Citation: ***R. (ex rel. Scheuermann) v. Gross*****, 2015 ONCJ 254**

Ontario Court of Justice

Toronto Region

Case Name:
SCHEUERMANN v. GROSS

In the matter of the *Provincial Offences Act*, R. S. O. 1990, c. P. 33.

B E T W E E N:

SCOTT SCHEUERMANN, Private Informant, and
MART GROSS, Defendant

REASONS FOR JUDGMENT

Before: His Worship Mohammed Brihmi

Appearances:
Mr. J. Chalmers, Provincial Prosecutor
Ms. L. Daviau, Counsel for the Defendant
Dr. M. Gross, Defendant, In Person
Hearing Date: January 16, 2015

Judgment: April 24, 2015

M. BRIHMI J.P. (orally):--

INTRODUCTION:

[1] This is a private information that is brought before the court by Scott Scheuermann against the defendant, Mart Gross, who has been charged under *The Forestry Act of Ontario, 1990*, R.S.O. 1990, c. F.26 (the "*Act*"), as follows:

That Mart Gross of 32 Fallingbrook Crescent in the City of Toronto, on or about the 1st day of April 2013, at 34 Fallingbrook Crescent in the City of Toronto, did commit the offence of Injure or Destroy a Tree Growing on the Boundary Between Adjoining Lands Without the Consent of the Land Owner, contrary to the *Act*, s. 10(3).

[2] This alleged offence falls under Part III of the *Provincial Offences Act*, R.S.O., 1990, c. P. 33, and it is a strict liability offence.

[3] The defendant has entered a plea of not guilty to this charge.

THE WITNESSES AND EXHIBITS:

[4] The matter before the court is a continuation of the trial, which began on January 16th, 2015 at the Ontario Court of Justice Toronto East (1530 Markham Road). The court heard evidence from the prosecution's two witnesses: Scott Scheuermann and Ann Scheuermann, who are the co-owners of the property located at 34 Fallingbrook Crescent in Toronto.

[5] Furthermore, the court heard from the defence's witness, Dr. Mart Gross, the co-owner of the property located at 32 Fallingbrook Crescent, Toronto, Ontario.

[6] In addition to the *viva voce* testimony, the court was also provided with 11 Exhibits; including the Agreed Statement of Facts, five of them entered by the Prosecution and the other five by defence counsel.

[7] After hearing closing arguments from both parties, and weighing all of the evidence in totality, this matter is before the court today for judgment.

THE RELEVANT JURISPRUDENCE:

[8] The court carefully reviewed the relevant case law, as follows:

a) The 1978, Supreme Court of Canada case, *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299.
b) The 2013, Ontario Court of Appeal case, *Hartley v. Cunningham,* [2013] O.N.C.A. No. 759.
c) The 2013, Superior Court of Justice (Ontario) case, *Hartley v. Cunningham,* [2013] O.N.S.C. 2929.
d) The 1991, Supreme Court of Canada case, *R. v. W.D.*, [1991] 1 S.C.R. 742.
e) The 2012**,** Supreme Court of Canada case, Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.
f) The 1993, Supreme Court of Canada case, *Murphy v. Welsh; Stoddard v. Watson* [1993] 2 S.C.R. 1069
g) The 2013, Ontario Court of Justice case, *Ladouceur v. Wawanesa Mutual Insurance Co.* [1998] O.J. No. 3561
h) The 2005, Alberta Court of Queen's Bench Judicial District of Edmonton case of *the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended, and CCI Industries Ltd. and Calgary Masonry Supplies (1993) Ltd.* [2005] A.J. No. 1158
i) The 2012 Ontario Court of Justice case, *R. v. Vastis*, [2006] ONCJ 347
j) The 2014, Superior Court of Justice (Ontario) case, *Jessica Laciak v. City of Toronto*, [2014] ONSC 1206

THE AGREED STATEMENT OF FACTS:

[9] Both parties have provided the court with an Agreed Statement of Facts.

[10] In it, they admit to the following:

1. Mart Gross is a co-owner of 32 Fallingbrook Crescent in Toronto;
2. Scott Scheuermann is co-owner of 34 Fallingbrook Crescent in Toronto;
3. That the Norway maple tree in question was located on the property line between 34 Fallingbrook Crescent and 32 Fallingbrook Crescent, Toronto, Ontario and was a "boundary tree" as defined by the *Forestry Act of Ontario;*
4. That Al Miley & Associates assessed the Norway maple tree located on the property line between 34 Fallingbrook Crescent and 32 Fallingbrook Crescent, Toronto, Ontario and on November 25, 2009 issued an arborist report. Mr. Miley's report is marked "Exhibit 1", however the truth of its content is not agreed to;
5. On December 23, 2009, the City of Toronto issued a Confirmation of Exemption with respect to the Norway maple tree in question. The Confirmation of Exemption from the Toronto Parks, Forestry & Recreation dated December 23, 2009 is marked "Exhibit 2";

6. That on April 1, 2013 on the instruction of Dr. Gross, co-owner of 32 Fallingbrook Crescent, Toronto, Ontario, Al Miley & Associates attended and removed the Norway maple tree from the property line between 34 Fallingbrook Crescent and 32 Fallingbrook Crescent, Toronto, Ontario; and
7. Neither Scott Scheuermann, nor his wife Ann Scheuermann consented to the removal of the tree.

TESTIMONY OF THE PROSECUTION'S WITNESSES:

[11] The Court heard from the Prosecution's two witnesses. The first one was Scott Scheuermann. He is the owner of and resident at the large property located at 34 Fallingbrook Crescent. His testimony has been summarized as follows:

[12] Mr. Scheuermann testified that he has resided at that location since June 1995. He said that years before he bought the property, both the owners of this place and the one immediately south of them, located at 32 Fallingbrook Crescent, had landscaped the front yards of both properties, planting three large spruce trees and other shrubbery to landscape them attractively. In addition, he testified that his wife has been an avid gardener and that she has spent hours landscaping their backyard.

[13] In regard to the photographs that were entered collectively as Exhibit 2, he testified that Exhibit 2B was taken in the summer of 2009. This photograph showed the backyard with its extensive landscaping, the plants and the Norway maple tree.

[14] In addition, he identified another photograph, Exhibit 2D. It was a picture that was taken on April 1, 2013, which showed a member of Mr. Al Miley's crew cutting down the Norway maple tree and trespassing on their property. Furthermore, he testified that the Norway maple tree had two large branches, which are 5 feet off the ground and the crew member was cutting the northern branch, which was on their property.

[15] Furthermore, Mr. Scheuermann identified another photograph, Exhibit 2E, which he testified was taken on April 5, 2013. This photograph showed the stump of the Norway maple and the temporary fence that was put up by the defendant. He testified that more than 90 percent of the stump was on their side of their property line, and only a very small portion of the stump was on the south of Dr. Gross's property.

[16] In addition, he testified that, in July 2007, the defendant approached them with a proposal to excavate land, north of his current driveway, to build a new retaining wall along the property line to have a double side by side parking. He also told the court that the defendant gave them two documents on July 2007. The first was a report from Kelly's Tree Care Limited, an arborist that the defendant had hired that identified a bunch of trees that were to come down, on his property and ours, as a result of his driveway expansion. This report also dealt with the Norway maple tree.

[17] Furthermore, Mr. Scheuermann testified that as they had not consented to taking down the Norway maple Tree, the proposal outlined in the Arborist report was that the northern stem of the Norway maple Tree was to be cut down and the tree would be left standing. In addition, the south overhanging stem would be taken down because it had a frost crack and some decay from a branch that had been taken off years before.

[18] Mr. Scheuermann testified that since this discussion of 2007, he never received any request or plan to have the Norway maple cut down and nothing took place between 2007 and 2009 with respect to this tree. Furthermore, he testified that only on April 1, 2013, when he returned home from his cottage for the long weekend that he found Mr. Miley's trucks in the yard. At that time, he saw two trunks of the Norway maple and the Spruce in the front of their yard being decimated. At that moment, he said that the Norway maple was completely gone, and only its stump remained.

[19] Under cross-examination, he testified that he categorically denies receiving or seeing the letter dated February 10, 2010 that was addressed to him. He added that his wife has never seen it before, either. He said that it was defence counsel who sent him that letter on June 4, 2014.

[20] In particular, he testified that he and his wife were not on speaking terms with the defendant, because of the proposed changes to the front of their property, the installation of parking pad and the cutting down of a healthy spruce tree on our property.

[21] **The Court heard from the Prosecution's Second Witness, Ms. Ann Scheuermann, the wife of Mr. Scheuermann. Her testimony has been encapsulated as follows:**

[22] Ms. Scheuermann testified that she has been married for thirty two years and that among her roles within the family, she has been responsible for the gardening, and that she has enjoyed it.

[23] Furthermore, Ms. Scheuermann testified that the backyard of her house does not look like it did before, as shown in Exhibit 2B. Since the tree has been cut down, there is very little shade. As a result, the hostas and a lot of plants have been removed because they were not growing in the new environment without the tree.

[24] In describing Exhibit 2C, she told the court about the plants that she had planted, which were growing without difficulty, underneath the tree. These plants included hostas, ferns, Solomon's seal, bishop's hat, wild ginger and bleeding heart.

[25] Furthermore, she described Exhibit 2D of the picture that she took when the Norway maple tree was removed and someone from the tree removal company delimbing the

Norway maple in the backyard in our property and that it started when she was not at home. Also, she told the court that the top limbs were mainly down and they were cutting the secondary ones.

[26] Furthermore, she testified that she called the police as well as the company telling them that they were on private property and that they had no permission to cut down a bordering tree on their property, and at that point, they stopped.

[27] In addition, she testified that Exhibit 2E showed the remainder of the tree once it has been cut to the stump and the temporary fence that was put up by their neighbour.

[28] Ms. Scheuermann testified that around 2007, when they were on friendly terms with the defendant, an arborist approached her in the defendant's backyard regarding taking down the tree and the arborist indicated that you have to both be in agreement about it. Furthermore, she testified that she told this arborist that she did not want the tree taken down, and there had been a suggestion at that time, that the left side of the tree, on their property, could be removed if necessary.

[29] In addition, she testified that few years later, while she was in her backyard, a landscaping architect from their neighbour asked her if she had any objection to having the Norway maple tree cut down and she told him that she has no desire to have the tree removed because it provided shade to the garden she had established underneath the tree.

[30] In regard to the letter dated February 10, 2010, she testified that this is the first time she has seen it and she does not think Mr. Scheuermann has shown it to her. However, she testified that he had told her about the letter they had not received.

[31] Ms. Scheuermann testified that she has never given anyone her permission or consent to cut down the Norway maple tree. At the time it was cut down, the police were called at the premise. When Dr. Gross came out with his permit, she asked him why he did not notify them about it, and his response was because we have not been on speaking terms.

[32] Under cross examination, she testified that Dr. Gross offered to replant a tree on their property and that she refused his offer. In addition, she told the court that the removal of this tree has ruined her enjoyment of her property because there is no shade and even if they had accepted Dr. Gross's offer, they would have to wait 20 years to have the shade.

[33] Furthermore, she testified that she had some concerns regarding one birch tree that was leaning on their property and they had an arborist to examine it. She indicated that the arborist told her that it was fine and that this arborist did not note any other hazards on their property. In addition, she clarified that it was possible that she had only one

conversation with Dr. Gross when they were on speaking terms about the removal of part of the limb on the left side of the tree.

[34] In regard to the letter, she clarified that she was aware of the letter they have received from defence counsel, but she said that she never personally received any correspondence from the neighbour. She added that both she and her husband check the mail at home. Furthermore, she clarified that between 2007 and 2010, there may have been letters dealing with various other issues, including the cutting down of the tree in the front and the back. Despite participating in the mediation regarding the dispute between neighbours in 2014, there was nothing involving the Norway maple tree at that time.

[35] The Court also heard from the defendant, Mart Gross. He is the co-owner with his wife Nancy Garesh of the property at 32 Fallingbrook Crescent that they bought since June 2003. His testimony has been summarized as follows:

[36] Dr. Gross testified that he is a senior professor of Biology at the University of Toronto.

[37] Dr. Gross told the court that he received a permit from the City of Toronto instructing him to remove the Norway maple tree after it was assessed as hazardous. In addition, he testified that if he did not act on the removal of the tree, he would be liable to any accident due to its collapse and that his property insurance would not cover any damage because he would be found negligent to have left it standing after the city identified it as hazardous.

[38] Dr. Gross also told the court that in 2005, two years after moving to his new home, he was concerned with the structural deformities and cracks in this tree and he brought in an arborist from one of the large tree companies in Toronto and the arborist had identified concerns with the Norway maple tree because of its structural deformities.

[39] In addition, he testified that he contacted Norm DeFraeye the Supervisor of the City of Toronto Forestry who pointed out that the Norway maple tree on the boundary was in a hazardous condition.

[40] Furthermore, Dr. Gross contacted another arborist from a large reputable company in Toronto, Al Miley's & Associates and they were in agreement with the City's Forestry department that nothing could be done to preserve it (Exhibit 1 of the Agreed Statement of Facts). In addition, he testified that he submitted their report with an application to the City that sent another forester from their department to review the site before they provided him with a permit to take the tree down (Exhibit 2 of the Agreed Statement of Facts). He confirmed that he picked up the Confirmation of Exemption sometime in early January, 2010.

[41] Dr. Gross also testified that he understood that he was held responsible for the removal of the tree, because it was identified as a hazardous one that must be removed and that was the reason why his name was the only name on the permit for its removal.
[42] In regard to Exhibit 3A, Dr. Gross explained that the photo of the Norway maple tree taken on March 2013 showed that it displaced the fence, and he testified that the property line goes right through the centre. In addition, it showed the structural deformities because the tree has two co-dominant stems and it should only have one attached to each other by the bark and not by the actual tree trunk.

[43] With respect to Exhibit 3C, he told the court that the photo showed the Norway maple tree was in very poor condition with the frost cracks going up the limbs of the tree. He testified that Exhibit 3D showed the frost on the limb of the Norway maple tree toward the north neighbour, the Scheuermann's residence.

[44] Furthermore, Dr. Gross testified that the Norway maple tree has no impact on the work he wanted to do to widen his driveway, stating that he enjoyed it, and did not want its removal. In addition, he told the court that he explored ways to save it, or to selectively remove just one limb with the largest crack and he was told that nothing could be done to save it.

[45] In addition, Dr. Gross testified that he did not believe that the consent of his neighbour was required to remove the Norway maple tree.

[46] In regard to Exhibit 4, the letter that he sent on February 10, 2010 to Scott and Ann Scheuermann, he testified that he drafted it with his wife; he signed it, and sent it to them through the Canadian postal system.

[47] In addition, Dr. Gross explained that because they had not spoken to the Scheuermann's for six years, this was the only avenue to exchange mail to inform them about the permit to remove the tree and to ask if they are willing to share the expenses of the tree's removal. Furthermore, he testified that he waited and never heard back and the letter was never returned.

[48] In regard to the dispute with the neighbour, he told the court that involved the removal of six trees for which he received a permit, including the removal of three boundary trees. In addition, Dr. Gross testified that when he received the Confirmation of Exemption, he believed that he had to remove the Norway maple tree because it stated that if he failed to remove it, the City would do so, and that the cost of that removal would be imposed on his municipal taxes.

[49] Furthermore, he testified that the Confirmation of Exemption was issued on December 22, 2009. He said that he picked it up in early January 2010, and that the tree

was taken down on April 1, 2013. When asked why he waited that long, Dr. Gross told the court that there were many concerns on his plate at that time, including his wait to hear back from his neighbours, his construction project on his home, and his mother's death in 2009. He testified that he was the executor for her affairs, as well as then the primary caregiver for his 94 year old father. He added that he and his wife both had busy careers.

[50] Under cross-examination, Dr. Gross clarified that when he met with Mr. Norm DeFraeye of the City of Toronto, he told him that the Norway maple tree was an imminent hazard and not an imminent hazardous tree; however, he didn't give any report or any instruction in writing.

[51] In regard to Kelly's Tree Services, he testified that he hired them to look if they could preserve the trees with their landscaping goals and that he did not authorize them to discuss the removal of the Norway maple tree with the Scheuermann's. However, Dr. Gross told the court that he authorized Kelley's Tree services to freely communicate with their neighbour. In addition, he never sought the consent or the permission of the Scheuermann's to cut the Norway maple tree between 2007 and 2012.

[52] When asked about the ravine permit he received from the City to remove the Serbian spruce trees to facilitate the construction of his fence under the *Fence Line Act*, he testified that those trees were on the north side of the driveway and not on the north neighbouring property (The Scheuermann's property). However, when he was shown the permit, he agreed that it involved the removal of five trees and that there was a separate permit or Notice of Exemption for the Norway maple tree.

[53] When Mr. Gross was asked about the Confirmation of Exemption in Exhibit 2 of the agreed statement of facts and the conditions attached to it, first he denied that no condition were attached to it and that it was a permit. Furthermore, when asked about the following sentence in the Confirmation of Exemption: "*Imminently hazardous tree must be removed immediately; failure to do so will result in the issuance of an emergency order by the municipal licensing and standards staff*". After reading it, he told the court that he removed the tree within the time the City considered to be an imminent hazard tree removal.

[54] In regard to the condition that it was the responsibility of the applicant to deal with the ownership issues, Dr. Gross told the court that he discussed it with the City, and they told him to proceed and remove the tree because it was a hazard. When asked about the worker who was cutting the Norway maple tree that he was on the Scheuermann's property, after denying that he was on their property, he told the court that he honestly did not know the answer because it was a complex question.

[55] In regard to the letter that he mailed to the Scheuermanns in 2010, he testified that he

mailed it from a local mailbox on Queen Street, with all the details, and that he considered the information in it to be important.

[56] In regard to the consent of the Scheuermanns, after he received the Certificate of Exemption, Dr. Gross told the court that they did not give their consent to cut down the tree and they have never denied it too. When he was asked if at any time since he lived next to the Scheuermanns, had they given him their consent to cut down the boundary Norway maple tree, he responded in the negative.

THE POSITION OF THE PARTIES:

Submissions of the Defence:

[57] The defence's position is that there is an issue of statutory interpretation in this case. They submit that the *Act and the City of Toronto Municipal Code* or its *by-laws* must be read together to avoid conflict. In addition, defence contends that the *City of Toronto Act* allows the City to pass by-laws to, *inter alia*, protect persons and property, including dangerous trees. However, the *Act* is completely silent on hazardous and dangerous trees. Therefore, the court should read the statutes in this manner; since they do not conflict and that it is not an offence under the *Act* to remove a hazardous tree from a property line.

[58] Furthermore, defence submits that the *Act* would have the defendant convicted under s. 10(3), "Injure or destroy a tree growing on the boundary between adjoining lands without the consent of the land owner." However, if the defendant had done nothing or if he continued to do nothing, he would have been guilty of an offence under the *Municipal Code*. Therefore it cannot be that the *Act* serves to protect trees that are dangerous to people and to property.

[59] In addition, defence submits a reference to the principles of the decision of the Supreme Court of Canada dealing with the *Broadcasting Act* and the *Copyright Act (Broadcasting Act… v. Bell Media Inc.…* [2012] 3 S.C.C. 489: in paragraphs 37, 38 and 43:

Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter" (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), *two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.*

Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid *conflict.*

Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the purpose of *the other.*

[60] Defence contends that to convict Dr. Gross would be an absurd result as he did what the City directed him to do. Moreover, circumstances such as these are what the Supreme Court of Canada has instructed the lower courts to avoid.

[61] Furthermore, defence submits that the doctrine of paramountcy does not apply in this case because there is no conflict between the *City of Toronto Ac*t and the *Act*. They co-exist and one does not frustrate the other; as the *Act* deals with healthy and non-dangerous trees while the *City of Toronto Act* deals with dangerous trees and property. However, the reverse is not the same. Penalizing someone who deals with a hazard frustrates the *City of Toronto Act* that regulates safety in property.

Submissions of the Prosecution:

[62] The Prosecution's submission is that the two pieces of legislation, the provincial *Act and the City of Toronto By-Law* are not in conflict and they can be read together. In addition, the defendant had to comply with both statutes. Furthermore, the Prosecution submits that there is a positive requirement in the *Ac*t not to destroy a tree, healthy, good, damaged or dead if it is a boundary tree. Therefore, you cannot injure or destroy or do anything to a boundary tree without the consent of both owners, which is not the situation in this matter.

[63] In this particular case, the Prosecution contends that the City did not object to Dr. Gross taking down the tree and that he did not need a permit or permission, however, he has responsibilities to make sure that the ownership issue was dealt with properly. Furthermore, the Prosecution argued that Dr. Gross took steps to see if he was in compliance with the *by-law*. He could have gone to the Scheuermanns after receiving the report that the tree needed to come down and sought to obtain their consent; but that he failed to do so.

[64] The Prosecution submitted that when there is a boundary tree, no action should be taken unless it is with the consent of the adjoining land owners. Prosecution made reference to a civil case from the Superior Court of Justice (Ontario) in *Hartley v. Cunningham*, 2013, ONSC 2929, where the applicant had sought to be the sole owner of a large Norway maple tree.

[65] Mr. Justice Moore decided on the basis of the evidence before him that the tree was a boundary tree and that the appellant and the respondents are co-owners. He said the following in this case in paragraph 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.*

[66] And at paragraph 20, Mr. Justice Moore held as follows:

The applicant submits that urban forestry bay-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 1998. I disagree. The bay-laws of municipalities are not before this court for review, the right 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 land and its ownership is therefore shared by the parties.

The Legislation:

[67] Subsections 10 (3) of the *Act* states as follows:

Offence

> 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. 1998, c. 18 Sched. 1, s. 21

[68] Section 19 (1) further provides that every person who,

(a) contravenes a provision of this Act;

(b) alone or through any other person, contravenes any provision of a by-law passed under this Act, or a predecessor of this Act;

(c) obstructs or interferes with an officer or any person acting under the officer's instructions, in the discharge of his or her duties; or

(d) fails, without just cause, to comply with an order made under subsection (2), is guilty of an offence and on conviction is liable to a fine of not more than $20,000 or to imprisonment for a term of not more than three months, or to both. 1998, c. 18, Sched. I, s. 21; 2002, c. 17, Sched. C, s. 12 (5).

The Nature, the Onus and the Burden of Proof of the Alleged Offence:

[69] The Court turned its mind to the offences contained in subsections 10(3) of the *Forestry Act* to determine if it is a strict liability offence.

[70] In particular, the Court relied upon the analysis of the Supreme Court of Canada in *R. v. Sault-Ste. Marie*,1978 CanLII 11 (S.C.C.), [1978] 2 S.C.R. 1299, which addressed the categorization of regulatory offences. Applying the categories of offences enunciated in this judgment, I am satisfied that most public welfare offenses are properly classified as either absolute liability or strict liability offenses. Very few regulatory offenses require the Prosecution to prove wrongful intention or knowledge in addition to the prohibited conduct. Based on construction of the language used in this statute, I am satisfied that this offence is a strict liability offence.

[71] Ergo, this offence places the onus on the Prosecution to prove its case beyond a reasonable doubt. If the Prosecution is able to do so, it also opens the opportunity to the defendant to present a defence and avoid liability if the Court is satisfied, on a balance of probabilities, that the defendant acted with due diligence and took all reasonable care in all the circumstances. A defence will also be available if the defendant reasonably believed in a mistaken set of facts which, if true, would render the act or its omission innocent.

ISSUES:

[72] The Court identified the following issues that have arisen in this proceeding and which need to be addressed:

1) Is there a conflict between the *Act* and *City of Toronto Code or the by- laws*?
2) Has it been proven that the defendant did injure or destroy the Norway maple tree growing on the boundary between adjoining lands without the consent of the land owner on April 1, 2013?
3) If the answer to (2) is yes, has the defence satisfied the court of either a due diligence defence, or a defence based on a mistaken set of facts?

ANALYSIS:

A: IS THERE IS A CONFLICT BETWEEN THE *CITY OF TORONTO CODE OR THE BY- LAWS* AND THE *FORESTRY ACT OF ONTARIO*?

[73] With respect to the submission made by defence counsel that when there is a conflict between the *Act* and the *Municipal Code* enacted through the *City of Toronto Act*, that the court should read them as an entire scheme and interpret them in a coherent manner, where they do not conflict, e.g., meaning that it is not an offence under the provincial

statute to remove a hazardous tree from a property line, the court accepts that there is no conflict between the two statutes and that they can be read together.

[74] I accept that both statutes are consistent and can be applied to this case. In addition, I accept that the provincial *Act* applies to all trees; whether they are healthy, good, bad or dead trees. In reviewing the *Act*, I did not find anything in it that makes it apply only and specifically to healthy trees and prevents its application to dead or hazardous trees.
[75] Furthermore, the court accepts that the Confirmation of Exemption of the City of Toronto (Exhibit 2 in the Agreed Statement of Facts) had included, among other conditions, that the defendant should deal with the issue of the ownership of the tree. Knowing that it was a boundary tree, Dr. Gross should have requested the consent of Mr. and Ms. Scheuermann before permitting Al Miley & Associates to cut down the Norway maple tree.

[76] I find that the decision of the Supreme Court of Canada was not particularly relevant in this case at bar as it has dealt with two federal statutes, *the Broadcasting Act and the Copyright Act*. However, in the case at hand, we are dealing with two statutes, one provincial and one municipal. There would be no conflict between them if the defendant had resolved the issue of the consent of the co-owners of the Norway maple tree.

[77] In addition, the *City of Toronto Act, S.O. 2006, c. 11, Sch. A (Amended in 2009, and came into force in 2009)* states the following in section 11 (1) regarding conflict with legislation:

> 11 (1) A city by-law is without effect to the extent of any conflict with,
> (a) A provincial or federal Act or a regulation made under such Act; or
> (b) An instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or a provincial or federal regulation
>
> 11(2) without restricting the generality of subsection (1) there is a conflict between a city by-law and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument. 2006, c. 11, Sched. A, s. 11(2)

[78] Therefore, I am relying on the 2013 decision of the Ontario Superior Court in *Harley v. Cunningham*, which is more appropriate in this case, as that judgment addressed the issue of the consent of the co-owners before removing a boundary tree. The Norway maple tree is a boundary tree and the Confirmation of Exemption notes that Dr. Gross has to deal with the co-owners.

B) HAS THE PROSECUTION PROVEN BEYOND A REASONABLE DOUBT THE *ACTUS REUS* OF THE OFFENCE BEFORE THE COURT?

[79] In order to prove the *actus reus* of the offence under section 10(3) of the *Act,* the Prosecution must prove that:

1) The Norway maple tree in question is a boundary tree that is co-owned within the meaning of the *Act*?
2) Did Mart Gross give instruction to Al Miley & Associates to take down the boundary Norway maple tree?
3) Did Scott and Ann Scheuermann give their consent as co-owners to have the Norway maple tree cut down?

[80] The court accepts that the Norway maple tree located on the property line between 34 Fallingbrook Crescent and 32 Fallingbrook Crescent in the City of Toronto was a boundary tree as defined by the *Act* and as conceded by the parties in the Agreed Statement of Facts. It is a common property of the adjoining lands and its ownership is therefore shared by both parties.

[81] Furthermore, I accept that Dr. Gross hired Al Miley & Associates to assess the Norway maple tree in dispute and that he prepared and issued an arborist report (Exhibit 1of the Agreed Statement of Facts). In addition, the court accepts that Dr. Gross gave his instructions to Al Miley & Associates to attend and remove the Norway maple tree on April 1, 2013. This evidence is admitted to in the Agreed Statement of Facts as well as in the evidence provided by Ann Scheuermann and also in Exhibit 2D.

[82] I find that the evidence of both Ms. Scheuermann and Mr. Scheuermann to be clear, concise, and credible. I accept fully their testimony that neither of them have ever given their consent, as co-owners of the Norway maple tree, to be cut down. I accept that Ms. Scheuermann was fond of and enjoyed gardening, and that she enjoyed the shade of the Norway maple tree.

[83] In addition, Dr. Gross testified that he never sought the consent or the permission of the Scheuermann's to cut the Norway maple tree between 2007 and 2012. Under cross-examination, at first, he told the court that the Scheuermanns never denied consent to cut down the tree. However, when asked at the end of the cross-examination if at any time since he lived in that house, next door to the Scheuermann's, did he ever receive their consent to cut down the Norway Maple, his response was negative even though it was clear from his evidence that he knew that the Norway maple tree was a boundary tree.

[84] Therefore, the court is satisfied that the Prosecution has proven beyond a reasonable doubt all the elements of the offence before the court.

C: HAS THE DEFENDANT SATISFIED THE COURT OF EITHER A DUE DILIGENCE DEFENCE OR A DEFENCE BASED ON A MISTAKEN SET OF FACTS?

[85] The Court recognizes that the defence has the ability to avoid liability by raising a doubt in the mind of the Court that the defendant has exercised all reasonable care to avoid committing the offence or that he had an honest but mistaken belief in facts which, if true, would have rendered the act innocent and could have exculpated him.

[86] As Dr. Gross presented, among others, contrary evidence, including his own testimony in which he denied that he was made aware of any conditions attached to the Confirmation of Exemption; that he did not know if the worker of Al Miley & Associates who was taking down the tree on his instruction was on the Scheuermann's side of the property as well; and that he mailed a letter to the Scheuermanns on February 10, 2010, informing them that the Norway maple tree was declared by the City to be a hazardous tree, that it was coming down and asking them to share 50 percent of the cost of the tree's removal. In this situation, an assessment of the credibility of the parties is required as part of an examination of this defence evidence.

[87] Therefore, it is incumbent upon the court to refer to the decision of the Supreme Court of Canada in *R. v. W. (D),* [1994] 3 S.C.C. 521, [1994] S.C.C. No. 91 (QL) in which Justice Cory J. set out the credibility test as follows:

1. First, if you believe the evidence of the accused, obviously you must acquit.
2. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
3. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[88] In terms of credibility for this matter, the Court finds itself at the third step of this analysis, based on the following evidence:

[89] On one hand, the court finds that Mr. Scott Scheuermann, Ms. Ann Scheuermann and Dr. Mart Gross were doing their best to tell the truth about what happened.

[90] Mr. Scheuermann provided me with a clear and concise account of events, in a straightforward manner. Under cross-examination, he categorically denied receiving the letter dated February 10, 2010 from the defendant, and he testified that he only received it from defence counsel in June 2014. I find Mr. Scheuermann to be highly credible.

[91] In regard to the testimony of Ms. Scheuermann, the court finds that she testified in a clear and detailed manner her evidence. The court accepts as true that she enjoyed gardening in the backyard of her house and with the removal of the Norway maple tree, there was very little shade as well as that the hostas and a lot of plants have been removed because they were not growing in the new environment without the tree.

[92] On the other hand, the court finds the evidence of Dr. Gross to be problematic, and in some instances, contradictory. In hearing his account of this ongoing dispute, that

started regarding the proposed changes to the front of Dr. Gross's property; including the cutting down of the Serbian Spruce trees, the installation of parking pads and the fact that they were not on speaking terms as neighbours for almost six years, commencing in 2007, a reasonable person would have acted differently from Dr. Gross.

[93] In these circumstances, a reasonable person who knew that he was not on speaking terms with his neighbours who were co-owners of the tree in dispute, would have sent at least one registered letter, if not more, after waiting and not hearing back from the Scheuermanns regarding the letter that he told the court he mailed on February 10, 2010. In addition, the letter contained important information to inform the co-owners about the permit he received from the City to remove the Norway maple tree and to ask if they are willing to share the expenses of the tree's removal.

[94] I find it reasonable to believe that the Scheuermann's never received this letter from Dr. Gross and that it was defence counsel who sent it to them for the first time on June 4, 2014.

[95] Furthermore; I find that a reasonable person would not have waited three and a half years before taking down an imminently hazardous tree that the Confirmation of Exemption stated must be removed immediately, noting that a failure to do so would result in the issuance of an emergency order by Municipal Licencing & Standards staff. I understand that Dr. Gross had many things on his plate during that time, nevertheless, the wait of three and half years seems to me to be unreasonable.

[96] In addition, the court finds it difficult to believe that Norm DeFraeye, the Supervisor of the Urban Forestry, Ravine & Natural Feature Protection of the City of Toronto would tell Dr. Gross to proceed and remove the Norway maple tree without telling him that he has to deal with the issue of the consent of the co-owners.

[97] Furthermore, I accept that the worker from Al Miley's & Associates who was taking down the Norway maple tree was on the Scheuermann's property and that they had not given their permission to have the tree removed.

[98] In addition, I do not accept the hearsay evidence that Norm DeFraeye or his office would tell Dr. Gross that the opinion of his neighbour of the boundary tree is of no concern because the City has identified the tree as hazardous and he is held responsible for its removal.

[99] Furthermore, the court does not accept the evidence of Dr. Gross that there were no conditions in the Confirmation of Exemption because the Norway maple tree is considered an imminent hazard. This document has a clear note that states the following: *Please note the determination of ownership of any subject tree is the responsibility of the*

applicant and any civil or common-law issues that may exist between property owners with respect to trees must be resolved by the applicant. The confirmation of exemption does not grant authority to encroach in any manner or to enter onto adjacent private properties. Therefore, the removal of the Norway maple tree requires the consent of the co-owners; which did not happen in this case.

[100] After reviewing the relevant case law, the totality of the evidence, which includes *viva voce* evidence, documentary evidence and after careful review of the submissions from the Prosecution, and defence counsel, the court finds that the Prosecution has met their onus of proving the *actus reus* of the offence in section 10(3) of the *Forestry Act* against Dr. Gross.

[101] Based on my reasons herein, I further find the defendant has not satisfied the court on a balance of probabilities either that he exercised all reasonable care so as to avoid committing the offence, or that he had an honest but mistaken belief in facts which, if true, would have rendered the act innocent and could have exculpated him.

ORDER:

[102] As such, I am satisfied that the prosecution has proven this case beyond a reasonable doubt. Accordingly, I find the defendant guilty and register a conviction against him.

Dated at Toronto, this 24th day of April, 2015.

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Mohammed Brihmi, J.P.