. The end result is a surrogate value for the lost tree that is intended to reasonably represent what has been lost.

One of the more controversial aspects of tree appraisal is how to ensure some sense of reasonableness in the end result. This is particularly testing for the courts. The injured party usually wants to have their landscape restored to the pre-damage condition. However, the Courts have been relatively consistent in deciding what will or will not be permitted as legitimate cost components. For small trees and simple landscapes, where the damage can be cured by clean up and replanting, this is not often an issue. But where large trees and ecosystems are damaged, even at a small scale, it becomes a bigger issue.

Several cases deal with this issue. They all note that there cannot be a reasonable expectation that the restoration will replace what was lost with an exact replica, especially where the existing land use was such that the lost trees were not the most critical component of the overall landscape. In *Oran v. Westwood Fibre Ltd.* (1996 B.C.J. NO. 2697 (S.C.)) the court noted "The award for cost of restoration must relate to the reduction in value of the property flowing from the defendant's conduct. That is, one of the factors to be considered in determining what are reasonable damages is the cost of restoration of property in proportion to any diminution in the value of the property. In determining what is reasonable restoration, the Court must also be mindful of the uses to which the plaintiff has and will put the property and the Court should, where the plaintiffs have taken no steps to restore damage caused by the trespass, weigh the lack of that restoration against the plaintiff regarding the value of the trees and claims for loss of amenities."

One of the more widely cited cases dealing with reasonable costs is *Kates v. Hall*, [1989] B.C.J. No. 1358 (S.C.). Here the Court stated "I find it appropriate to award compensatory damages in a sum sufficient to pay for the remedial work which a reasonable person without money constraints in the plaintiffs' position would have implemented had the loss been caused without fault on anyone's part, and in addition an amount which will fairly compensate the plaintiffs for loss of use and enjoyment to the extent that this scheme will not completely replace what has been lost."

In a recent case in Alberta (Durham v. Bennett, 2009 ABPC 66) involving a single birch tree that was pruned adversely in trespass, the Court reinforced this



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concept, noting "If replacement with a tree of the same kind and size is possible but not practicable, I am compelled to look at what is reasonable in the circumstances and not what is the express wish of the Plaintiffs (*Kates v. Hall*). While the wishes of the owner who suffered the loss are not irrelevant, they are subordinate to the overall consideration of what is reasonable, practicable and fair in all of the circumstances. Further, the courts are directed to consider what is fair by looking at whether "these are wishes [of the plaintiff] reasonably directed to the enjoyment of their land, and not to making the largest possible demand on [the defendant's] purse. ... in dealing with the compensatory damage claim the court must be concerned with reinstatement rather than retribution."

The lesson here is that the Courts will not award damages that are so extravagant that they unfairly represent the values lost. That does not mean that the overall damages will be small. The Court can (and frequently does) establish the basic monetary loss and then add punitive damages on top as a means of penalising the trespassing party. More examples of that can be found in the book *Arboriculture and the Law in Canada*, available from Julian Dunster (Canada) or the International Society of Arboriculture in the US.

Julian Dunster is the senior author of Arboriculture and the Law in Canada. Dr. Dunster is not a lawyer and the above notes are intended as general guidance only. If you have a tree issue contact a lawyer for legal advice specific to your situation. ■

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