THE LAWYER'S DAILY
Published by LexisNexis Canada

Tree-protection-bylaws

By Julian Dunster

Julian Dunster

(Tuesday, May 05, 2020 @ 1:47 PM).

Many parts of Canada have municipal bylaws designed to protect trees and restrict activities that damage or destroy trees. Bylaws are often relatively blunt instruments and can be challenging to write in a way that covers all likely circumstances. On one hand they need to be broad enough that most of the issues to be regulated are clearly defined. On the other hand, they need to be specific enough to clarify what is or is not unacceptable behaviour and in what context. Once in effect bylaw enforcement is supposed to be administratively fair, reasonable, transparent and accountable.

Clarity is an important obligation in bylaws. They should not be vague or contain uncertainty; they should be consistent throughout and be technically accurate for specific subject matter. Ideally, a well written bylaw allows every citizen of common intelligence to clearly understand the bylaw, its intent, and obligations, and how they are supposed to comply with them (Regina v. Sandler [1971] 3 O.R. 614). Challenges to a bylaw can be made based on alignment with enabling legislation, or Official Community Plans (OCP). However, the latter tend to be visionary in scope and are designed to provide guidance to municipal councils. Care must also be taken to avoid unintended consequences.

In practice, there may be difficulty in interpreting and enforcing one or more parts of a bylaw in which case more thorough review of the specific circumstances may be required (Smith and Toronto (City) (Re) [1860] O.J. No. 195).

As societal awareness about urban forests increases, so too does political awareness and the desire to use tree bylaws to further restrict tree damage and tree removal. Increasingly, municipalities are adding more restrictive language, but not always in a coherent manner. For example, the City of Vancouver bylaw 9958 s. 8.2 states "A person must not: (f) prune a tree to the extent that it is unlikely to regain its characteristic appearance."

The problem with such language is that it is not simple to define a characteristic appearance for any tree, other than in extremely broad terms, such as columnar, fastigiate or broad crowned. And in all circumstances the ultimate form of any tree crown depends entirely on the growing conditions in any one site.

Factors such as the depth, fertility, hydrology and available volume of soil, amount of shading, species selection and overall health of the tree will all alter the appearance of the tree. As a result, the same species can have widely different appearances in any one region. Moreover, the concept that the pruning will be so severe in extent, that the tree would be permanently altered, often requires a long time frame to evaluate if the tree might recover.

In order to have a successful and technically valid prosecution, we must first define what the characteristic appearance ought to be, then show how the alleged activity has changed that, and then prove that the changed appearance will never be the same again.

But, far more importantly, is the entire concept of what pruning does or does not mean. It always involves removal or part of a tree and should be done to meet specified objectives. These might include reducing risk of limb failure, maintaining clearance between a tree and a building, a sign, or power lines, reducing shade, improving or maintaining views, or to help maintain tree health. In many of these objectives the end goal is a long-term permanent modification of the tree form,

which will alter its appearance. In practice trees do grow back over time, which is why most municipalities and utility companies have pruning cycles: they need to come back and reprune trees periodically in order to maintain the management objectives.

Which puts bylaw provision 8.2(e) in direct contradiction with entirely legitimate practices. In effect, what the clause states is that nobody can prune any tree anywhere in the City of Vancouver if it would alter this ill-defined concept of "characteristic appearance." Surely not what was intended, and clearly not what is being practised since street trees that are maintained by the city are regularly pruned back to ensure clearance for trolley bus lines, power lines and road signs.

As a result of these entirely legitimate objectives, the form and appearance of these trees are very obviously modified, and in some cases, it is permanent. Since the City of Vancouver is subject to the provisions of the bylaw in managing its own trees, issues of equitable application of the bylaw provision arise. Why would it be acceptable for the city to prune a tree "to the extent that it is unlikely to regain its characteristic appearance" and at the same time prosecute private landowners for doing the same thing?

Administrative fairness in bylaw enforcement is often an issue of concern. In this example, the disconnect has been successfully argued at trial, and in an unreported verbal decision, at least one prosecution has failed as a result.

A different problem arises in the City of Victoria tree bylaw No. 05-106. The definitions section includes wording for "protected tree" which lists some species and any tree more than 30 centimetres in diameter, and "tree" which is any tree more than 10 centimetres in diameter, more five metres high, or a replacement tree.

The regulations in Part 2 list the prohibited activities, all of which apply to protected trees. Items 6 and 7 prohibit removal of trees on slopes or watercourses without a permit. Item 8 prohibits removal of a tree that is shown to be retained in building plans, permits and rezoning or subdivision applications.

But, at the planning stage, there is no legal requirement in the bylaw to show anything on the application plans other than protected trees. However, if an applicant were to show "trees" on their plans then both protected trees and trees in general appear to be subject to the tree permit and tree replacement requirements, along with the cost implications.

Not surprisingly, developers are inclined to remove any tree not on a slope or in a watercourse, that is not defined as a protected tree. It saves them a considerable amount of time and money. Experience so far shows that the costs associated with surveying, assessing and discussing trees get passed on to the purchaser, thus ensuring that the costs of housing are increased and become less affordable.

In this case, the bylaw might be better worded to offer more incentives and reduce the onerous cost implications, since they do not accomplish much in the way of maintaining urban forest cover. These two examples both show the need for better bylaw wording, and a more pragmatic balance between utopian desires to save every tree and the practical realities of tree management.

Julian Dunster is a consulting arborist, professional forester and professional planner based in Victoria B.C. He is the author of *Trees and the Law in Canada*. None of the material above shall be considered as legal advice.