

TREES & THE LAW

BY JULIAN DUNSTER



Straddle trees and boundary trees

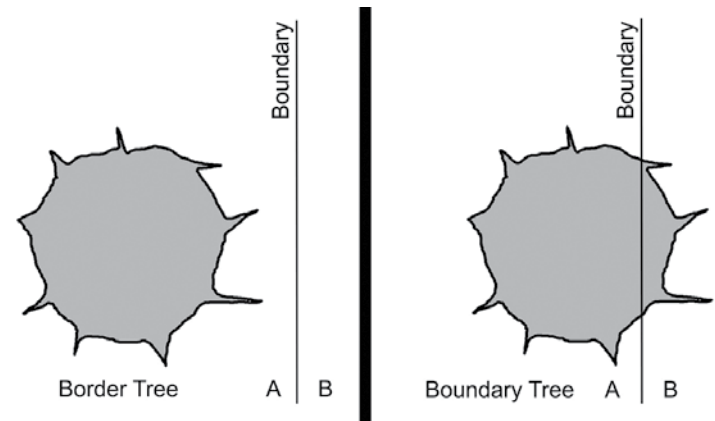
Legal challenges of trees close to or growing over the boundary

A boundary is a theoretical line without width. It defines the extent of property ownership whether the property be public or private. The boundary may be based on natural features such as a river or rock formation. Or, more typically, it will be based on a series of artificial lines set up to demarcate ownership. In all cases, boundaries are established by reference to known control points, long established and accepted by governments, in the form of survey markers attached to the land. These will be seen as monuments, iron pins, or lead plugs in rocks or sidewalks.

Case law clearly shows that private or

government land owners should not rely on the alignment of a fence to be a reliable indicator of the actual boundary line. Fences should be seen as a general indicator, but not necessarily an accurate indicator, of the exact boundary. Fences are often installed inside a boundary to ensure that the fence itself does not trespass or they can be placed quite incorrectly in the first place. Years later the neighbours, mistakenly seeing the fence as the boundary, remove vegetation and find they have in fact trespassed.

The usual reason given for trespass is that the boundary was not where it was



A border tree has its entire trunk and visible (above ground) root flare entirely on one side of the boundary line — that is, the entire tree base grows close to but not over the boundary. A boundary tree has part of the trunk or part of the visible (above ground) root flare crossing the boundary line, that is, it is not merely by the boundary but demonstrably growing across it.

thought to be. The common fact pattern is that A was cutting down trees thinking they owned them. B arrives and claims that they own the trees, not A. In routine cases, the court simply notes:

- You knew or ought to have known the boundary was close to or in the vicinity of where you were working;
- You could have and should have, checked the exact boundary location to ensure you did not trespass;
- You did not check for whatever reason;
- You did trespass and will now have to pay some damages.

Not all incidents of trespass involve cutting trees well beyond the actual boundary. Many focus on the precise location of the tree relative to the exact location of the property boundary. Issues of ownership arise in most trespass cases involving boundary trees. Case law has added some confusion by using various terms including: boundary, border and straddle trees. Later decisions use the words differently. For clarity it is suggested that a border tree has its entire trunk and visible (above ground) root flare entirely on one side of the boundary line — that is, the entire tree base grows close to but not over the boundary.

A boundary tree has part of the trunk or part of the visible (above ground) root flare crossing the boundary line, that is, it is not merely by the boundary but demonstrably growing across it. How the tree came to be in that location, did it slowly grow over the line or was it planted on top of the line, is of less consequence. At the time of the claim it straddled the line and is therefore a boundary tree.

In Quebec and Ontario there are statutes affecting boundary trees. Ontario has a long legislative history of discussing trees on or by boundary lines. The issue of where to define the presence or absence of the tree relative to the boundary line, regardless of where the original tree grew, arose in *Hartley vs Cunningham et al.*, 2013. One side claimed sole ownership of the

tree because at ground level the trunk was almost entirely on her side of the boundary. She claimed the tree was dangerous and needed to be removed. The court settled on the tree trunk rather than previous standard used, which was the base of the tree, which might include the root crown or flare.

Using the tree trunk, the tree in *Hartley* was then found to be a boundary tree within the meaning of the Forestry Act, and was therefore jointly owned. Any work on the tree required consent of both owners. While some have seen this decision as a move forward, it is not clear quite how much difference it makes. In practice, it is not uncommon to find no well defined transition point on a typical tree where it can be definitively stated, “This is trunk and that is root crown.” If the line between trunk and root crown is to be defined as a matter of centimetres, it is doubtful that there would be widespread agreement among technically qualified people as to where the trunk starts and the base stops in most trees. There is simply too much variation in trunk form to have a simple definition of that unless one accepts a tolerance of say, plus or minus 10 centimetres i.e. a general area not an exact line on the trunk. If such an approach was adopted who would choose the ‘right’ answer and on what basis? Arguably, either side would choose whichever interpretation favoured their case.

So, while *Hartley* satisfied the case at hand with respect to the Ontario Forestry Act, it entirely fails to resolve the technical issues. Merely stating that the determining point is the trunk not the base, adds little in the way of clarification. Precisely the point made in *Koenig v. Goebel*, 1998 where the Judge stated “... no logical basis exists for drawing a distinction between the trunks and roots of a tree, save for Consensual Straddle Trees.” Where on the trunk should the critical point be measured? At a nominal point close to but not at ground level? Higher up? In *Demenuk v. Dhadwal*, 2103,

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Natural regeneration versus tree planting

BY PAT KERR

University of Maryland Baltimore County released a study, “Natural regeneration or tree-planting?” that points out a bias in forest restoration studies. The story was published in *ScienceDaily*, 16 May 2018.

The summary says, “At a time when countries are pledging to restore millions of hectares of forest, new research argues that recent studies on forest regeneration techniques are flawed. Sites used to evaluate natural regeneration were secondary growth forests, whereas sites chosen to evaluate artificial regeneration ranged from abandoned coal mines to cattle-trampled fields. Authors of the new study suggest elements of both techniques should be considered, depending on the objectives for a site and its current state.”

The authors recommend, “rather than argue for natural regeneration versus artificial tree planting, it’s often worthwhile to just step back and give natural regeneration a chance for a year or two. It’s free. If it fails, then look at your objectives and figure out what sort of interventions you need to do, rather than saying one is better than the other.”

“In some cases it makes sense to combine elements from both approaches. For example, planting small clusters of trees, rather than trying to replant an entire site, can sometimes be enough. Tree planting can be the sparkplug that gets birds coming into a site, that then kick starts regeneration.”



Chestnut gall wasp attacking Chestnut in Ontario

The chestnut gall wasp, *Dryocosmus kuriphilus*, one of Canada’s newest invasive species was found to be more invasive than previously known. The wasp reproduces without the presence of a male. A study was done by University of Extremadura, in Spain. In a very short time one or very few female chestnut gall wasps give rise to genetically homogeneous populations which are threatening the chestnut sector in Europe. This study was published in *ScienceDaily* 21 May 2018.

The wasps are producing genetically identical daughters. To date, no males have been found in Italy where it was introduced in 2006. This shows the insect is both highly vulnerable and highly reproductive.

At this point, the only defense recommended by the authors is maintaining all stock for at least one year to ensure the tiny wasp eggs are not transported. Fleshy balls form on the tips of branches of infected stock. As the invasive is new to Canada, nothing is listed for use to control it in this country.



Chestnut gall wasp



Trees and The Law *continued*

it was suggested that 1.4 metres would be the correct point.

The use of a standard reference point is termed diameter at breast height (DBH). DBH is a forestry term and is the reference height above ground used when measuring tree trunk diameters to calculate timber volumes. In Canadian forestry practice the standard height for DBH is 1.3 metres, which is the standard set by the International Union of Forest Research Organizations (IUFRO) and is commonly used around the world. The United States uses 1.4 metres as a standard height for DBH. Occasionally the term is seen as DSH meaning diameter at standard height, but Cullen (2015) points out that is not a correct use of the term as DSH generally refers to diameter at stump height.

Municipal bylaw requirements often use DBH to define what is or is not a bylaw-sized tree, though the height above ground varies. Once the diameter threshold is set, trees can then be measured at the prescribed height to see if they are or are not within the purview of the bylaw. However, using DBH or any other reference point on the trunk to determine if a tree is or is not crossing the boundary line, is very uncommon, realistically an aberration, not common practice.

Notwithstanding *Koenig, Hartley or Demenuk*, common practice is still the base of the tree where it meets the ground as was seen in *Kelley*, perhaps because it eliminates other issues that arise if the trunk is used. This is noted in *Mynors* (2002) as well. “The basic rule is that a tree is part of the land (soil) surrounding the base of its trunk.”

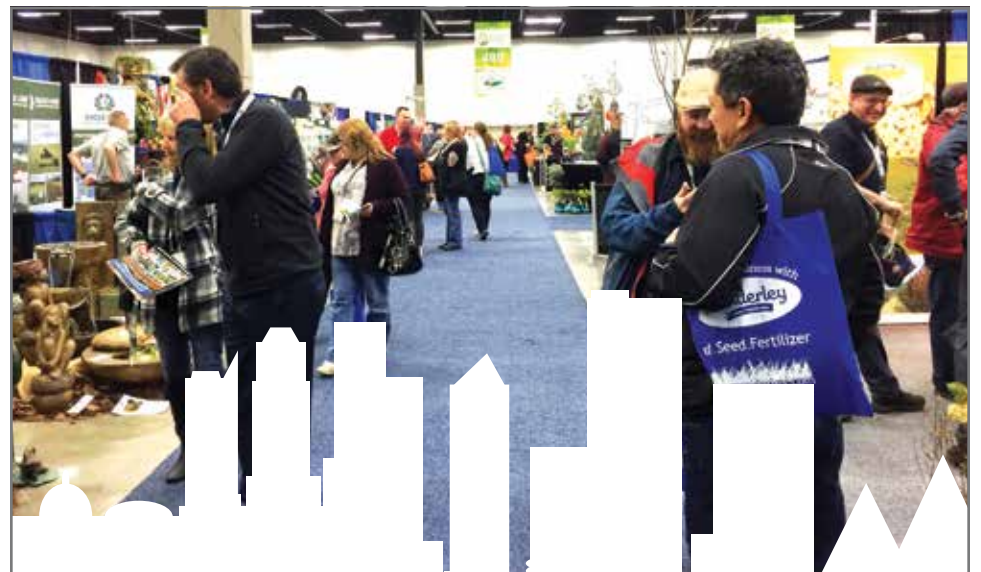
Defining ownership may matter less for a tree trunk that is standing vertically but a tree trunk with a lean raises far more complicated issues. It would not be uncommon to find that the base and lower trunk of a tree grew on one side of a boundary, and the rest of the trunk and much of the crown grew over the other side of the boundary. It may be that regardless of where delineation of ownership occurs — the base or the trunk — the person whose land is occupied by the overhanging portion may want to abate the nuisance it creates. If they did so by cutting the tree down, above and beyond the boundary, so that no trespass occurred, are they then liable for destroying the tree? Surely not. They have simply abated a nuisance without trespass.

Applying an arbitrary trunk height, indeed any trunk height, as a legal test for boundary trees seems bound to yield perverse and clearly unwanted challenges. Future cases may need to defer to the court to decide this issue on a case by case basis, but the long established practice of taking the root crown at ground level as the test of ownership would appear to be far more logical than using DBH — a reference point never intended for use as a demarcation of ownership.



Extracted from *Trees and the Law in Canada*. Now available at www.treelaw.info.

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.



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