TREES & THE LAW

BY JULIAN DUNSTER

When is a tree a nuisance?

Not everyone likes trees.

This becomes painfully apparent when trees grow close to property lines. In a typical scenario, neighbour A owns a tree growing close to the boundary. The roots or branches of the tree (or both) grow over the property line, or as is often the case, the property line has been imposed on the landscape already containing said tree. Neighbour B decides that the roots and/or branches are creating problems be it blocking sunlight, obscuring views, or simply shedding leaves.

In legal terms, nuisance can be something as simple as branches contacting a roof and abrading the surface.

Or, the problem may be actual harm caused by roots damaging structures, or branches physically contacting a roof and abrading the surface. Either way, the nuisance has to be demonstrable in some way.

Black's Law Dictionary (1990) offers several definitions of nuisance including this one: "An offensive, annoying, unpleasant or obnoxious thing or practice; a cause or source of annoyance, especially a continuing or repeated invasion or disturbance of another's right, or anything that works a hurt, inconvenience, or damage." But it could also be, "that activity which arises from unreasonable,

What is reasonable for one person may be seen as very unreasonable by another.

unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage."

Two forms are commonly seen: Private nuisance centres on activities or undertakings that are lawful within the confines of the property, but cause problems beyond the property lines. Thus, trees or tree parts (roots and branches) encroaching across a boundary, might cause actual damage, or loss of enjoyment for the adjacent property owner.

Many cases refer to private nuisance as unreasonable interference with the use and enjoyment of land (for example Yates v Fedirchuk ONSC 5549 2011). Public nuisance affects the public at large and although the extent of nuisance may be unequal in perception or result, it is seen as something that potentially injures or endangers the general public. Sidewalks lifted by roots would be a good example.

Private tree nuisance claims hinge on the extent of the actual or perceived damage and require proof that the damage does in fact exist. In Yates v Fedorichuk the judge notes, "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society."

The judge goes on to note, "The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place. Reasonableness in this context is a twosided affair. It is viewed not only from the standpoint of the defendant's convenience, but also must take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: is he using it reasonably, having regard to the fact that he has a neighbour?"

Added to the mix is whether or not the owner of the tree was aware, or ought reasonably to have been aware of the issue in contention. This gets problematic when for example; Neighbour A has recently purchased the property and has no idea that the tree is in fact causing damage to Neighbour B. However, once notified of the problem Neighbour A is now aware and at the very least, has to investigate and see if in fact the issue is real or perceived.

In Canada at least one of the cases often cited for that issue is the Leakey test. In Leakey, Neighbour A owned land which subsequently slid down onto Neighbour B causing damage. The Leakey test hinges on whether or not the owner of the problem causing the damage, "knew or ought to have known of the risk," and whether or not that owner did, "what was reasonable in all circumstances to prevent or minimise the risk of the known or foreseeable damage or injury to the other person or his property." Of course, what is reasonable for one person may be seen as very unreasonable by another, and again, the judge would ultimately decide that issue.

In all these cases, care must be taken to ensure that a) the owner of the alleged nuisance has in fact been notified correctly of the actual or perceived problems and b) the owner has been given every opportunity to examine and if necessary correct the problems. However, there does not appear to be an automatic requirement that the nuisance must be abated at the cost of the owner. For that to happen, the nuisance must be proved to have caused or be very likely to cause actual damage. For arborists involved in such issues, that means being aware of the actual issues on the ground and being able to see and prove a cause and effect linkage. Simply writing a report based on client desires will not be sufficient to prove the case. This is a particularly sensitive issue when dealing with risk issues and the likelihood of failure.

In the next article, we will look at foreseeability of damage as a component of nuisance.

Julian Dunster is the senior author of Arboriculture and the Law in Canada. Copies of the book can be obtained by emailing him: jd@dunster.ca.