

## Trees: The self-help approach

Friday, February 28, 2020 @ 10:37 AM | By Julian Dunster



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Tree branches and roots growing across a property line are a common source of nuisance between neighbours. (*Lemmon v. Webb* (1894)) is the foundation of what is known as the self-help rule. Several large trees growing on the plaintiff's land had branches overhanging onto the defendant's property. The defendant, Webb, without notifying the plaintiff, and without trespassing onto the plaintiff's land, cut several branches back to the boundary line. The court upheld the right of the defendant to cut back the branches. The defendant did not trespass on to the tree owner's property to do the cutting. The court did not require the tree trimmer to notify the tree owner prior to making the cuts.

“The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so” (Lord Justice L. Kay, *Lemmon v. Webb* (1894)).

*Lemmon v. Webb* dealt solely with overhanging branches, and whether the offended party had a right to cut them back without notifying the owner of the tree. In the appeal (1895) the discussion extended to include roots, albeit in *obiter dicta*. Subsequent case law in the U.K. did not challenge the concept and it became accepted law that branches and roots crossing a boundary could be considered a nuisance.

That is confirmed in *Davey v. Harrow Corporation* 1958: “In our opinion, it must be taken to be established law that, if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie.” And later in *McCombe v. Read* 1955: “It is very old law that if my neighbour's tree encroach on my ground, either by overhanging branches or by undermining roots, I may cut the boughs or roots so far as they are on my side of the boundary.”

The matter seems to have been laid to rest in *Solloway v. Hampshire County Council* 1981.

“... the duty in respect of the nuisance created by the roots arises if the encroachment of those roots is known, or ought to be known, to the owner, occupier, or other person responsible for the tree and its maintenance, if the encroachment is such as to give rise to a reasonably foreseeable risk that such encroachment will cause damage.”

Damage to the property of the plaintiff occurred in the U.K. case of *Smith v. Giddy* 1904, and set another important precedent. Elm and ash trees were cut because they overhung the property of the defendant and interfered with the growth of his fruit trees. There was no precedent at the time of *Smith v. Giddy* with respect to the overhanging limbs of non-poisonous trees which had caused damage. The court ruled that when trees were overhanging the boundary and not doing any damage, the defendant's only right was to cut back the overhanging portions, but where the limbs were actually doing damage, there was a right of action in the law of nuisance.

In an interesting twist, *Mills v. Brooker* 1919, involved the issue as to whether or not fruit growing on overhanging branches could be picked and sold by the neighbour. The court found that the fruit belonged to the owner of the tree, regardless of whether the fruit was attached to the tree.

Moreover, although the defendant had a right to abate a nuisance caused by overhanging branches following *Lemmon v. Webb*, he could not pick the fruit and then convert it for his own use. The same principle applies to any branches severed in order to abate a nuisance; they can be cut, but not then converted into cash. Rather, they must be returned intact to the owner. The case was appealed but dismissed.

These early cases defined case law dealing with trees and nuisance in Canada, outside of Quebec. In the absence of any law to the contrary, the self-help rule is very clear. The person affected by encroaching branches and roots from a neighbour's tree may legally sever branches and roots to the property line without concern for what that might do to the tree. If the pruning activity subsequently kills or destabilizes the tree that is too bad. The tree owner has no recourse in law against the person who conducted the pruning. *Demenuk v. Dhadwal* 2013 BCSC 2111 expounds on that in more detail.

I was referred to no case in which a property owner has been found liable in negligence for cutting either the branches or roots of a tree that extend on to his property from a neighbour's property so long as he or she did not trespass in carrying out this activity. This is so even in circumstances where such conduct may kill the tree. It is so without any assessment of what steps a property owner could or should have taken to avoid that result.

In the absence of any local bylaws to the contrary, the only restriction on self help is that there cannot be trespass. More recently, municipal bylaws, at least in British Columbia, have been introduced that try to define tree damaging activities and prohibit pruning of branches or roots above a certain size or in a way that might be seen to harm the tree.

In principle, that approach attempts to prevent or at least reduce the damage to trees that the self-help approach might cause. In practice it also introduces a large amount of subjectivity about what is or is not a nuisance and whose rights and opinions should prevail.

In Quebec, the *Civil Code of Quebec* specifies what can and cannot be done, often using similar concepts. When the issue directly involves trees on or close to the boundary Articles 984 and 985 come into play:

984. Fruit that falls from a tree onto neighbouring land belongs to the owner of the tree.

985. If branches or roots extend over or upon an owner's land from the neighbouring land and seriously obstruct its use, the owner may request his neighbour to cut them and, if he refuses, compel him to do so.

Trees next to boundaries are entirely owned by one person. Trees straddling a boundary are jointly owned by adjoining neighbours. The owner of a solely owned tree is responsible for maintaining it and the neighbour must grant them access to do that.

If the tree is jointly owned both parties are responsible for the tree and neither can cut or remove it without consent of the other. No pruning can be undertaken on jointly owned trees, or by the adjacent property owner of a solely owned tree without consent. If a tree on the neighbouring land is in danger of falling on the owner's land, he may compel his neighbour to fell the tree, or to right it.

If the tree is solely owned any encroaching roots and branches cannot be cut back without first asking the tree owner to do it. If the owner refuses, the applicant cannot simply go ahead and do the work anyway. The applicant must apply to the court for an injunction compelling the work to take place. If a self-help approach is adopted the court will automatically find fault and a financial penalty is likely to be imposed.

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