

## Is Your Tree a “Border Tree” or a “Straddle Tree” or Is It Just Plain Old Neighbourly Love – Not Likely?

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December 3, 2015

*As with all aspects of environmental law, the law turns on the facts. The law of trees is no different. And, it is often the technical advice of arborists about certain aspects of a specific tree that drives how Courts decide tree disputes among neighbours. One common situation that leads to disputes between neighbours is where a tree straddles the property line. Another is where the tree is entirely on one property with its roots across or its ‘drip line’ hanging over the property line. In some cases, an opinion from an arborist may be helpful to define which it is. In the end, Courts are called upon to referee these not so neighbourly disputes!*

In Ontario, there are two primary statutes governing trees. One is Ontario’s *Municipal Act, 2001* and the other is Ontario’s *Forestry Act*. The *Municipal Act, 2001* sets out municipal by-law making powers about the destruction or injuring of trees. The *Forestry Act* defines ownership of trees situated on boundaries and also sets out municipal by-law making powers.

The *Forestry Act*, s. 10(2) provides that “Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands.” This tree is known in law as a Straddle Tree.

Section 10(2) of the Act was recently judicially considered by the Ontario Superior Court in *Hartley v. Cunningham* 2013 ONSC 2929. In *Hartley*, one property owner’s request for a declaration that she was the sole owner of a tree was put before the Court. Justice Moore held:

*I accept [the expert’s] reasoning, that: a great deal of caution must be exercised when measuring trees at ground level. This is because establishing the base of the tree is often difficult and controversial. The base of the tree contains the root flare which may be broader than the trunk itself and the trunk of the tree at ground level is ambiguous and not necessarily a useful measure of where the tree trunk transfers into the root system (the true base of the tree). Focusing solely on the tree at ground level can lead to arbitrary results (para 9)*

...

*In my view, the meaning of the words in section 10(2) is clear. It includes within the ambit of the meaning of a tree trunk growing on a boundary line the entire trunk from its point of growth away from its roots up to its top where it branches out to limbs and foliage. In any event, it is not only the arbitrary point at which the trunk emerges from the soil that governs (para 14)*

On appeal, *Hartley v. Cunningham* 2013 ONCA 759 was affirmed with no modifications in a brief endorsement by the Ontario Court of Appeal. The Court of Appeal held:

*We agree with the application judge's interpretation of s. 10(2) of the Forestry Act and his conclusion dismissing the appellant's application to be declared the sole owner of the tree.*

In short, trees whose trunks straddle property boundaries are jointly owned. The cases suggest that neither owner may unilaterally remove a straddle tree but may trim back its branches and roots.

Trees with trunks that are entirely on one side of the property line but encroach across the property are known in law as Border Trees. The most often cited cases in Canada about Border Trees are from: (i) the Saskatchewan Queen's Bench in *Koenig v. Goebel* [1998] 6 WWR 56; [1998] CarswellSask 13; 162 Sask R 81, and (ii) the Ontario High Court of Justice in *Centrum Land Corp. v. Institute of Chartered Accountants of Ontario* [1988] O.J. No. 350; 64 O.R. (2d) 289.

Recent cases in Ontario summarize and adopt *Koenig & Centrum*. For example, in 2010, in *Huston v. Lang* [2010] O.J. No. 6060, the Ontario Small Claims Court held that:

*The issue of "tree trespass" was recently discussed by Klebuc J. in Goebel v. Koenig, [1998] 6 W.W.R. 56. An analysis of that case reveals that in the context of "Border Trees" (trees whose 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), the law is fairly clear that an adjoining property owner may abate this type of nuisance by cutting back the offending portions of tree up to the property line regardless of the immediate or eventual effect that this action has on the tree (at para. 8):*

*There is clear authority for the proposition that a property owner is legally entitled without notice to cut those branches and roots of a neighbour's Border Tree which extend onto his property or air space although such action may kill the tree. See Graham v. DaSilva (1984), 34 R.P.R. 264; British Columbia (Attorney General) v. Saanich (District), [1921] 1 W.W.R. 471, aff'd in part [1994] 1 W.W.R. 186; Anderson v. Skender, [1994] 1 W.W.R. 186; Centrum Land Corp. v. Institute of Chartered Accountants of Ontario et al. (1988), 64 O.R. (2d) 289 (H.C.).*

This line of case law has been followed in several Ontario decisions.

To know with greater certainty which line of cases involving the law of trees will apply, you will need to know about the physical attributes of the tree both above- and below-ground, including the location of the tree relative to any property line. In the end, the law turns on the facts.

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