TREES & THE LAW

BY JULIAN DUNSTER

Tree nuisance and self help

There are no shortage of cases involving disputes about trees between adjacent properties. Some involve neighbour A adopting a self help approach and removing one or more trees on neighbour B's land by trespassing. Other cases involve pruning back roots or branches overhanging the boundary with or without trespass occurring.

The issue of how far self help can be utilised and under what circumstances seems to vary. The concept of self help refers to an individual taking action to enforce their perceived rights without resorting to legal channels or other possible authority. If no laws are broken and no damage to other people or property results then all may be well. But, if the actions go wrong and do cause provable damage or injury, or if laws are broken, then self help can be very problematic.

Self help and tree issues often arise due to nuisance created by overhanging branches, or encroaching roots. While it may be tempting to adopt a self help approach and simply get on with a solution to remove the nuisance, problems can arise.

In order to prove nuisance the plaintiff has to prove certain issues. These are summarised at [223] in Wallace v. Joughin 2014 BCPC 73.

Nuisance requires the following elements and considerations to be applied:

- Substantial and unreasonable interference which affects the use or enjoyment of property;
- Substantial and serious interference of such a nature that it should be an actionable wrong;
- The interference must be viewed with regard to its nature, duration and effect;
- Subjective complaints must be viewed in the context of the objective standard of the average reasonable area resident to guard against those with abnormal sensitivity or unreasonable expectations;
- Nuisance must be determined within context;
- Consideration is to be given to the character of the neighborhood and the utility of the impugned conduct.

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In Wallace v. Joughin, self-help was adopted but resulted in trespass, and a long standing dispute was exacerbated when the incorrectly pruned branches were dumped back on the neighbour's property. The self help approach attracted a fine of $4,000.

By contrast, failure to implement some self help was noted in Yates v. Fedirchuk, 2011 ONSC 5549. Here Neighbour A had installed a swimming pool that was subsequently damaged by the roots of a tree on Neighbour B's land. Neighbour A sought relief and damages in court. Neighbour B, the defendant, failed to attend and was therefore in default. Neighbour A sought an order requiring Neighbour B's trees be removed pursuant to the Rules of Civil Procedure.

In reviewing the evidence the Court noted that deciding cases of nuisance involved ". . . balancing competing rights of landowners." While there was no doubt that the creation of a swimming pool was ". . . in general accordance with the character of the community and not abnormally sensitive." the court also chose to consider the general value and role of the Neighbour's trees in the context of the overall urban forest, the Ottawa Official Community Plan and The Urban Tree Conservation Bylaw.

After reviewing the purpose and intent of these documents the Court concluded that enforcing removal of trees simply to prevent damage to a swimming pool on the next lot might not be reasonable because a) societal values are changing and the role of trees has assumed greater importance, b) the bylaws adopted reflect the City's intent and place heightened importance on effective tree retention in the Ottawa region, and c) the Court did not wish to usurp the City's role in managing the tree resource.

The issue of self help arises because the Court noted that the pool owner could have installed root barriers at the same time as the pool was installed, but did not. In effect the Court noted that ". . . the failure by a plaintiff to take foreseeable and reasonable selfhelp remedies should be recognized as a factor in determining both the occurrence of a nuisance and the extent of damages the defendant is responsible for." Further, it was noted that "the defendant is truly the innocent party in this scenario. She had neither the knowledge of the potential problem nor an opportunity to consider a less expensive alternative to the removal of her trees."

The Court ruled that the plaintiff should have attempted a self help approach first of all by installing root barriers that would have prevented the damage from occurring later on. The plaintiff was given the opportunity to ". . .present further evidence both regarding the practicability of root barriers at the time she altered the use of her land and the lack of foreseeability of damage to her pool caused by the roots of the neighbour's trees."

The outcome of that option is not known at this time.

Not only does this case suggest that self help could have been an option, it also implies that self help should have been adopted because the damage from tree roots was a foreseeable event, and had it been adopted the damage to the swimming pool might have been avoided. Moreover, the refusal to grant approval to force removal of the offending trees, because they played a more important role as a part of the larger urban forest, provides an interesting reflection of changing societal attitudes towards tree in urban areas. Whether or not it will be adopted in other tree cases remains to be seen.

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. jd@dunster.ca www.dunster.ca Julian Dunster also maintains an extensive data base of Canadian case law involving trees. Please contact him for more information.*

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