



# TREES & THE LAW

BY JULIAN DUNSTER

## Foreseeability in tree risk assessments

There are numerous cases dealing with tree issues where one person causes damage to one or more trees on the other side of a boundary. Similarly, there are cases of roots and branches crossing a boundary line. One of the more commonly cited cases is *Anderson v. Skender*, (1991 CanLII 260 (BC SC) (1991), 61 B.C.L.R. (2d) 292). In this case, a tree that straddled the boundary line was damaged. Interestingly, within the judgement is an early citation from America, *Griffin v. Bixby* (1841). It was noted in this case that: "... a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other."

Clearly, boundary-related tree disputes are nothing new!

That concept fledged in the 1840s has been applied in several cases since. In the 1998 case of *Koenig v Goebel* [1998] 6 W.W.R. 56 (Sask. QB) the court went further and defined straddle trees into three categories:

- Consensual trees: trees that had been planted along a boundary with both adjoining owners in agreement;
- Straying tree: a tree planted on one side of the boundary that subsequently grew over the boundary line, and;
- Voluntary trees — not known to have been planted by either party.

A recent case in Ontario, *Hartley vs. Cunningham et al.* [2013] ONSC 2929, has resurrected the debate. There is legislation in Ontario, under the Forestry Act RSO 1990, cF26 that specifically defines Boundary trees (section 10) as follows.

### Boundary trees

10. (1) An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between the two lands. 1998, c. 18, Sched. I, s. 21.

### Trees common property

(2) Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands. 1998, c. 18, Sched. I, s. 21.

### Offence

(3) Every person who injures or destroys a tree growing on the boundary between adjoining lands without the consent of the land owners is guilty of an offence under this Act. 1998, c. 18, Sched. I, s. 21.

In the case of *Hartley v. Cunningham*, a Norway maple grew across the boundary line. One neighbour wanted it cut down and obtained a permit from the City of Toronto to do so. The other neighbour wanted it retained and opposed its removal. The first neighbour sued to have the tree declared entirely hers so that she could legally remove it. She lost.

The application to remove the tree was based in part on the claim that the tree was unhealthy. The defendant retained arborists who claimed the maple was in good health. Evidence was introduced



According to at least one legal interpretation, "... a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties. . ."

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about where to measure the tree trunk and how, but ultimately the judge found the Forestry Act definition was sufficient. That being the case, the maple was the common property of both neighbours and one could not legally act without the permission of the other.

The *Hartley* case has interest for arborists because not only did it uphold the Forestry Act definition, it yet again reinforces the need for a boundary line that has been very clearly defined on the ground. That part of the equation lies with surveyors. For arborists the need to be sure about the accuracy and veracity of the boundary line is important. Check before acting

and be sure that the responsibility of verifying the boundary line is clearly placed with the property owner. If it seems that the tree might be straddling the boundary, have the boundary line confirmed and then let the owner decide how to best deal with the issue and the other 'owner.'

For municipal arborists the *Hartley* case reinforces the need to be sure that any permits issued clearly note the need for accurate surveys and definition of tree ownership.

*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. [www.dunster.ca](http://www.dunster.ca)*



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