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Natural Resources

Trees on boundaries: Where to measure the tree?

By **Julian Dunster**

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(March 18, 2021, 10:55 AM EDT) -- Many tree trespass cases involve trees whose trunk and roots are on both sides of a boundary line between adjoining properties. It has been long established law that trees in such cases shall be considered as jointly owned by the adjoining property owners (*Waterman v. Soper* (1698), 1 Ld. Raym. 737; *Griffin v. Bixby* (1841) 12 N.H. 454). That is, one owner may not harm, damage or remove the jointly owned tree without the consent of the other owner.

Koenig v. Goebel [1998] S.J. No. 31 is often cited as it describes a border tree as one where the "... trunks are solely on one property at ground level, but whose roots encroach into an adjoining property, or whose canopy of branches invades the air space above an adjoining property." *Koenig* goes on to suggest a straddle tree is one "... whose trunks straddle the common boundary between adjoining properties at ground level."

Later case law has added some confusion in the terms. *Trees and the Law in Canada*, (Julian Dunster, 2018) suggests a border tree is one where it "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." He then defines a boundary tree as a tree that "... 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."

A critical element in common law and under the *Civil Code of Quebec*, is that it is the location of the trunk and root flare, where it meets the ground, that determines ownership. That was fine until *Hartley v. Cunningham* 2013 ONCA 759. Here, it was argued at trial that established precedent was wrong, and that a better approach was to measure the tree at the point where the trunk meets the roots of the tree. While that may indeed have assisted the court with regard to s. 10(2) of the *Forestry Act* in Ontario, the ruling has had perverse results.

Accurately determining the exact point where the trunk joins the roots is fraught with difficulty. Many trees have a gradual taper in the lower trunk down to the ground and there is no obvious change from trunk to roots that is any different from previously established precedent. While the concept of a root flare is nice, and in some instances is indeed an obvious feature, it is not obvious or easily defined on all species or all trees on every site. If anything, it has introduced far more uncertainty than previously existed.

Demenuk v. Dhadwal 2013 BCSC 2111 took the concept even further by accepting that the accepted point of ownership would be 1.4 metres above ground on the tree trunk. Quite how the court saw that as "... generally consistent with .... *Hartley* ..." is unclear since these are two entirely different measurement points. *Trees and the Law in Canada* points out that the 1.4 metres above ground has absolutely no bearing on ownership.

It is derived from industrial forestry as a standard point of measurement known as diameter at breast height (DBH), which is 1.3 metres in Canadian forest practice and 1.4 metres in the U.S. Municipal bylaws have adopted DBH as a useful reference point to determine if a tree is or is not large enough to be defined as a protected tree. Nowhere in established precedent in Canada has DBH ever been used to determine ownership until *Demenuk*. The implications of *Demenuk* are even more

perverse than *Hartley*. While DBH may work if the tree trunk is vertical, it has extremely perverse implications if the tree leans.

Suppose a municipality plants a street tree close to but not over the boundary line. For whatever reasons, the tree later leans over the boundary such that the trunk at or beyond DBH is clearly growing over the boundary line. Prior to *Demenuk* that tree would belong solely to the municipality. It would own it and be responsible for it. Further suppose that part of the leaning tree breaks off in a storm and damages the house on the adjacent property. Would the municipality deny liability on the basis that the failed part was above DBH and therefore not under its ownership?

Perhaps so, but would the same municipality be able to accept the inverse argument in such a situation? If ownership is determined by DBH as a measuring point then, in the absence of any bylaw provision to the contrary, the homeowner could entirely remove the tree above DBH without penalty. They would not have trespassed to do so. This is the very point made in *Anderson v. Skender* (B.C.C.A.) [1993] B.C.J. No. 1769 dealing with a leaning tree removed in trespass. These are very real issues in practice and they remain unresolved. (I recently encountered an instance where a damage claim was denied on the basis of ownership established by DBH.)

It remains unclear if it is even feasible to resolve such an issue if DBH is used as the measurement point. A bylaw definition could be included but what degree of lean is to be used as a reference point? And how would that ever be determined on a logical basis? *Trees and the Law in Canada* illustrates the perversities arising from *Hartley* and *Demenuk* in greater detail.

Hartley and *Demenuk* are good examples of decisions creating unintended consequences in practice. It would be good to see a return to established precedent using the point at which the base of the entire tree trunk and roots contact the ground. It is easier to apply, and although not perfect, it creates far less uncertainty than the results created by *Hartley* or *Demenuk.*

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