TREES & THE LAW

BY JULIAN DUNSTER

Getting to the root of the matter (part 2)

Who is responsible when roots block storm drains & sewers?

In my column in the last issue of *Tree Service Canada* I discussed issues of roots causing damage to property and the notion of self-help to abate nuisance caused by encroaching roots. In this column, I am going to discuss a related matter—the flooding damage roots can cause when they create blockages in storm drains and sewer lines.

Some species of trees are well known to have roots that readily create pipe blockages. These include, for example, all poplar species, willows, elm, ash, birch, and silver maple. When any of these species are planted close to buildings it can reasonably be expected that there will be fine roots gaining access to drainage pipes and in some cases, getting into storm water or sewage pipes through the pipe joins. Once inside, the roots develop a plug of fine roots that eventually block the pipe leading to backup of fluids and flooding.

If the tree is located on private property and affects only the pipes on the same private property, then the problem is entirely one belonging to the property owner. But, when the tree roots are on city or local government land and extend onto private property, then there may be a case for action against the owner of the trees.

However, local governments are responsible for thousands and thousands of pipelines connecting from individual properties into the municipal storm water and sewer lines. The case of Fletcher v. Rylands was noted in part 1 and says in essence, 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.

While the principle applies generally, provincial law also exists that may supersede the general principle with more stringent tests. The principle that roots growing across a property line can constitute a nuisance has been accepted in Canadian Courts.

In the case of Craxton v. The District of North Vancouver (British Columbia) the Craxtons sued the district for damages arising from a sewer pipe plugged by tree roots. At trial the court examined two issues: nuisance and negligence. Under the British Columbia Local Government Act (1996) nuisance is noted and the act states:

A municipality, council, regional district, board or improvement district, or a greater board, is not liable in any action based on nuisance or on the rule in the Rylands v. Fletcher case if the damages arise, directly or indirectly, out of the breakdown or malfunction of

(a) a sewer system,
(b) a water or drainage facility or system, or
(c) a dike or a road.

In the Craxton case, the court had to determine if there had been a breakdown or malfunction. Reviewing other case law the court concluded "The purpose of the Storm Service Connection was to take storm service water from the Craxtons' residence to the District's sewer system. The roots in the Storm Service Connection prevented that purpose from being fulfilled in a normal and satisfactory manner. That amounts to a malfunction."

The district produced a written policy concerning maintenance and repair of storm service connections. In the policy, three methods for the maintenance and repair of storm service connections were identified—rodding, flushing and excavation. The court found that the process used by the district to monitor blockages and repair blocked pipes was reasonable. The district had noted the complaint, had rodded the sewer, and for a while had not received additional complaints. On that basis, the next blockage that occurred was not deemed to be readily foreseeable. As a result negligence was not established and the claim was dismissed.

What emerges from these and similar cases is that many municipalities now have better defined policies and procedures to deal with what is a quite common problem. If you or your client feels that tree roots may have partly or wholly blocked a sewer line then the first step is to notify the local municipality, find out what policies and procedures exist, and who is likely to be responsible for what.

Taking action early on is always prudent and saves expensive flooding and restoration costs at a later date.

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.

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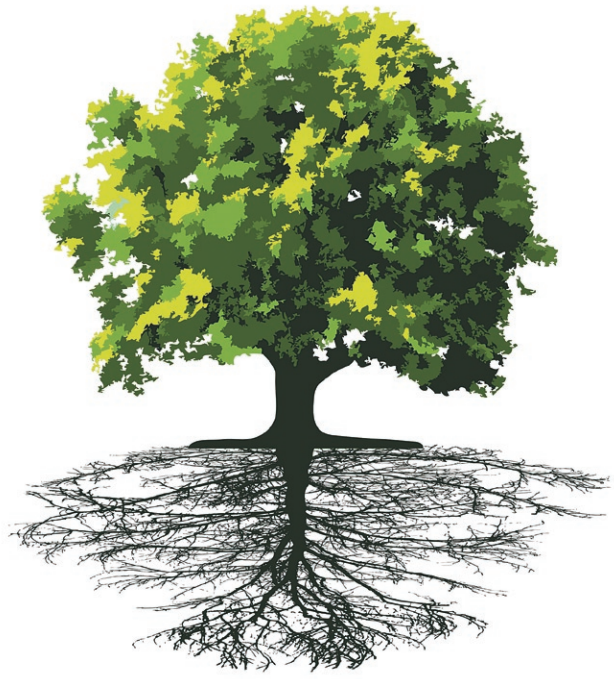

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