The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

Trees can be appreciated for their aesthetic beauty, shading function and in how they offer refuge for birds and small animals. Yet trees can also be a source of annoyance in their need for maintenance, falling leaves and in the casting of shadows where shadows are not wanted. Trees can have a functional purpose in demarcating property lines if planted for this reason and therein lies the potential for friction between neighbours.

In this issue we consider an appeal from a private prosecution under the *Forestry Act* which had resulted in a conviction – *despite the fact that the owner who removed the tree had a permit to do so from the City of Toronto*. In *Gross v. Scheuermann*,[1] an Ontario Court of Justice dismissed the appeal. The discussion in the reported case is an extensive, but helpful, review of the nature of the common law on this topic and how the law has only been altered in part by provincial legislation and municipal by-law.

Trees on Boundaries

Key Words: *trees, boundary structures, neighbour, arborist*

Trees that are located on, or in close proximity to, property lines continue to pose challenges. After an Ontario decision in *Hartley v Cunningham*,[2] was reported on in a past issue of *Geomatica*,[3] a British Columbia case was also reviewed in a past issue of *The Boundary Point.*[4] However, the treatment of trees as an amenity (or as a nuisance) requiring neighbours to act reasonably towards one another continues to provide examples of litigation where the actions of one or the other owner triggers a dispute. This remains true across Canada.

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[1] *Gross v. Scheuermann*, 2017 ONCJ 722 (CanLII), http://canlii.ca/t/hmtdl

[2] *Hartley* v *Cunningham*, 2013 ONSC 2929 (CanLII), http://canlii.ca/t/fxkt6 Appeal to ONCA dismissed, 2013 ONCA 759 (CanLII), http://canlii.ca/t/g2d08

[3] de Rijcke, I., *Hartley v. Cunningham: Trees as Common Property*, *GEOMATICA*, 2013, 67(3): 192-195

[4] *The Boundary Point*, Vol2(3), March 2014. The decision was *Demenuk v. Dhadwal*, 2013 BCSC 2111 (CanLII), http://canlii.ca/t/g1z80

Legislation and case law dealing with boundary trees can be found in most Canadian jurisdictions. In addition to British Columbia and Ontario, reported cases and legislation can be found, as examples, in Saskatchewan,[5] Edmonton,[6] and Nova Scotia.[7]

The circumstances giving rise to the original prosecution in *Gross v. Scheuermann* were summarised by the court; they involved a Norway maple tree that straddled the property line. One owner wanted the tree removed; the other did not. When one owner had the tree cut down during the neighbour's absence over a long weekend, a private information[8] was sworn alleging a breach of section 10(3) of the *Forestry Act*, which makes it an offence to injure or destroy a tree growing on the boundary between adjoining lands without the consent of the land owners. Following a trial before a Justice of the Peace in January 2015, a verdict of guilty was rendered. A fine of $5,000 was imposed.

The principal issue on appeal concerned the interpretation of section 10(3) of the *Forestry Act*, namely, whether the accused was properly found guilty of the offence of destroying a boundary tree, despite his defence that he was entitled to remove a tree which he considered to be hazardous, and further that he had a permit from the City of Toronto to do so. Nonetheless, there was no consent to remove this Norway maple boundary tree from his neighbours.

The reported decision included many references to the origin of the "Norway Maple" in North America. One reference included a link to a publication that displayed the distinctive leaf of the tree in Figure 1:

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[5] In *Koenig v. Goebel*, [1998] 6 WWR 56; [1998] CarswellSask 13; 162 Sask R 81, 1998 CanLII 13635 (SK QB), http://canlii.ca/t/1ntq1, a boundary tree was referred to as a "straddle tree" and the court analogized the ownership rights and obligations in the tree to neighbours' ownership of a party wall as tenants in common.

[6] The City of Edmonton website states, "The Community Standards Bylaw requires that you maintain the trees on the perimer [sic] of your property." at: https://www.edmonton.ca/city_government/bylaws/tree-regulations.aspx

However, the Community Standards By-law, *CITY OF EDMONTON BYLAW 14600 COMMUNITY STANDARDS BYLAW (CONSOLIDATED ON JULY 11, 2017),* only contains provisions regulating the pruning, removal and disposal of elm trees.

[7] In *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 SCR 445, 1994 CanLII 122 (SCC), a diseased tree on private property fell onto a highway causing personal injury to a motorist. Although the Department of Highways was ultimately found not liable, the case is an interesting discussion of the risk factors that trees can pose to public authorities.

[8] A private information is the method by which minor offences under provincial statute can be prosecuted. The authority to do so lies in section 23 (1) of the *Provincial Offences Act* which states:

> 23(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information. R.S.O. 1990, c. P.33, s. 23 (1).

Figure 1: Illustration of the leaf of the Norway Maple.[9]

The tree in question can be seen on the boundary line between the two neighbours in 2011 in Figure 2. An aerial image in Figure 3 of the same site in 2016 shows no tree.

Figure 2: 2011 Aerial view from City of Toronto GIS.[10]

[9] From North American Native Plant Society on *Norway Maple*, at: http://www.nanps.org/index.php/conservation/alien-invaders/103-norway-maple

Photos: John Oyston

> "At first glance it looks similar to a Sugar Maple (*Acer saccharum*), but the leaves are usually wider than they are long, and have more lobes than the Sugar Maple. Fortunately there is an easy way to identify the Norway Maple: Break off a leaf and look for the characteristic white sap which comes out of the leaf stalk."

[10] From: http://map.toronto.ca/maps/map.jsp?app=TorontoMaps_v2

Figure 3: 2016 Aerial view from City of Toronto GIS.[11]

The evidence in chief of the appellant was summarised by the court:

> By way of background, Dr. Gross explained that, as a biologist, he had become concerned with structural deformities and cracks in this tree around 2005. A few years later, he brought in an arborist from one of the large tree companies in Toronto to do a general assessment of the trees of their property. The arborist concurred that there were structural deformities in the tree. Subsequently, a City forestry supervisor, Norm DeFraeye, inspected the tree, and informed Dr. Gross that the boundary tree was in hazardous condition. Upon being advised that the tree could not be salvaged, Dr. Gross submitted the arborist's report recommending that it should be cut down. When he received a permit from the City to remove the tree, he contacted the Miley tree company to do so.
>
> The arborist's report, entitled "Notice of a Hazardous Tree," submitted to the City for obtaining the permit to remove the tree, was dated 25 November 2009. It highly recommended the removal of the tree "at earliest possible date". According to Dr. Gross, the City supervisor, DeFraeye, told him to submit the report to his department for review, which they approved. He picked up the permit to remove the tree from their office in early January, 2010.
>
> Dr. Gross testified that upon receiving the permit, he was required to remove the tree as it was in hazardous condition. When he informed the City office that he had a very poor relationship with his neighbours, they told him their opinion was "of no concern" as the City had identified it as a hazardous tree, and he alone was responsible for its removal as his name was on the permit.

[11] From: http://map.toronto.ca/maps/map.jsp?app=TorontoMaps_v2

According to Dr. Gross, the tree had displaced the fence on the property line. It also had two co-dominant stems, so that it was actually two trees fused together. The bark of the tree was falling off; there were frost cracks on its main limbs. He estimated that it was probably about 80 years old, which is the life span of a Norway maple tree in the City. In his opinion, the tree was in very poor condition.

Dr. Gross also stated that the Norway maple tree did not impact his dispute with the Scheuermanns over widening his driveway. He had consulted other arborists to see if the tree could be saved, but was told by the City forester Mr. DeFraeye that no remedial measures would be effective. Miley tree removal was of the same opinion.

The defendant did not believe he required the consent of his neighbours to take down the tree given its hazardous condition. Dr. Gross was not aware of the Forestry Act. He had sent a letter to the Scheuermanns in February, 2010 by regular mail to inform them that he had a permit to remove the tree, and to ask them if they would pay for their share. They had not spoken for over six years by this point, and communication between the parties was by written mail only. He waited "a good length of time" for a response, but never received one.

Once he received the permit to remove the boundary tree, Dr. Gross believed that if he did not remove the tree, the City would do it for him and pass on the cost to his tax form. The police could also be called to enforce the order. As for the delay between the time of the permit being issued on 23 December 2009, and the removal of the tree on 1 April 2013, Dr. Gross testified that he had been waiting to hear back from his neighbours. He also contacted the City forestry department and was told that there was no expiry date for the permit. In addition, there was a construction project in his house that required his attention, and he also was busy being the executor for his mother's estate and looking after his father who lived in British Columbia. Nevertheless, he remained "very concerned" about the Norway maple tree over this time, but he had many other concerns on his plate.[12]

This evidence was augmented on cross-examination:

In cross-examination, Dr. Gross was questioned about his meeting with Mr. DeFraeye from the City. He acknowledged that he was not given anything in writing by him saying that the tree was an imminent hazard. He also did not know whether any of the arborists he had previously consulted discussed the removal of the tree with the Scheuermanns. Dr. Gross realized that the tree in issue was a boundary tree, yet did not seek his neighbours' consent to cut it down at any time between 2007 and 2012.

The permit issued by the City of Toronto authorizing the removal of the tree in question stated the following in bold print: "Imminently hazardous trees must be removed immediately. Failure to do so will result in the issuance of an emergency order by Municipal

[12] *Gross v. Scheuermann, supra,* footnote 1, at paras. 18 to 24

Licensing & Standards staff." Dr. Gross was asked whether he understood this to be a condition of the issuance of an exemption permit. He replied that he did not think this was a condition for removing the tree, but rather the permit to do so. In his view, the permit identified the tree as an imminent hazard and he was instructed "to remove it at your timeframe", otherwise the City would order or remove it themselves. He interpreted the word "immediately" on the permit as meaning "it [the tree] should be removed."

Dr. Gross proceeded to explain that since the City did not issue an emergency order after he received the permit, he guessed "I removed it within the time that they considered to be an imminent hazard tree removal." From the City's perspective, he believed he was complying with term to remove the tree immediately although he waited three and one-half years until he took it down. He was not aware whether the City came out to check up on the tree, and whether it continued to be in a hazardous condition over this time.

The witness was referred to last paragraph in the permit which was circled. It indicated that the determination of ownership of any subject tree "is the responsibility of the applicant", and that any civil or common law issues that may exist between property owners "must be resolved by the applicant." The concluding sentence reads: "This confirmation or exemption does not grant authority to encroach in any manner or to enter adjacent private properties." He stated that he read this portion of the permit, and discussed it with the City. He was told to remove the tree as it was a hazard and to proceed.

Dr. Gross disagreed that there was trespassing on the Scheuermann's property in order to remove the tree. However, when he was shown a picture of a worker taking down the tree on his instructions, he didn't "fully agree" the worker was on his neighbour's property, since the worker had his permission to remove the tree. Dr. Gross acknowledged that one of the two branches of the tree was on the Scheuermann's side of the property. While he was on that property, though, Dr. Gross stated, " … whether that technically means he's on the Scheuermann's property I do not know. I mean, does it not mean his feet have to be on the ground?"

With respect to the letter that Dr. Gross said he mailed to the Scheuermanns in 2010, he stated that he sent it from a local mailbox on Queen Street. This was the first communication from him informing his neighbours that a permit had been issued by the City of Toronto to remove the tree. Dr. Gross disagreed, though, that this was the first notice he gave them after the Scheuermanns denied consent to cut down the tree. In his words, "they've never denied consent to cut down the tree" although he agreed they did not give consent to cut it down.

Dr. Gross acknowledged he hired a landscaping company for a development in both his front yard and backyard. However, he did not authorize the landscapers to speak to the Scheuermanns about taking down the Norway maple tree in order to facilitate the garden at the back of his property. He was unaware if the company did that on their own accord.

> Neither did he receive a report from the company stating that the presence of this tree prevented the backyard development. When asked, then, why he had sent this notice letter about removing the tree, Dr. Gross responded that it was "a courtesy to the neighbor to inform them that the tree was coming down" and that he had a permit "to deal with the hazardous tree." As well, it was a request that they pay half the cost of the tree's removal.
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> From the time that Dr. Gross and his family moved into the Fallingbrook Crescent house next door to the Scheuermanns, at no time did he ever receive their consent to cut down the Norway maple tree. He knew it was a boundary tree.[13]

Section 10(3) of the *Forestry Act* states,

> 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*.

The elements of the offence were explained by the Justice of the Peace in his decision below and summarised by the Ontario Court as follows:

> After reviewing the evidence of the witnesses and position of the parties, His Worship commented that the boundary tree offence under s.10(3) of the Forestry Act was strict liability in nature. Hence, upon the prosecution proving the commission of the prohibited act beyond a reasonable doubt, the burden of proof was on the defendant to establish, on the balance of probabilities, that he had acted with due diligence and taken all reasonable care in the circumstances, or alternatively, reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.
>
> The learned trial Justice of the Peace proceeded to identify the following three issues as requiring resolution in the case at bar: (1) is there a conflict between the *Forestry Act* and City of Toronto Code or the bylaws? (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?
>
> Turning to the first issue, namely, whether there was a conflict between the provincial and municipal legislation insofar as they concern the removal of a hazardous tree from a property line, the trial Justice found that there was no conflict between the two statutes and that they could be read together. In his opinion, the provincial Act applied to all trees, whether healthy or not, and nothing in its wording prevented its application to dead or hazardous trees. Moreover, the municipal Confirmation of Exemption issued to remove the tree specifically included, among other conditions, that the defendant should deal with the issue of the ownership of the tree. Accordingly, knowing that it was a boundary tree, the

[13] *Ibid.*, at paras. 25 to 32

defendant should have requested the consent of the Scheuermanns before permitting Miley & Associates to cut down the Norway maple tree.

In short, there would be no conflict between the provincial *Forestry Act* and the municipal by-law if Dr. Gross had "resolved the issue of the consent of the co-owners of the Norway maple tree" (Reasons, para. 76) The tree in question was a boundary tree, and the Confirmation of Exemption noted that the applicant, Dr. Gross, had to deal with the co-owners.

With respect to the second issue as to whether or not the prosecution had proven the *actus reus* of the offence under s.10(3) of the *Forestry Act*, Justice of the Peace Brihmi considered that the essential elements of the offence were as follows: (1) the Norway maple tree in question is a boundary tree that is co-owned within the meaning of the Act? (2) Did Dr. Gross give instruction to Miley & Associates to take down the boundary Norway maple tree? (3) Did the Scheuermanns give their consent as co-owners to have the Norway maple tree cut down?

The Court found in this regard that the Norway maple tree in question located on the property line between 34 and 32 Fallingbrook Crescent was a boundary tree within the meaning of the Forestry Act, and as such it was "a common property" of the adjoining lands and its ownership therefore shared by both parties. Further, the Court found, there was no dispute that Dr. Gross hired Miley & Associates to assess the Norway maple tree in dispute, and ultimately to attend and remove it on April 1, 2013.

Justice of the Peace Brihmi proceeded to accept the evidence of Mr. and Mrs. Scheuermann, which he described as "clear, concise and credible" (Reasons, para. 82) that neither of them had ever given their consent, as co-owners of the Norway maple tree, to it being cut down. Indeed, it was clear that Mrs. Scheuermann was fond of gardening, and enjoyed the shade provided by the tree.

The defendant, on the other hand, testified that he never sought consent or permission of the Scheuermanns to take down the Norway maple tree between 2007 and 2012. In cross-examination, he first told the Court that his neighbours never denied consent to cut down the tree; however, when he was further asked if at any time since he had lived in that house, next door to the Scheuermanns, whether he ever received their consent to cut down the tree, his response was negative, even though it was clear from his evidence that he knew that the Norway maple tree was a boundary tree.

In the result, the learned trial Justice of the Peace was satisfied that the prosecution had proven beyond a reasonable doubt all the elements of the offence in question.[14]

[14] *Ibid.*, at paras. 42 to 50

Ultimately, the appeal boiled down to a question of whether or not the *Forestry Act* applied to a boundary tree. There were arguments (and case law) submitted by both sides in support of making a finding that the *Act* did and did not apply. The Appellant relied on the decision in *Freedman* v *Cooper*,[15] where the Court granted an application to remove a boundary tree despite the lack of consent by her neighbour. In *Freedman*, the Court stated,

> It seems that Ms. Freedman is of the view that she needs court approval to remove the tree because she and her agents would be committing an offence under s.10(3) of the *Forestry Act* if she used the permit for the tree's removal, which was issued by the City of Toronto. This view is based on the circumstances that under s.10(3) of the *Act*, the consent of both Ms. Freedman and Mr. Cooper is apparently required for any removal of the tree.
>
> I disagree. I read s.10(3) of the *Forestry Act* as simply not applying to the owners of the boundary tree. The owners remain liable one to another in accordance with the common law. In my opinion, s.10(3) of the *Forestry Act* simply does not apply in the circumstances of this case.
>
> It is presumed that legislation preserves rather than changes the common law. It is presumed that the legislator will not change the common law without expressing its intentions to do so with irresistible clearness…
>
> The common law applies to the circumstances of this case.[16]

The Respondent relied on the decision in *Hartley* v *Cunningham*.[17] In *Hartley* the co-owner of a boundary tree, again a Norway maple, had sought a declaration that she was the sole owner of the tree, so that she could have it removed. The co-owners were opposed, and led evidence that the tree was in reasonably safe condition. Justice Moore dismissed the application, and found that the tree was, in fact, a boundary tree for the purposes of the *Forestry Act.*[18]

In order to resolve the apparent conflict, the Court engaged in an extensive review of the legislative history of the *Forestry Act*, boundary tree provisions, other court decisions,[19] and academic writings.

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[15] *Freedman* v *Cooper*, 2015 ONSC 1373 (CanLII), http://canlii.ca/t/gghsw

[16] *Ibid.*, at paras. 29 to 32

[17] *Hartley* v *Cunningham*, 2013 ONSC 2929 (CanLII), aff`d 2013 ONCA 759 (CanLII)

[18] *Gross v. Scheuermann, supra,* footnote 1, at para. 73

[19] For example, reference was also made to *Gallant* v *Dugard*, 2016 ONSC 7319 (CanLII), in which the applicant sought an injunction requiring his next door neighbours to remove a black walnut tree situated on the property line between their houses. He claimed that it was interfering with the use and enjoyment of his property due to nuts falling from the tree on to his roof at all hours of the day. In addition, the Court considered *Laciak* v *Toronto (City),* 2014 ONSC 1206 (CanLII). Ms. Laciak had appealed a decision of the Property Standards Committee which

The analysis used by the court was explained in detail. The benefit for readers lies in a better understanding of this area of law and how future situations might be approached. The Court explained,

> In short, the learned Justice found the appellant's conduct leading up to the tree's removal, and the circumstances of doing so, to be unreasonable. In particular, he rejected his evidence that a City official, who was not called as a witness and whose evidence was therefore hearsay, told him to proceed despite the opposition of his neighbours, as only his name appeared on the permit. Neither did he consider that the appellant's explanation that the respondents "never denied consent to cut down the tree", in the face of his admission that they had, at no time, ever consented to its removal, to be a tenable one.
>
> Moreover, if the appellant genuinely considered himself to be caught in the intractable position of not having the required consent to take down an imminently hazardous tree that he could be held legally responsible for, he should have, at a minimum, as in the very case he relies on, *Freedman v Cooper*, sought legal recourse for an order authorizing its removal, as well as the payment of half the costs by his neighbours, which he also was seeking.
>
> Alternatively, it was open to him to have applied to the court for a mandatory injunction requiring the Scheuermanns to remove the tree, as in *Gallant v Dugard*, or for a judicial declaration entitling him to abate the nuisance caused by the boundary tree and remedy it: see *Davis v Sutton*.
>
> The *Freedman* decision relied on by the appellant, and the *Hartley* case cited by the respondent, are not inconsistent with each other. Neither are the cases applying them. To the contrary, they illustrate the utility of a dispute resolution process with respect to the disposition of boundary trees when the co-owners are in disagreement and withhold consent, as opposed to the unilateral actions employed by Dr. Gross in advance of any such determination.
>
> In *Freedman v Cooper*, Justice Perell was satisfied that the boundary tree in question constituted a nuisance and ordered it removed over the neighbour's objections. In such a case, the consent of the co-owner was not required. Indeed, both parties were legally

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ordered her to do maintenance work on a tree on her property which the City considered to be a potential hazard. The tree's roots were on three adjoining properties. As a result, Ms. Laciak argued that it was unfair that she alone should be ordered to pay for the work on the tree, and not her neighbours who were co-owners of the tree. Further, in the more recent case in *Davis* v *Sutton*, 2017 ONSC 2277 (CanLII), a small claims court decision was appealed after adjudicating in a dispute between neighbours over the removal of cedar trees in order to facilitate the erection of a fence between their properties. In the absence of any agreement between the parties to do so, the defendant proceeded to cut down the cedars. The plaintiff countered by bringing a lawsuit, claiming nuisance, negligence and trespass. It was dismissed by the trial judge. The basis for her ruling was that any of the cedars that were cut down were on the defendant's own property; to the extent that any were on the property lines and thus boundary trees, the defendant was entitled to remove them in order to abate a nuisance.

obligated to take steps to abate the nuisance and remedy its cause by removing the tree. For this reason, the co-owner opposed to the tree's removal was not only ordered to refrain from blocking the removal of the tree, but was also obligated to pay half the costs of taking it down.

On the other hand, Justice Moore in *Hartley v Cunningham* found the evidence put forward in support of removing the tree fell short, and instead endorsed the respondent's proposal for maintaining it. That is, the application by the party who was seeking a declaration of sole ownership of the boundary tree so that she could have it removed over the respondent's objection was dismissed. And given the absence of any nuisance which would justify the unilateral action of the one party in taking down the tree, the consent of both parties was required to do so.

The *Freedman v Cooper* and *Hartley v Cunningham* cases thus illustrate when the *Forestry Act* prohibition against removing boundary trees without consent obtains. Where it is necessary to remove a boundary tree, such as in the case of a nuisance caused by the tree, the prohibition in s.10(3) of the *Forestry Act* against doing so unilaterally does not apply. Hence, Justice Perell held that the neighbour's consent was not required in such a situation, as there was a requirement (for both parties) to abate and remedy the nuisance.

Indeed, one might envision the scenario where the other co-owner of a boundary tree may not be in a position to provide consent to the tree's removal in a timely manner, as where a storm causes a boundary tree to split in half and it comes in contact with a live power line. Similarly, if one was away from the premises for an extended period and could not be reached, the co-owner might also be unable to reach the other before having to cut down the tree. In such cases, it would be unreasonable to interpret s.10(3) of the *Forestry Act* as requiring the consent of both of the co-owners of the tree before it could be removed.

But where there is no basis to resort to a self-help remedy, as occurred in the *Hartley* case before Justice Moore, the applicant was not permitted to remove the tree without first seeking the permission of the co-owner. Upon the neighbour's opposition to the tree's removal being made known, the co-owner had no right to destroy the tree without risking being found in contravention of the *Forestry Act*, absent a legal justification to do so. There being no such nuisance or other lawful basis to remove the tree unilaterally, Justice Moore accordingly dismissed the application.

This was also the result in *Gallant v Dugard*, where upon the Court determining that there was no nuisance established by the applicant, she did not have the right to take down the boundary tree on her own volition.

Conversely, in *Laciak v Toronto (City)*, once it was established that there a basis to perform some maintenance work on the boundary tree, all of the owners of the adjoining properties bore the financial responsibility of doing so.

> And in *Davis v Sutton*, the confirmation by the Court that the boundary tree constituted a nuisance entitled the party to solely remove it, without being found in violation of the s.10(3) *Forestry Act* offence, notwithstanding the neighbour's opposition and withholding of consent to do so.
>
> Returning, then, to the case at bar, the appellant took no steps to obtain the consent of the co-owner of the boundary tree to remove it, or otherwise resolve their outstanding dispute surrounding it. Indeed, it is clear from the record, that this was a deliberate decision on the part of Dr. Gross.
>
> Thus, not only did the appellant fail to seek lawful redress to resolve the dispute over removing the boundary tree, as required by the permit issued by the City, he took no measures to obtain his neighbours' consent, as required by the *Forestry Act*. Instead, knowing of the respondent's longstanding opposition to his taking down the Norway maple tree on their property line, which preceded his application to the City for a permit to remove it, he acted as if there was no reason to inform them that he was in receipt of the Confirmation of Exemption or permit to do so, given the breakdown in their relationship. Indeed, he only showed them the permit when the police were called in response to the tree being cut down on the day in question.[20]

A number of factors emerge for consideration when encountering a problem between neighbours over a boundary tree. These factors include a consideration of:

- A proper characterization of the tree as a boundary tree;
- The degree of imminent danger or harm requiring immediate action;
- The presence or absence of consent on the part of neighbours to a proposed pruning or removal;
- The application of a municipal code or by-law addressing the treatment of boundary trees;
- The reasonableness of neighbours' conduct to one another; and,
- Whether the presence of the tree can be characterized as a common law nuisance.

The decision in *Gross v. Scheuermann* is detailed and long, but offers a degree of assistance and clarity that will hopefully reduce the number of conflicts between neighbours over boundary trees.

Editor: Izaak de Rijcke

[20] *Ibid.*, at paras. 139 to 152

Cross-references to *Principles of Boundary Law in Canada*

The treatment of tress located on boundaries is not dealt with as a distinct topic in *Principles of Boundary Law in Canada.* A future edition of the book will, but in the context of how lawyers and land surveyors think about boundaries. Instead of a clean, mathematical line or vertical plane that separates estates in land, a boundary takes on different attributes when – as a structure, like a party wall, or as a living entity, like a hedge – it incorporates property held in common by both owners.

FYI

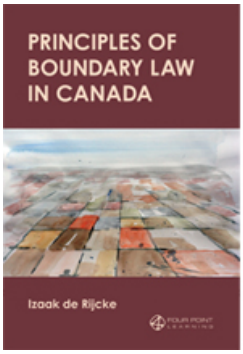
There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[21] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Fifth Annual Boundary Law Conference — New Date and Venue

We now have a date and location for the postponed conference: April 23, 2018 at the Hilton Mississauga/Meadowvale. As many will appreciate, this topic is a daunting challenge to configure and organize in a manner that will ultimately benefit professionals, property owners and the public. The adjournment has permitted time to re-focus the theme to "*Waterfront Properties in Ontario: Best Practices to Resolving Title and Boundary Issues*". The revised agenda will be revealed soon, but for now, please mark your calendar: APRIL 23, 2018. Thank you for your patience.

[21] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

Principles of Boundary Law in Canada



Boundaries are a feature that applies to every parcel of land in Canada. Providing secure and predictable results in recording title and identifying the extent of title are elements that operate hand in hand in order to give certainty to the immense value tied up in real estate in Canada. In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. Furthermore, the education and training needs of new members to the cadastral surveying profession are served by this reference work that not only provides comprehensive coverage of the material but is organized and indexed in a manner that supports the formation of professional opinions. See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** pay online Buy Now (*NB: A PayPal account is not needed to pay by credit card.*)

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