

TREES & THE LAW

BY JULIAN DUNSTER



Hedges: what they may or may not signify as a boundary

Hedges are often considered to be an indication of property boundaries. While this may be correct in some instances, there are many cases where removal, or pruning of the hedge has created all sorts of problems.

The key point to consider is whether or not the hedge accurately reflects the boundary line. This requires an accurate survey to determine where the roots and stems are located relative to the actual boundary.

Bosch v. Smolik (2007 BCPC 41) is a typical case in which failure to properly survey the hedge location lead to major problems with trespass, hedge removal and an award of \$51,741.00 (eventually limited to \$25,000 since it was a small claims action). In this case a survey was undertaken but was limited to establishing corner points, and did not locate the hedge in between.

Cases such as *Bosch* are simply a matter in which a proper survey would have solved the issue early on at much less cost and trouble.

There are instances in which careless development created improperly located access roads, poorly defined boundaries and subsequent hedge plantings that are not correctly located, despite what all parties had always assumed. The Owners, Strata Plan VR 10 v. EE Management Corp. (2015 BCSC 473) is one such case. Here the access road was found, more than forty years after construction, to be partly located on the wrong side of a boundary. A row of mature cedars defined the edge of the road.

At issue was whether or not an easement should be granted for the portion of road that encroached.

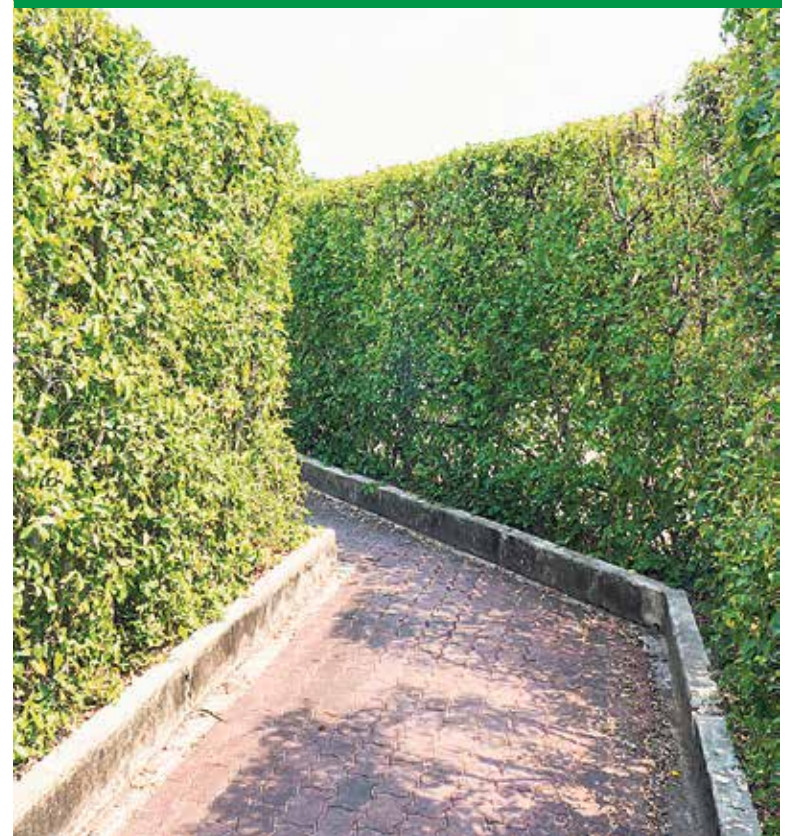
The case delved into how a statutory easement might be declared, and whether or not a hedgerow can be considered a fence, because a fence would fall under an issue that could be remedied in the Property Law Act. In this case the judge decided the row of trees did constitute a fence, and that the fence had been incorrectly located at the time of development. The easement was granted.

Gray v. Guerard (2013 ONSC 6200), is a similar case in which the hedge was assumed to indicate a boundary, but did not, leading to a costly dispute about land ownership.

Not all cases deal with ownership. Many involve the extent to which a hedge can be pruned back without being in trespass. Often the issue at trial deals with the extent of lateral growth that results when the hedge becomes well established. Pruning the growth to restore clearance can be an issue. *Legriss v. Mudge* (ON SCSM 2014) is one such example. Here the hedge was clearly planted well inside a boundary line but had, over time, grown beyond the boundary. The pruning work undertaken was clearly in trespass and was so extensive it destroyed several trees. This despite a cease and desist letter after an initial stage of work, that was followed by a second stage of pruning.

The judge noted "*The Defendant's conduct in this regard can hardly be said to be reasonable. Furthermore, the course of conduct taken to allegedly remedy the nuisance was precipitous and risky without the benefit of expertise as to how to correct it without inflicting permanent damage to the hedge. There is no doubt that the evidence supports a finding*

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that less invasive steps could have been taken to trim back any overhead impinging foliage."

The trespass cost \$12,475 in damages, and an additional \$7,193.03 in costs.

In all such cases arborists need to clearly consider:

- Has the boundary line been surveyed, and are the trees or hedge plants clearly defined on the survey?
- Does the work requested by the client extend over the boundary line?
- If it does extend over the boundary line, has the client obtained written permission to prune the hedge back beyond the property line, and more importantly, has that written permission been shown to the arborist, as opposed to simply being told, "It's okay, they have agreed to let us do the work."
- In many cases, it would be prudent to decline the work unless ownership and permission is acceptably defined with a formal professional survey and a written letter of permission based on the survey.

*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. jd@dunster.ca 778 433 8465*

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