



TREES & THE LAW

BY JULIAN DUNSTER

Getting to the root of the matter

Tree roots have no sense of property lines or trespass

Tree roots that grow across a property line onto the adjoining land can be a very contentious issue when they cause damage. They can potentially damage foundations, driveways and paths, buried infrastructure, and drains, as well as landscapes in general. A commonly cited precedent is *Rylands v. Fletcher* (1868). In that case a reservoir built on Rylands' property failed and flooded Fletcher's coal mine on the adjacent land. After a series of judgments and subsequent appeals, the House of Lords ruled that a person who lawfully creates or brings onto his land something that by itself is harmless, but would cause damage if it escaped beyond the property, has an absolute duty of care. In other words, they will be held responsible if the escape of this "something" causes damage to adjacent lands.

The principle is simple enough. If you own a tree and its roots grow onto the neighbour's land, and those same roots can be shown to have caused actual damage, then you may be held responsible for that damage and all of its associated costs. Of course, the person alleging damage has to provide evidence that can be substantiated—

that is, there must be a clearly proven causal link between the damage and the tree roots. Another case of importance is *Leakey v. National Trust for Places of Historic Interest or National Beauty* (1980). In this case a mound of soil owned by the National Trust failed and damaged a neighbouring property. The court found in favour of the plaintiff and the appeal was dismissed. As a result, the Leakey test is used to determine if the owner "...was under a duty, if he knew or ought to have known of the risk of encroachment, to do what was reasonable in all the circumstances to prevent or minimise the risk of the known or foreseeable damage or injury to the other person or his property." In effect, if you own trees that have the potential to cause damage or injury to adjacent property, the courts may find you liable for any damage if it can be proven that the damage was foreseeable.

In *Butler v. Standard Telephone & Cable Ltd* (1940) the defendant had planted a row of poplar trees. Seven years later the plaintiff's house showed signs of subsidence attributed to the poplar roots drying out the clay soil and causing shrinkage of the load-bearing materials (the clay). The court found in favour of the plaintiff. Subsequent cases of this nature have become quite common, especially in the United Kingdom. One of the earliest Canadian cases is *Mendez v. Palazzi* (1976): again, a poplar tree causing damage that was proven and upheld by the Court.

Another case concerned what is known as the concept of self help, and whether or not a neighbour could cut off overhanging branches at the property line from a tree wholly situated on the tree owner's property, without giving notice of intent or asking for permission. Initially the Court ruled no, but at appeal the Court noted "...if he can get rid of the interference or encroachment without committing a trespass, or entering upon the land of his neighbour, he may do so whenever he pleases, and that no notice or previous communication is required by law." Subsequently, in *Mills v. Booker* (1919) the Courts held that, if self help was applied, the materials removed should be returned to the owner. The concept that overhanging parts of the tree can be cut back to the property line also applies to the roots.

The grey area has always been (in Canada): what happens if, in the process of self help, the result is to seriously damage or destabilise the tree, such that the owner then suffers loss from damage. That issue has not been definitively resolved. In the United States a lower court ruling, *Booska v. Patel* (1994), stated that, notwithstanding the defined right to cut back roots to the property, it could only be done if in so doing it would not damage the tree. In a 2003 decision in British Columbia (*Edwards v. Poldrugo*) the Court was



Courts have been dealing with root-related legal issues for centuries.

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asked to award damages for an oak tree legally pruned on one side as part of a new development. The plaintiff claimed that, as a result of the root pruning, the tree was now deemed by an arborist to be unstable, and requested monetary damages to compensate for the tree that they felt now needed to be removed.

The Court declined, noting: "*It strikes me that it is contrary to public policy for any property owner to be restricted in the development of his property in a manner beyond the restrictions on development imposed upon him by the municipality or government authority responsible for making rules respecting development of property by a property owner. I feel that it is not in the purview of the Courts to impose rules on development which are not mandated by that authority. There is no doubt that in our society today there is a growing movement to preserve trees in residential neighbourhoods as much as possible. But I feel that the making of rules in this regard must come from the governmental authority, and not the Courts. It strikes me that a ruling by the Courts in this regard will have the effect of placing an "injunction" on all development authorized by the proper governmental authority, where there is a danger that the cutting of roots may result in mortal injury to a neighbouring tree, whether or not such injury does in fact occur.*"

In summary, if roots cross the property line and can be shown to be causing damage, the tree owner may be liable for that damage. The affected party has

a legal right to prune roots back to the property line, but not beyond it (which would then be trespass). Commonsense suggests that, although it is not legally required, it would be prudent to notify the neighbour (the owner of the tree) of the intention to prune before it is undertaken, although if they object it seems unlikely, given the present court precedents, that there would be much that can be done to prevent the pruning as long as there is no trespass involved. If the result is to kill or destabilise the tree, there is a possibility that you may then have created a new problem: namely, the destruction of a tree you did not own. Although so far case law about this is sparse in Canada and elsewhere.

In Canada the legal right to abate a nuisance arising from encroaching roots appears to remain intact, as defined in *Lemmon v. Webb*. Before taking action, the alleged damage should be very clearly documented and the causal linkage should be established if the person affected intends to sue for damages arising from the root encroachment. That is, the onus to prove that roots from your neighbour's tree is causing damage lies with the person alleging the damage. If, as in the *Edwards* case, the root pruning is simply undertaken as part of development work in order to accommodate new buildings, then the issue of damage caused by the roots may be irrelevant. They are simply in the way and can be removed without further ado.

*Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. Additional case law can be found in the book *Arboriculture and the Law in Canada*. Copies are available from Julian Dunster.*

For more information: www.dunster.ca