

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Katherine Anne Hartley

Applicant

- and -

Hilary Cunningham and Stephen Scharper

Respondents

BEFORE: Moore J.

COUNSEL: *John A. Howlett*, for the Applicant

Clayton C. Ruby, for the Respondents

ENDORSEMENT

[1] At issue in this matter is the right of the respondents to assert an ownership right to a Norway Maple Tree that the respondents assert straddles the property line between the applicant's and the respondents' back yards. More specifically, the issue is whether the respondents enjoy an ownership right to the tree at all and therefore whether they can be heard to object to the applicant's intention to have the tree felled.

[2] The applicant seeks a declaration that she is the sole owner of the tree.

[3] The parties agree that the applicable legislation is the *Forestry Act*¹ which is silent on any definition of what a tree trunk is but which 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.²

[4] It is common ground that if the tree is co-owned by the applicant and the respondents, the latter must consent to the removal of the tree, a consent that the respondents are not prepared to provide.

¹ *Forestry Act*, R.S.O. 1990, Chapter F.26

² *Ibid.*, s. 10(2).

[5] The applicant insists that the focus of any consideration of whether or where a tree trunk crosses a boundary line must be directed only at the level where the trunk emerges through the ground. The respondents submit that a tree, indeed this very tree, is a boundary tree when its trunk crosses the boundary line above its roots and beneath its leaf canopy.

[6] The respondents also dispute the applicant's assertion that the tree trunk is situated only on her property at ground level. They insist that the level of the ground adjacent to a tree is a variable factor dependent upon how fill is placed against the trunk. A more precise point of measure and one consistently applicable to all trees would require the base of the tree to be measured at the point at which the trunk meets the roots of the tree. A measurement taken by respondents' expert at that point demonstrates that the trunk at root the ball is on the boundary and this tree is a boundary tree on that basis.

[7] The applicant has asserted that the tree is unhealthy and that supports her wish to have it taken down. She has not adduced evidence to support that assertion but the respondents have marshaled and presented evidence to the contrary. The respondent's expert arborist has inspected the tree and found it to exhibit very good vigour and vitality and that it is in good overall health.

[8] Upon the uncontested expert evidence before me, I conclude that the tree is in a reasonably safe condition and can be retained in that condition by application of a dynamic tethering system to its three main stems, a procedure the respondents have offered to pay for but which the applicant had declined to accept. As such it is not a distinction without difference to say that the applicant's wish to remove the tree falls short of a need to do so.

[9] Mr. Radecki, one of the respondents' experts, provided evidence in this matter. He explained that the applicant's position that tree trunk position should be measured at ground soil level is arbitrary and although some municipalities use that measurement location for their purposes and while he is aware of competing definitions of boundary trees, he rejects them as inconsistent with the conventional wisdom. He stated, and I accept his 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.

[10] The respondents retained two other experts. Mr. Van Wassenaer is a certified arborist with twenty years of experience. He too opines that arborists determine whether a tree is a boundary tree by examining whether any part of the trunk crosses the boundary line. He maintains that municipal by-laws to the contrary notwithstanding, the conventional wisdom within the field of arboriculture is consistent with his stated view.

[11] From the perspective of a landscape architect, Ms. Spiegel concludes likewise that any part of the trunk over the boundary line makes the tree a boundary tree.

[12] The opinions of the experts are helpful to better understand the anatomy and development of a growing tree and the extent that its growth and location impact the experts in their

involvement with the tree as arborists, foresters or landscape architects. These sources also assist in understanding whether particular interpretations urged on the court by the parties can lead to absurdities. I do not rely on the opinions of experts to the extent that they might appear to address the ultimate issue of my interpretation of the meaning of the relevant section of the legislation.

[13] The expert evidence accords with a common sense reading of the word “trunk” and with its dictionary meaning³ as well.

[14] 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.

[15] I accept the respondents’ evidence and submissions that to interpret the legislation otherwise may lead to anomalous results where a property owner chooses to add soil or other materials to the base of the tree to artificially raise the soil up and away from the roots, perhaps to a portion of the trunk, not on the boundary line.

[16] Even upon the applicant’s submission, however, that it is the base of the tree trunk that is determinative of tree ownership, the expert evidence establishes that this tree measured against the property boundary at its base, where the trunk meets the roots, is located on the boundary line. Therefore the evidence supports the respondents’ entitlement to co-ownership of this tree in any event.

[17] Beyond this though, the legislation in effect now no longer asks for evidence establishing who planted the tree, when and where with relation to the boundary line and whether it was planted with the consent of adjacent property owners.⁴ The legislature streamlined the provisions in the previous legislation to eliminate these historical components so often difficult to prove. The object of the revision and consolidation of forest husbandry legislation leading to the enactment of the *Forestry Act* was to eliminate red tape; it succeeded in bringing boundary tree ownership determinations into the present and facilitates proof of ownership by readily ascertainable factual information and mathematical precision.

[18] The legislation addresses the present time and focuses on where the tree trunk is “growing”. In circumstances where the trunk is growing on the boundary line, co-ownership follows, no matter who planted the tree. This is important in the instant case given that none of the parties knows who planted this tree. There is no evidence suggesting it was planted with the consent of adjoining owners at the time and there is some evidence suggesting it may not have been planted at all but grew from a seed blown by the wind.

³ Oxford Dictionary: <http://oxforddictionaries.com/definition/english/trunk?q=trunk>

⁴ *The Trees Act*, R.S.O. 1990, c. T.20, s. 3, repealed by *The Forestry Act*, supra.

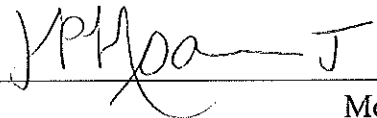
[19] I agree with the submission of the respondents that where, as here, the Legislature changes the wording of a statute, it does so intentionally and a presumption arises that the meaning of the previous legislation also changed.⁵

[20] The applicant submits that urban forestry by-laws of various municipalities in Ontario, whenever they were enacted, will be undermined if the present legislation is not read to reflect the state of the law before the *Forestry Act* came into force in December of 1998. I disagree. The by-laws of municipalities are not before this court for review, the rights of private citizens to one tree are. This tree is a boundary tree within the meaning of the *Act*, it is common property of the owners of the adjoining lands and its ownership is therefore shared by the parties.

Disposition

[21] The application is dismissed.

[22] The respondents are awarded costs in amounts to be agreed upon or fixed. The parties having been directed to exchange costs demands on the day of the hearing were well positioned to understand their potential financial jeopardy and the applicant was able to form a reasonable expectation of costs demanded from her. If the parties cannot agree on costs issues, they may file written submissions of no more than five pages with the Motions Office for my attention within thirty days.



Moore J.

Date: May 17, 2013

⁵ Ruth Sullivan, *Construction of Statutes*, 5th edition (Toronto: LexisNexis, 2008) at 579.