TREES & THE LAW

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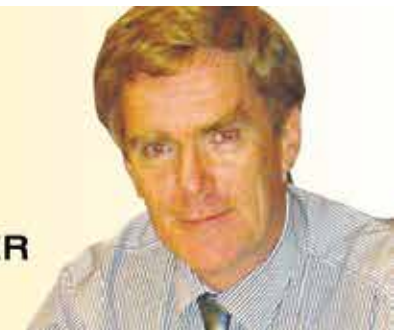

Keeping the neighbours informed

It is well-established law in Canada that a tree straddling the boundary line between properties shall be considered to be jointly owned between the two adjacent property owners.

Commonsense suggests that if the tree is jointly owned, Owner A must be informed if Owner B wishes to remove the tree. As a matter of prudence, informing the neighbour ought to be done in writing, even if a verbal discussion has taken place, so that there is a clear record of what was suggested or requested, what was discussed and any next steps contemplated. It is also prudent to send the letter by registered mail so that a receipt noting delivery can be obtained. That of course does not guarantee or prove that the recipient has read the letter delivered.

In Freedman v. Cooper, (2015 ONSC 1373) the dispute centred on a maple tree straddling the boundary between two homeowners in the City of Toronto. The tree had been damaged by ice storms in December 2013. One owner, Ms. Freedman, was concerned about the safety of the tree that remained. She obtained several arborists' reports suggesting that the tree was not safe and should be removed. These reports were then copied and delivered to the other neighbour, Mr. Cooper.

The City had no record of a staff visit to Mr. Cooper although the Court accepted it had taken place, but felt the advice offered was misunderstood.

Mr. Cooper decided to seek his own advice and claimed that a City staff person had visited the site and told him the tree was safe and did not need removing. Despite Mr. Cooper's objections, the City of Toronto granted a tree removal permit. Mr. Cooper then retained his own arborist who felt the tree could be cabled and braced and would then be acceptably safe. Ms. Freedman commissioned another report in which the original problems were reiterated with recommendations to remove the tree.

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The City had no record of a staff visit to Mr. Cooper although the Court accepted it had taken place, but felt the advice offered was misunderstood by Mr. Cooper, since it appeared to be inconsistent with other assessments.

At trial it was noted that even if the tree was cabled and braced, this would not be a guarantee that the tree might not fail later on. Mr. Cooper noted he was prepared to accept the responsibility for the mitigation actions suggested (cabling and bracing) but would not accept any responsibility for ". . . damage to person or property should the tree fall."

Apart from issues as to whether or not the Ontario Forestry Act or the Toronto Municipal Code had precedence (the Court ruled out the Forestry Act,) the key points centred on common law of nuisance. The tree in question had been identified as a problem with a level of risk sufficient to warrant Ms. Freedman wanting the tree removed. The Court noted " *Nuisance is a common law tort, and it is a form of strict liability that is not concerned with fault or misconduct. Rather, it is a social ordering law based on imposing responsibility or legal liability when an owner's use of his or her property unreasonably interferes with the use and enjoyment of land by others. Generally speaking, whether the landowner's unreasonable use was intentional, negligent or innocent is of no consequence if the harm can be categorized as a nuisance. What is unreasonable reflects the ordinary usages of people living in society, and determining unreasonableness involves balancing competing rights of landowners.*"

The Court also noted, " *The law of nuisance also imposes responsibility on a landowner for the natural state or conditions of his or her property if the owner is aware or ought to have been aware that the state of the property is a nuisance to neighbours.*"

The judgement was that Mr. Cooper was compelled to take some action because the danger posed by the damaged tree was no longer an inherent risk that might occur in concept, but had become a patent risk, clearly identified by several assessments, and clearly communicated to Mr. Cooper. He could not simply ignore the possible risk to his neighbour. His objections to the City issuing the removal permit were overruled, and he was ordered to not interfere with the tree removal. The costs were half of the removal expense at $2,940.50 plus other costs of $13,500.00. Lessons in this case seem to be:
--formal written notification to the neighbour is very important;
--city staff visiting a site should be very careful about what is or is not discussed and should also provide their opinions in writing to avoid subsequent misunderstandings;
--neighbours receiving a formal letter notifying them of one or more issues about a boundary tree are obliged to take some action. The alleged defect in the tree changes from latent to patent once the notification has been received. The type of action required will vary but doing nothing may not be enough.

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