CITATION: Allen v MacDougall, 2019 ONSC 1939
COURT FILE NOs: CV-18-00604396
DATE: 20190327

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Drew Keith Allen and Susan Michelle Byrne, Applicants

– AND –

Meghan Ann MacDougall and Nigel Hamid Scott, Respondents

BEFORE: E.M. Morgan J.

COUNSEL: *Christopher Cosgriffe and Heidi LeBlanc*, for the Applicants
Nader Hasan and Benjamin Kates, for the Respondents

HEARD: March 26, 2019

REASONS FOR JUDGMENT

[1] What could be more Canadian than Toronto neighbours arguing about building an addition on a house? Home owners arguing about a maple tree, of course.

[2] The parties own adjacent homes in the Moore Park neighbourhood of Toronto. They share a large tree that straddles the boundary line between their two properties. The tree is a mature maple, some 104 cm in diameter at the trunk, and is estimated to be 50 or 60 years old. It is 2/3 on the Applicants' property and 1/3 on the Respondents' property.

[3] Section 10(2) of *The Forestry Act*, RSO 1990, C. F.26 provides confirmation and clarification of the rights of ownership at common law. It states that, "Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands." The large maple in issue in this Application belongs to both property owners.

[4] The Applicants seek to chop the tree down as part of their home renovation and expansion. They plan to build an addition to the back of their existing house, extending the structure on the north side of the house and requiring them to excavate around the tree and deep into the so-called "tree protection zone" which encircles it. The Respondents' expert says that this will cause the death of the tree. The Applicants do not dispute this conclusion, and bring this Application for the court to authorize the destruction of the tree.

[5] The Applicants come well prepared. They have obtained all relevant municipal permits to cut down the tree – including authorizations from the Committee of Adjustments, the Toronto

Building Department, and the Toronto Urban Forestry Department. These permits are necessary as a matter of regulatory compliance. They do not, however, reflect any adjudication of property rights, including those of a neighbour and co-owner of the boundary tree. The authorization letter from Toronto Urban Forestry dated March 22, 2018 makes this explicitly clear.

[6] The Respondents object to the tree being chopped down. They say that the tree is their property as well as that of the Applicants, and that the Applicants cannot simply invade and take away part of their property. The Respondents say that the Applicants should reconfigure their proposed addition to the house so that they can build it without destroying this piece of mutual property.

[7] The Applicants purchased their property in 2001. The Respondents purchased their property next door to the Applicants in 2015. The Applicants depose that they are a family of five and that until now their children have had to share bedrooms. They are now fortunate enough to be in a financial position to expand their residence with a substantial renovation, adding approximately 1,300 square feet of living space to their house. They also explain that they have strived to maintain the character of the neighbourhood in designing the extension to their home, but that the configuration of the house and the location of the tree make it necessary to get rid of the tree if they are to accomplish their desired expansion.

[8] The Applicants find the Respondents to be overly stubborn. They say that their renovation will be very nice and will enhance their use and enjoyment of their home and will improve the neighbourhood for all concerned.

[9] The Respondents may indeed be stubborn, but they contend that there are occasions when one is entitled to be stubborn. They explain that the tree is on their property, and to destroy it is to destroy part of their property. Respondents' counsel submit that property law does not allow the Applicants to do that, regardless of the merits of their proposed renovation. They state, accurately, that no matter how unreasonable it may seem not to let your neighbours take your property, you can refuse to do so even if the neighbours really need it.

[10] Having said that, one caveat to this general rule of property law is embodied by the law of nuisance. If your own use of your property constitutes a nuisance, the neighbour may be in a position to interfere with that use. The law of nuisance is designed to accommodate neighbours to each other, so that what might be a legitimate use in a remote area with no one else in sight can be curtailed in a more crowded urban environment. "The law of nuisance seeks to balance the competing rights of owners – one neighbour to do what he wants and the right of the other neighbour not to be interfered with": *Davis v Sutton*, 2017 ONSC 2277, at para 47.

[11] Counsel for the Applicants submits that the maple tree is a nuisance and seeks an Order to that effect. My colleague Perell J. has indicated that, "Under the law of nuisance, property owners are entitled to resort to self-help remedies to eliminate a continuing nuisance caused by roots and branches from trees, or the court may order that the nuisance be abated or removed": *Freedman v Cooper*, 2015 ONSC 1373, at para 36. The Applicants here have wisely not pursued a "self-help" remedy – i.e. they have not unilaterally chopped down the tree – as section 10(3) of

The Forestry Act makes such action a criminal offense. They have therefore sought a court Order authorizing the tree's removal.

[12] The Applicants argue that the tree deprives them of access to their property in the sense that the "tree protection zone" curtails the amount of land on which they can build. In making this point, they rely on *Davis*, *supra*, where one neighbour could not properly fence in his property because a line of cedar trees along the boundary forced him to place the fence some 6 to 8 feet inside of his property. The Court found that the boundary trees constituted a nuisance since they physically deprived one owner of substantial property footage. Counsel for the Applicants submits that this ruling is analogous to the position in which the Applicants find themselves here.

[13] The Applicants also analogize their situation to cases where the nuisance amounts to a physical invasion of the claimant's property. They point out that the Supreme Court of Canada has recognized that "[a]t common law, an owner would clearly have a right to claim for nuisance against roots, branches, etc., growing on his land from a tree located on his neighbour's land": *Centrum Land Corp v Institute of Chartered Accountants (Ontario)*, 1988 CarswellOnt 193, at para 11. In fact, a number of courts have noted that this is the most frequent basis for characterizing a tree as a nuisance. "In the main, cases have arisen where it is alleged that falling trees have damaged property, or where roots of trees have damaged things like drains or swimming pools": *Gallant v Dugard*, 2016 ONSC 7316, at para 15.

[14] As counsel for the Applicants point out, this principle should not change just because the tree straddles the boundary line between the two properties:

> It goes without saying that if the trees in this case were located entirely on the [Applicant's] land, they could be removed the [Applicant] despite their shade and ornamental value to the [Respondent's] tenant… I cannot see how the situation can be different merely because the trees happen to grow on the boundary line.
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> *Centrum*, at para 22.

[15] Contemporary environmental considerations have emphasized the increased importance of trees. While this is not an inflexible rule, the tendency of courts today is that trees are not lightly ordered removed on the basis of being a nuisance: *Yates v Fedirchuk*, 2011 ONSC 5549, at para 59. In fact, there are relatively few modern cases that consider trees to be a nuisance where the roots have not caused damage to an abutting property or the tree has not physically impeded access to a neighbour's land.

[16] This is not that kind of case. The shared maple has not caused damage to the Applicants' house or to any other structure or amenity built on the Applicants' land. Rather, the Applicants contend that their newly proposed use (i.e. the extension of their house) has made an existing use by the Respondents (i.e. the preservation of the tree) untenable. The complaint is reminiscent of the old English notion that there is no nuisance where one has, in effect, come to the nuisance: *Rex v Cross* (1826), 172 Eng. Rep. 219. The tree pre-dated the Applicants' arrival on the scene, and, as in *Gallant*, is one of the defining characteristics of the neighbouring properties.

[17] The Applicants have owned the property for nearly two decades. The maple tree was already there when they arrived. The tree was not a nuisance for the first 18 years that they occupied their property. They could go on using and enjoying their property for the next 18 years in the same way as they have done for the past 18 years. And they could do so without touching the boundary tree. It has only become a nuisance to them once they decided to add an addition to their house.

[18] Counsel for the Respondents submit that this is a case not of a tree interfering with the Applicants' use and enjoyment of their property, but rather of a tree preventing the Applicants' desire to increase their property value. The Applicants take some umbrage at that characterization; their counsel submits that the record demonstrates that the Applicants want to expand their house for reasons of improving their family's living conditions and not to flip the property for profit as a speculator/investor might want to do.

[19] I understand Applicants' counsel's argument and I do not attribute a crass profit motive to the Applicants' desire to build an addition onto their home. What is clear from the record, however, is that the tree is not interfering with the Applicants' current use and enjoyment of their land, but rather is interfering with the Applicants' planned enhancement of their land.

[20] The Supreme Court of Canada has stated that for there to be a nuisance, there must be an interference with a property owner's use and enjoyment that is both substantial and unreasonable: *Antrim Truck Centre v Ontario (Minister of Transportation)*, [2013] 1 SCR 594, at para 18. As Respondents' counsel points out, the first branch of the test – substantial interference – is a threshold test. It relates to the fact that actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes": *Tock v St. John's Metropolitan Area Board*, [1989] 2 SCR 1181, 1191. As was clarified in *St. Lawrence Cement Inc. v Barrette*, [2008] 3 SCR 392, at para 77, the upshot of the substantial harm requirement is that "compensation will not be awarded for trivial annoyances".

[21] The Respondents' expert arborist, Philip van Wassenaer, has submitted a report that establishes that the maple tree is healthy and that it provides a range of environmental, economic, and social benefits to the Respondents (as well as to the Applicants) in the form of a shade canopy, improved air quality, aesthetics, habitat for birds and small animals, and stormwater reduction. The tree also provides value, since there would be a significant cost to replacing it. There is nothing in the Applicants' record to counter these observations.

[22] I can readily conclude that destruction of the tree is not trivial. It therefore meets the 'substantial' portion of the *Antrim* test.

[23] In terms of the 'reasonableness' branch of the *Antrim* test, this is to be analyzed from a mutual point of view. That is, in looking at the claimant's contention of nuisance, "[o]ne must ask whether his conduct is reasonable considering the fact that he has a neighbour": *Pugliese v Canada (National Capital Commission)* (1977), 17 OR (2d) 129 (Ont CA), varied on other grounds, [1979] 2 SCR 104. While the various municipal authorities examined the

reasonableness of the proposed destruction of the tree from a community planning and construction safety point of view, the task of the court is to consider reasonableness from a competing property rights point of view.

[24] One factor that is mentioned repeatedly in the case law is the nature and character of the property and neighbourhood in issue: *Oakley v Webb* (1916), 38 OLR 151, 157 (Ont CA). Thus, for example, this Court refused to allow the removal of trees where "[t]he applicant chose to purchase a house in a district…that is heavily populated by trees": *Gallant*, at para 25.

[25] Mr. van Wassenaer has provided a plan of the Applicants' property showing in red outline the area that the Applicants say is sterilized by virtue of the "tree protection zone". It covers a good part of the north side of the Applicant's backyard, which is where the Applicants propose to build the addition onto their existing home. The Applicants complain that if the tree protection zone represents a no-go zone for construction, their plans for an extension and renovation of their home will be foiled.

[26] What the plan also shows, of course, is that the tree protection zone does not cover much of the south side of the Applicants' backyard. The Applicants complain that Mr. van Wassenaer, an arborist and not an architect, is not qualified to propose alternative designs for their home. That is true. However, it is not for the Respondents' expert to propose a reasonable design; it is for the Applicants to show that the design is reasonable given that they have a neighbour with property rights. That entails demonstrating that the tree must be chopped down, which in turn entails demonstrating that there is no reasonable alternative. The record contains no alternative design explored by the Applicants.

[27] As Mr. van Wassenaer points out, the tree protection zone only prevents excavation, not building on top of the land. Moreover, it only covers the north side of the Applicants' backyard and not the south side. It is not at all clear that the Applicants' proposed design is the only possible design. It is not up to the Respondents to fashion a tree-sensitive renovation and expansion of the Applicants' house. It is for the Applicants to produce one, or at least try. They have not done so here.

[28] The Application is dismissed.

[29] The Respondents are entitled to costs. Counsel may make brief written submissions (2 pages plus a Bill of Costs). I would ask counsel for the Respondents to send their submissions to my assistant within 2 weeks of today, and counsel for the Applicants to send theirs within 2 weeks thereafter.

Morgan J.

Date: March 27, 2019