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HIGHLIGHTS

- * A Justice of the Ontario Court of Justice has upheld a conviction of destroying a boundary tree without the consent of an adjoining land owner. Sections 10(1) and (2) of the Ontario Forestry Act provide that a land owner may, with the consent of the owner of adjoining land, plant trees on the boundary between the two lands, and that trees growing on the boundary of adjoining lands are the "common property" of the adjoining owners. Section 10(3) provides that anyone who destroys a tree growing on this adjoining boundary without the consent of the land owners is guilty of an offence. The Court reviews, in considerable detail, the lengthy statutory and judicial history of boundary trees under Ontario law and considers the situations in which an adjoining land owner may remove trees without the consent of the other owner, where the tree constitutes a nuisance. The Court concluded that the common law defence of nuisance did not apply in this case. (Gross v. Scheuermann, [CALN/2017-060](#), [\[2017\] O.J. No. 5618](#), Ontario Court of Justice)

NEW CASE LAW

Gross v. Scheuermann;

[CALN/2017-060](#),

Full text: [\[2017\] O.J. No. 5618](#);

[2017 ONCJ 722](#).

Ontario Court of Justice,

R. Libman J.,

November 1, 2017.

Boundary trees -- Ontario Law -- Co-ownership of Boundary Trees -- Conviction for Removal of Boundary Tree Without Consent of Adjoining Co-owner.

Dr. Mart Gross ("Dr. Gross") appealed to the Ontario Court of Justice from his conviction, pursuant to a private prosecution brought by Scott Scheuermann ("Scheuermann") as a result of which Dr. Gross was found guilty of destroying a boundary tree, contrary to the provisions of s. 10(3) of the Ontario Forestry Act, [RSO 1990, c F.26](#).

Dr. Gross and Scheuermann are neighbours. An 80 year old Norway maple tree was located on their property line between their houses in Toronto, where Dr. Gross and the Scheuermann families reach reside.

Dr. Gross had retained an arborist who wrote a report entitled "Notice of Hazardous Tree" dated November 25, 2009 in which the arborist recommended removal of the tree due to its hazardous condition. The City of Toronto issued a permit to remove the tree on December 23, 2009 based on this report. The Scheuermanns refused to consent to the removal of the tree.

On April 1, 2003 the arborist took down the tree on the instructions of Dr. Gross. The tree was removed without the prior knowledge or consent of the Scheuermanns. The Scheuermanns alleged the tree was removed to allow Dr. Gross to expand his driveway, that the tree was not diseased or a hazard and provided privacy and shade desired by the Scheuermanns.

Section 10 of the Forestry Act provides:

10(1) An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between the two lands.

(2) Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands.

(3) Every person who injures or destroys a tree growing on the boundary between adjoining lands without the consent of the land owners is guilty of an offence under this Act.

On April 24, 2015, Justice of the Peace Brihmi, found Dr. Gross guilty and imposed a fine of \$5,000.00 [[2015 ONCJ 254](#), 2015 O.J. No. 2429 (QL)]. Justice of the Peace Brihmi concluded that s. 10(3) of the Forestry Act was a strict liability offence.

On appeal, Dr. Gross argued that s. 10(3) of the Forestry Act did not apply to a joint owner of a boundary tree; that s. 10(3) does not apply to a hazardous tree for which the

City of Toronto had issued a Confirmation of Exemption, and that the conviction failed to recognize and apply Dr. Gross' right to a self-help remedy as a complete defence [at para. 62].

Decision: Libman, J. dismissed Dr. Gross' appeal [at para. 168].

Libman, J. conducted an extensive legislative review of Ontario boundary tree legislation, commencing with Ontario's first statute, that was passed in 1893 [at para 78 to 105].

Libman, J. observed [at para. 78]:

[78] Forestry legislation generally, and tree planting provisions in particular, have a rich history in the Province of Ontario, and elsewhere in Canada. From forest exploitation to forest management, legislation governing forest policy has been promulgated in every jurisdiction, both federal and provincial: see Monique M. Ross, *A History of Forest Legislation in Canada 1867-1996* (Calgary: Canadian Institute of Resources Law, March 1997).

Libman, J. observed that successive Ontario statutes had recognized the potential for legal disputes involving trees growing on boundary lines, and reviewed how legislation had dealt with this issue through numerous revisions between 1883 and 1998, when boundary tree provisions were incorporated into the Forestry Act, and were reduced to the 3 sections quoted above, observing at para. 102 to 104:

[102] Subsections (1) and (2) are essentially restatements of the earlier legislation which provided the authority to plant boundary trees with the consent of the owner of the adjoining land, and stated that such trees were the common property of the co-owners.

[103] Subsection (3) reflects the greatest change to the previous versions of the offence creating provision of destroying a boundary tree. Gone was the prohibition against allowing an animal to cause damage to such trees; the non-consensual conduct of trimming, cutting down or removing a boundary tree was replaced by simply injuring or destroying a tree in such circumstances.

[104] The general penalty provision for any contravention of the Forestry Act, including the boundary tree offence, is a fine of up to \$20,000.00, or to imprisonment for not more than three months, or to both (s. 19(1)).

Libman, J. next reviewed 90 years of case law involving boundary trees [at para. 106 to 134]. The cases referred to included *Freedman v Cooper*, 2015 ONSC 1372 and *Davis v Sutton*, [2017 ONSC 2277](#), in which Courts had held that the Forestry Act did not apply where a boundary tree constituted a nuisance which may be cut down without consent to abate the nuisance.

However Libman, J. rejected this defence stating, at para. 154 to 156:

[154] As the civil cases on point illustrate, where the boundary tree constitutes a nuisance, whether inherent or patent in nature, one may resort to

self-help and take steps to abate and remedy it. Indeed, the first tree planting legislation in Ontario recognized the potential for boundary trees to cause "a nuisance in the highway or other public thoroughfare", and prohibited owners of trees from so planting them. (Tree Planting Act, 1883, s. 4).

[155] While this legislation was subsequently amended, and the current version makes no reference to "nuisance" boundary trees, common law defences are recognized by s. 80 of the Provincial Offences Act, and thus continue to operate. In addition, the permit issued by the City authorizing the tree's removal makes explicit reference to the requirement of addressing any common law or civil law issues in relation to the subject tree, including, presumably, nuisance.

[156] However, the lack of urgency in the appellant's actions in waiting so long to remove the imminent hazard said to be caused by the boundary tree negates whatever common law recourse to nuisance would have justified the self-help defence put forward. That is, it was not reasonable, as found by the learned trial justice, to claim that the Norway maple boundary tree constituted a danger, or nuisance, and that it needed to be removed immediately, yet not get around to doing so until three and one-half years later, simply because the appellant was too busy. It is implicit, in other words, in the trial judge's findings that any interference claimed by the appellant with respect to his use or enjoyment of the land due to the tree's condition was neither substantial nor unreasonable, as evidenced by the lengthy period of time that passed before he removed it.

Libman, J. then concluded [at para. 161 to 163]:

[161] While prosecutions under the Forestry Act may well be rare, they are available in cases such as this one where one of the joint owners of a boundary tree proceeds to remove the tree without seeking the consent of the other.

[162] The appellant could have avoided this conflict with the law by resorting to the very application process that he cites in support of his legal position, that is, having a court rule that as a co-owner of a boundary tree, he was legally entitled to have it removed over the objection of the co-owner, based on an evidentiary record to do so, including the steps he had taken to obtain the consent of the other co-owner, and the merits of the reasons for wishing to cut down the tree, notwithstanding the opposition of the co-owner.

[163] In this case, however, the appellant had the tree taken down first, rather than seeking consent from the co-owner, or approval of the court, beforehand. It is clear that there was no basis in law or fact for the appellant to act in the manner he did, without attempting to obtain his neighbour's consent at a time proximate to the removal of the tree. Indeed, the permit

issued by the City to remove the tree expressly imposed this condition of addressing the rights of the co-owners of the boundary tree. Instead, the appellant took his position to do so, apart from his own testimony and belief based on the issuance of the permit by the City.

CREDITS

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