CITATION: *Gross v. Scheuermann*, 2017 ONCJ 722
DATE: November 1, 2017
Case No. 4811 99 13 325520

ONTARIO COURT OF JUSTICE

(Toronto Region)

BETWEEN:

MART GROSS

Appellant

- and –

SCOTT SCHEUERMANN

Respondent

Reasons for Judgment on Provincial Offences Appeal

Heard: 27 September 2017; Judgment: 1 November 2017

(168 paras)

On appeal from the decision of His Worship Mohammed Brihmi, dated 24 April 2015, at Toronto, with reasons reported at 2015 ONCJ 254.

Counsel for the Appellant: Yan David Payne
Counsel for the Respondent: Timothy E. Breen

Libman J.: -

Introduction

[1] This provincial offences appeal case arises from a private prosecution brought by Scott Scheuermann against his neighbor, Dr. Mart Gross, under the *Forestry Act of Ontario*, R.S.O. 1990, c.F.26.

[2] The subject of the dispute between these two estranged neighbours was a Norway maple tree that shared their property lines. Dr. Gross wanted the tree removed; the Scheuermanns did not. When Dr. Gross had the tree cut down in their absence over the Easter holiday weekend in April, 2013, Mr. Scheuermann swore a private information alleging a breach of s.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.

[3] The trial proceedings before Justice of the Peace Brihmi took place on 16 January 2015. Both parties had legal representation. Mr. Scheuermann and his wife Ann gave evidence for the prosecution; Dr. Gross testified in his own defence. A verdict of guilty was rendered on 24 April 2015. The matter was adjourned for sentencing to 24 July 2015, at which time a fine of $5,000 was imposed.[1]

[4] The principal issue on appeal concerns the interpretation of s.10(3) of the *Forestry Act*, that is, whether Dr. Gross was properly found guilty of the destroying boundary tree offence, despite his defence that he was entitled to remove a tree which he considered to be hazardous, and had a permit issued by the City of Toronto to do so, but in circumstances where there was no consent to remove this Norway maple boundary tree from his neighbours, the Scheuermanns.

Evidence on Trial Proceedings Before Justice of the Peace Brihmi

[5] The testimony of the parties is summarized in detail in the Reasons for Judgment by the learned trial Justice of the Peace. However, to appreciate the parties' legal positions at both trial and appeal, I will set out the most relevant portions of the evidence taken in the trial proceedings.

[6] At the commencement of the trial, an agreed statement of fact was put before the Court. It indicated that a Norway maple tree was located on the property line between the Fallingbrook Crescent houses in Toronto where the Gross and Scheuermann families resided. This boundary tree had been assessed by an arborist, Al Miley & Associates, retained by Dr. Gross. The arborist's report, entitled "Notice of a Hazardous Tree", dated 25 November 2009, was not admitted for the truth of its contents at the trial. However, its recommendation to remove the tree due to its hazardous condition led the City of Toronto to issue a permit on 23 December 2009 to cut it down.[2] The Scheuermanns refused to consent to the removal of the tree. On 1 April 2013, Miley took down the boundary tree, acting on the instructions of Dr. Gross.

[7] Scott Scheuermann was the first witness called by the prosecution. He and his wife moved to 34 Fallingbrook Crescent in June, 1995. The previous owner had landscaped the property extensively, in both the front and back yards. The Norway maple tree in question was located in the back yard on the property line with 32 Fallingbrook Crescent

where the Gross family lived. More than 90 percent of the stump of the tree was on the Scheuermann's side of the property.

[8] Mr. Scheuermann described the circumstances leading up to Dr. Gross' application to take down the tree. In July, 2007, Dr. Gross showed him plans to expand his driveway, which necessitated the removal of the Norway maple tree. The Scheuermanns enjoyed gardening in their backyard, and the privacy provided by the tree, and so did not consent to the tree's removal. No request was ever made to them to cut down the tree after that time.

[9] On 1 April 2013, which was Easter Monday, Mr. Scheuermann returned to his home after being away for the holiday weekend. His wife had arrived home shortly before he did. There were trucks belonging to Miley & Associates in their yard; the Norway maple tree had been reduced to a stump. It was completely gone.

[10] From the time Dr. Gross first approached him about taking down the tree in 2007, and until its removal in 2013, Mr. Scheuermann never gave his consent to have the Norway maple boundary tree cut down.

[11] From his perspective as a homeowner with this large tree in his backyard, there were no problems with it over this period of time. No large branches had fallen, nor were there any other issues or concerns with the condition of the tree.

[12] In cross-examination, Mr. Scheuermann denied ever receiving a letter from Dr. Gross, dated 10 February 2010, in which he and his wife were notified that the City of Toronto had issued a permit for the removal of the boundary tree, and that they were expected to pay their "fair share of the cost" towards it. The letter concluded by stating that if they did not respond in "a reasonable time period", Dr. Gross and his wife would proceed on their own. According to Mr. Scheuermann, he only saw this letter when counsel showed it to him in court. He had last spoken to Dr. Gross at the Committee of Adjustments hearing in 2007 when he opposed their application to install a parking pad and remove a number of trees, including the Norway maple boundary tree. Their relationship as neigbhours had broken down after this time, and they were no longer on speaking terms.

[13] Ann Scheuermann testified, in turn, that by the time she returned home on the day in question, the tree removal company was in their backyard and the limbs of the Norway maple tree were mainly down. She called the police and told them a tree was being cut down that was bordering on their property, and the company was going on private property to do so. The company stopped cutting down the tree when the police arrived. However, by this time the tree could not be saved, and the company completed their work.

[14] Prior to the incident, in 2007, Ms. Scheuermann described speaking to the arborist the Gross' had retained. They were on friendly terms at the time. She told her neighbours that she did not want the tree taken down. A few years later, she spoke to a landscape architect from the Gross property who approached her; she told him that she had no desire to have the tree removed as it provided shade to her garden, and she had an established garden growing underneath the tree. This was the last time she spoke to anyone about removing the boundary tree. Like her husband, she had not previously seen the 2010 letter addressed to them, advising that a permit had been issued to take down the tree. She was not on speaking terms with Dr. Gross and his wife at this time.

[15] When the police arrived on the day in question, Dr. Gross came out with his permits. She asked him why he had not notified them that the tree was being removed. He told her that they had not been on speaking terms for some time. At no time over the 20 year period that she and her husband had lived at 34 Fallingbrook Crescent had she ever given anyone permission to cut down the Norway maple tree

[16] In cross-examination, Ms. Scheuermann acknowledged that Dr. Gross had offered to replant a tree on her property so as to provide shade to her backyard, however she declined his offer. Moreover, she had spoken to an arborist herself who had not expressed any concerns about any of the trees on her property. She denied ever telling Dr. Gross that the Norway maple tree was causing a nuisance to her. She spent a lot of time digging into the ground under the tree to make the garden underneath it, and there were leaves that fell from it, but she never told anyone that it should come down.

[17] Dr. Gross, the co-owner of 34 Fallingbrook Crescent with his wife Nancy Garesh, testified in his own defence. They moved there in June, 2003. It was his evidence that the he was required to take down the Norway maple tree that bounded on their properties as it had been assessed as hazardous, and the City of Toronto had issued him a permit to do so. He understood that if he did not remove the tree, he would be liable for any damage caused by the collapse of the tree, and insurance would not cover him as he would be considered negligent for failing to remove it.

[18] 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.

[19] 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.

[20] 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.

[21] 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.

[22] 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.

[23] 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.

[24] 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.

[25] 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.

[26] 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 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.”

[27] 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.

[28] 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.

[29] 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?"

[30] 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.

[31] 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.

[32] 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.

[33] In re-examination, Dr. Gross maintained that he believed the tree in question was "an imminent hazard" before speaking to the City. In his view, the tree was "a concern". He did not know it was "an imminent hazard." There was nothing he did to mislead the City about the tree or influence it in issuing the permit. They requested an arborist report which he submitted. Miley, in turn, requested the survey so that he could establish it was a boundary tree, "and that was it." He did not say anything further to Miley about taking down the tree

Position of the Parties at Trial

[34] The position taken by the appellant's legal representative at trial was that the matter was simply one of "statutory interpretation." The provincial *Forestry Act* and City of Toronto by-laws needed to be read together, given that the former was "completely silent on hazardous and dangerous trees." Consequently, it was argued, dangerous trees and dangerous property was properly the subject of regulation by the municipality.

Otherwise, it would be “an absurd result” if the *Forestry Act* was interpreted to “protect trees that are dangerous to property and people”, such that it would constitute an offence under the *Municipal Code* had Dr. Gross not removed the boundary tree in question.

[35] Put simply, the appellant did what he was directed by the City to do. He removed “a hazard, a danger”. While it was conceded he should have done so sooner, he did in fact remove the tree that the City had designated as “an imminent hazard.” There was nothing improper in the application process that he followed, nor did he seek to unduly influence the decision that was made.

[36] To convict the appellant of doing what he was directed to do by the City in removing this tree would therefore be an absurdity. In order to avoid such a result, s.10(3) of the *Forestry Act* must be interpreted in a way that does not frustrate the purpose of the municipal by-law. In short, the *Forestry Act* deals with healthy non-dangerous trees whereas the City of Toronto by contrast deals with dangerous property, dangerous trees.

[37] In summary, penalizing someone who deals with a hazard would frustrate the *City of Toronto Act* which must regulate and address safety in property. Had Dr. Gross done nothing, there could have been consequences brought to bear by the City of Toronto, and if the tree had fallen and injured somebody or damaged property, he would have been responsible. In such circumstances, the consent of the co-owner of the boundary tree to remove it – and thus prevent the danger posed by the tree from being dealt with - is not required. As a result, the appellant argued, he should not be found responsible for violating the *Forestry Act* as alleged.

[38] The respondent’s position, on the other hand, was that there was no conflict between the two statutes in question. Indeed, it did not follow that compliance with the municipal by-law necessitated an infringement of the provincial *Forestry Act*. The scheme of the former is to protect healthy, naturally growing trees, such that a healthy tree on one’s own property cannot be removed without a permit from the City. Conversely, a tree that is diseased or imminently hazardous can be cut down and removed without a permit. In such a case, a confirmation of exemption is issued, along with an encouragement to replace the tree.

[39] The City process requires, noted the respondent, that the determination of ownership of any subject tree is the responsibility of the applicant. Indeed, as set out in the documentation, any civil or common law issues that may exist between property owners, with respect to trees, must be resolved by the applicant. The *Forestry Act*, in this regard, makes it “absolutely clear” under s.10 that the ownership of a boundary tree

lies in both parties. Further, it makes it very clear that a person cannot destroy or cut down that tree without the consent of both parties.

[40] No absurdity, as argued by the appellant, therefore results in such circumstances, given that Dr. Gross did not take any steps to obtain the consent of the Scheuermanns to take down the Norway maple tree. In fact, the tree was part of an ongoing dispute between the neighbours. The appellant was involved in a property development and knew “full well” that removing the boundary tree would interfere with the rights of the Scheuermanns. His waiting three and one-half years to remove the tree undermined the appellant’s position that it was necessary to take down this tree, and the need to do so without the co-owner’s consent. Indeed, the tree was deliberately cut down at a time when there was no one home to consent to its removal.

[41] In the view of the respondent, then, the requisite elements of the s.10(3) *Forestry Act* offence were made out: (1) the subject tree was admitted to be a boundary tree; (2) it was admitted that Dr. Gross instructed Miley to cut it down; and (3) there was unequivocally no consent from the co-owners of that tree to have it cut down. In terms of any defences available to the appellant to excuse his conduct, he had not exercised any due diligence to take the steps that were necessary to make sure he was in compliance with the *Forestry Act*. Acting solely under the authority of a municipal permit in the case of a disputed tree is no excuse, as the case-law demonstrates. In short, where the subject tree is a boundary tree, nothing can be done to it “unless it’s with the consent of the adjoining land owners.”

Reasons for Judgment by the Trial Justice of the Peace

[42] Having reserved his decision at the conclusion of the proceedings, Justice of the Peace Brihmi delivered oral Reasons for Judgment on 24 April 2015.[3] 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.

[43] 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?

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

[45] 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.

[46] 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?

[47] 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.

[48] 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.

[49] 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.

[50] 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.

[51] The final issue considered by the Court was whether the defendant had raised any defence of due diligence, or a defence based on a mistaken set of facts.

[52] Noting that the defendant had presented evidence, including his own testimony in which he denied he was made aware of any conditions attached to the Confirmation of Exemption; that he did not know that the worker who was taking down the tree on his instructions was on the Scheuermann's side of the property; and, finally, that he had mailed a letter to his neighbours in February, 2010, informing them that the City had declared the boundary tree to be hazardous, such that it was to come down and that they should pay half of the costs of the tree's removal, the Court indicated that an assessment of the credibility of the parties was required as part of an examination of this defence evidence. The Court referred, in this regard, to the case of *R* v *W. D.,* [1994] 3 S.C.R. 521, as setting out the approach to follow in making this determination.

[53] Justice of the Peace Brihmi stated, at the outset, that he considered the respective parties were "doing their best to tell the truth about what happened." (Reasons, para. 89). However, he found Mr. Scheuermann to have provided "a clear and concise account" of events, in a straightforward manner." His evidence that he never received any letter from Dr. Gross in February 2010 about removing the tree was "highly credible". (Reasons, para. 90)

[54] Likewise, the evidence of Mrs. Scheuermann was found to have been given in "a clear and detailed manner". (Reasons, para. 91) It was accepted that she enjoyed gardening in the backyard of her house, and that with the removal of the Norway maple tree there was very little shade, and lots of plants had to be removed as they could not grow in the new environment without the tree.

[55] Conversely, the evidence of Dr. Gross was found to be "problematic, and in some instances, contradictory." (Reasons, para. 92). In short, his account of the "ongoing dispute" involving the boundary tree, including the fact that he was not on speaking terms with his neighbours for almost six years, led the Court to conclude that "a reasonable person would have acted differently from Dr. Gross".

[56] It was found in this regard by the learned trial Justice that 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 receiving a response to a letter that he claimed to have been sent about removing the boundary tree in February, 2010. Instead, the Court found it reasonable to believe that no such letter was ever received by the Scheuermanns prior to it being shown to them in the trial proceedings.

[57] Further, the Justice found that a reasonable person would not have waited three and one-half years before taking down an imminently hazardous tree that the Confirmation of Exemption stated must be removed immediately, as well as noting that a failure to do so would result in the issuance of an emergency order by the municipality. While the defendant stated that he had “many things on his plate during that time,” nevertheless for him to have waited for such a lengthy period of time before taking down the tree was “unreasonable”. (Reasons, para. 95).

[58] The Court also found it difficult to believe, contrary to the evidence of Dr. Gross, that the City supervisor of Urban Forestry, Norm DeFraeye, would tell him to proceed and remove the Norway maple tree without telling him that he had to deal with the issue of the consent of the co-owners, or that this official would tell him that the opinion of his neighbors of the boundary tree was “of no concern” because the City had identified it as hazardous, and he was held responsible for its removal. (Reasons, para. 98).

[59] Neither did the Court accept the defendant’s testimony that there were no conditions in the Confirmation of Exemption due to the Norway maple tree being considered an imminent hazard. To the contrary, the document clearly stated the determination of ownership of any subject tree was the responsibility of the applicant, and that any civil or common-law issues that may exist between property owners with respect to trees must be resolved by the applicant. Consequently, the removal of the Norway maple tree in question required the consent of the co-owners, which did not occur in the instant case.

[60] Having therefore reviewed the relevant case law, the totality of the evidence which included the *viva voce* and documentary evidence, and the submissions of counsel, the Court was satisfied that the prosecution had met its onus in proving the *actus reus* of the offence in s.10(3) of the *Forestry Act* against the defendant. It was further found that Dr. Gross had 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 exculpated him. In the result, the defendant was found guilty, and a conviction was registered against him.

Position of the Parties on Appeal

[61] The Notice of Appeal filed by the appellant against his conviction (by his previous counsel) set out a number of grounds of appeal. These were that the trial Justice of the Peace erred in law by finding: that it was an offence under the *Forestry Act* to remove a hazardous tree from a property; that the prosecution had proved the *actus reus*; the defences of due diligence, mistake of fact and officially induced error were not established, and misapplying the principles in *R* v *W.D*., [1991] 1 S.C.R.742. An appeal against sentence was also brought on the grounds that the fine imposed was harsh and excessive.

[62] In the written argument filed on appeal by his current counsel, the grounds of appeal against conviction have been narrowed, and are stated as follows: Justice of the Peace Brihmi erred in law by: (1) applying s.10(3) of the *Forestry Act* to Dr. Gross who is a joint owner of the boundary tree; (2) applying s.10(3) of the *Forestry Act* to a hazardous tree for which the City of Toronto had issued a Confirmation of Exemption; and (3) failing to recognize and apply Dr. Gross' right to a self-help remedy as a complete defence.[4]

[63] The appellant notes, at the outset, that the Court's jurisdiction on appeal is found under ss.116-125 of the *Provincial Offences Act* which applies to proceedings brought under the Part III sworn information procedure of the Act. As such, on questions of law the standard of review is correctness. Findings of fact are not to be reversed, absent palpable and overriding error; palpable errors include findings that are clearly wrong, unreasonable or unsupported by the evidence: see *Housen* v *Nikolaisen*, 2002 SCC 33.

[64] The primary issue raised on appeal by counsel for Dr. Gross is whether s.10(3) of the *Forestry Act* applies to a joint owner of a boundary tree. The appellant states that it is not in dispute that Dr. Gross is an owner of the land upon which the boundary tree is partially located. As such, he comes within the authority of Justice Perell's decision in *Freedman* v *Cooper*, 2015 ONSC 1373, where the Court granted an application to remove a boundary tree despite the lack of consent by her neighbour. In that case, the applicant, like Dr. Gross, submitted an arborist's report setting out the defects in the Norway maple tree, and obtained a permit from the City to take it down.

[65] Perell J. stated the following at paras. 29-32, upon which the appellant relies:

> 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.

[66] The related issue raised by the appellant, namely, whether consent is required to remove an imminently hazardous tree or is a self-help available as a lawful remedy, touches on the previous ground of appeal. In the appellant's view, the *Freedman* case not only stands for the proposition that the *Forestry Act* does not apply to a joint owner of a boundary tree, but that both neighbours have an equal and positive duty to mitigate the effects of a defective tree.

[67] Justice Perell observed in this regard at paras. 34, 39:

> The law of nuisance also imposes responsibility on a landowner for the natural state or conditions of his or her property if the owner is aware or ought to have been aware that the state of the property is a nuisance to neighbours …
>
> . . .
>
> Because the danger posed by this particular boundary tree is no longer inherent but is rather a patent risk, it was no answer for Mr. Cooper to say that all trees pose inherent dangers. Mr. Cooper was obliged as a matter of law to take steps to abate the nuisance.

[68] As a result, the appellant was entitled to resort to a self-help remedy to eliminate the continuing nuisance posed by the boundary tree, and the consent of his neighbours to remove the tree was therefore not required. When considered in conjunction with his steps to alert the Scheuermanns as to the need to take down the tree in issue, the appellant met, if not exceeded, the due diligence standard, and in any event the self-help remedy constituted a 'complete defence" to the prosecution.

[69] In oral argument, counsel for the appellant characterizes the threshold issue in the case as revolving around whether or not the boundary tree that was the subject of this

property dispute constituted an imminent risk to Dr. Gross. Given the evidence on the record that it was such a hazard, the learned Justice of the Peace erred in law by holding that s.10(3) of the *Forestry Act* had any application to the case at bar. As a result, there was no need for the appellant to secure the respondent's consent to remove the boundary tree, and the trial Justice erred in law in so finding.

[70] On behalf of the respondent, it is contended that the trial before Justice of the Peace Brihmi was contested on the basis of statutory interpretation, and that the learned Justice did not err in law in holding that there was no conflict between s.10(3) of the *Forestry Act* and the *Municipal Code* of Toronto. In counsel's view, the appellant has fundamentally misconceived the nature of the Confirmation of Exemption, interpreting it as an order compelling him to remove a hazardous tree, rather than as an exemption, which relieves him from the obligation of obtaining a permit to remove trees.

[71] Moreover, the permit or exemption issued by the municipality does not displace an owner's property rights in a tree. That is, neither a permit nor exemption confers authority to remove a tree without the consent of an owner. The permit or exemption simply reflects a waiver by the City of the municipal restriction on the removal of exiting trees.

[72] The purpose of s.10 of the *Forestry Act*, in the respondent's view, is to make clear rights of ownership in boundary trees. It would be absurd, however, to construe it as applying to the rights of one co-owner, but not the other.

[73] In support of his position, counsel for the respondent makes reference to the decision of Moore J. in *Hartley* v *Cunningham*, 2013 ONSC 2929, aff`d 2013 ONCA 759. There the co-owner of a boundary tree, again a Norway maple, 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.* In so ruling, Moore J. commented at para. 20:

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

[74] The undisputed evidence before the trial justice, notes counsel for the respondent, was that the appellant did not have permission from the respondent to remove the boundary tree they shared. Moreover, there was no admissible evidence before the Court, unlike the case of *Freedman* v *Cooper*, indicating that the tree was diseased or dangerous, such that it constituted an imminent hazard. In the result, the learned trial Justice of the Peace did not err in finding that the appellant committed the *actus reus* of the destroying boundary tree offence, contrary to s.10(3) of the *Forestry Act*.

[75] With respect to the justification based on nuisance so as to resort to self-help claimed by the appellant, and thus provide him with a defence to the *Forestry Act* charge, the respondent states that this argument was never advanced before the trial judge. As such, the respondent submits that the appellant is attempting to recast its position, which at trial was stated to be one of statutory interpretation. This argument based on the application of the common law, then, is essentially a pretext for removing the boundary tree without the Scheuermanns` consent, which Dr. Gross was well aware would not be granted.

[76] In any event, the test for a claim in private nuisance requires that the interference with the owner`s use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is not trivial; where this threshold is met, the inquiry proceeds to the reasonableness analysis, which concerns itself with whether the non-trivial interference ``was also unreasonable in all of the circumstances``: see *Antrim Truck Centre Ltd*. v *Ontario (Transportation),* 2013 SCC 13 at para.19.

[77] Having regard to the findings of fact by the learned trial Justice, particularly that the conduct of Dr. Gross was not objectively reasonable in failing to deal with the supposed`` imminent hazard`` posed by the boundary tree for more than three and one-half years, there was no justification based on nuisance, in the respondent`s view, for the appellant to resort to a self-help remedy and remove the tree for this reason. The trial Justice of the Peace therefore correctly found that no defence was established by the appellant – either under due diligence or the common law - in removing the boundary tree without seeking the permission of the co-owners, the Scheuermanns.

Legislative History of Boundary Tree Provisions

[78] Forestry legislation generally, and tree planting provisions in particular, have a rich history in the Province of Ontario, and elsewhere in Canada. From forest exploitation to forest management, legislation governing forest policy has been promulgated in every jurisdiction, both federal and provincial: see Monique M. Ross, *A History of Forest Legislation in Canada 1867-1996* (Calgary: Canadian Institute of Resources Law, March 1997).

[79] In Ontario, the first tree planting law dates back to just after the time of Confederation: *The Ontario Tree Planting Act*, 1883, S.O. 1883, c.26. It went into force on 1 February 1893. The full title of the Act left little doubt as to the broader objectives of the legislation: *An Act to Encourage the Planting and Growing of Trees.*

[80] Under this first *Tree Planting Act* in Ontario, municipalities agreeing to plant trees were to be compensated by the province. In addition, the drafters of the Act recognized the potential for legal disputes involving trees growing on boundary lines of property, and expressly addressed the issue in section 4 of the legislation

> 4. Any person owning land adjacent to any highway, or to any public street, lane, alley, place or square in this Province, may plant trees on the portion thereof contiguous to his land; but no tree shall be so planted that the same is or may become a nuisance in the highway or other public thoroughfare, or obstruct the fair and reasonable use of same.
>
> (2) Any owner of a farm or lot of land may, with the consent of the owner or owners of adjoining lands, plant trees on the boundary lines of his farm or lot.
>
> (3) Every such tree so planted on any such highway, street, lane, alley, place or square shall be deemed to be the property of the owner of the lands adjacent to such highway, street, lane, alley, place or square, and nearest to such tree; and every such tree so planted on a boundary line aforesaid shall be deemed to be the common property of the owners of the adjoining farms or lots.
>
> (4) Every tree now growing on either side of any highway in this Province shall upon, from, and after the passing of this Act be deemed to be the property of the owner of the land adjacent to such highway, and nearest to such tree, shrub or sapling.

[81] For almost 50 years, the legislation remained in substantially similar terms, being slightly modified by the Revised Statutes of Ontario which followed in 1887, 1897 and 1914, respectively.

[82] The first of these three revisions of statutes Acts was made by S.O. 1887, c.201. This occurred just a few short years after the law had gone into effect. The section in question was renumbered and slightly reworded as follows:

> 3 (1) A person owning land adjacent to any highway, public street, lane, alley, place or square in this Province, may plant trees on the portion thereof contiguous to his land; but no tree shall be so planted that the same is or may become a nuisance in the highway or other public thoroughfare, or obstruct the fair and reasonable use of the same.

(2) Any owner of a farm or lot may, with the consent of the owner or owners of adjoining lands, plant trees on the boundary lines of his farm or lot.

(3) Every tree so planted on such highway, street, lane, alley, place or square shall be deemed to be the property of the owner of the lands adjacent to such highway, street, lane, alley, place or square, and nearest to such tree; and every such tree so planted on a boundary line aforesaid shall be deemed to be the common property of the owners of the adjoining farms or lots.

(4) Every growing tree, shrub or sapling whatsoever planted or left standing on either side of any highway for the purposes of shade or ornament shall be deemed to be the property of the owner of the land adjacent to the highway and nearest to such tree, shrub or sapling.

[83] The revision of 1897 (R.S.O. 1897, c.243) re-enacted the legislation as *An Act Revising and Consolidating the Acts To Encourage the Planting and Growing of Trees,* and gave as its short title, *The Ontario Tree Planting Act, 1896*.

[84] Once again, the boundary tree provisions were renumbered by the 1897 Revision. They now read:

2.(1) A person owning land adjacent to any highway, public street, lane, alley, place or square in this Province, may plant trees on the portion thereof contiguous to his land; but no tree shall be so planted that the same is or may become a nuisance in the highway or other public thoroughfare, or obstruct the fair and reasonable use of the same.

(2) Any owner of a farm or lot may, with the consent of the owner or owners of adjoining lands, plant trees on the boundaries of the adjoining lot.

(3) Every tree so planted on such highway, street, lane, alley, place or square, shall be deemed to be the property of the owner of the lands adjacent to such highway, street, lane, alley, place or square, and nearest to such tree; and every such tree so planted on a boundary line aforesaid shall be deemed to be the common property of the owners of the adjoining farms or lots.

(4) Every growing tree, shrub or sapling whatsoever planted or left standing on either side of any highway for the purposes of shade or ornament shall be deemed to be the property of the owner of the land adjacent to the highway and nearest to such tree, shrub or sapling.

[85] In the next revision of Ontario statutes (R.S.O, 1914, c. 213), no further changes were made, either to the section number or content of the provisions.

[86] However, in 1927, the same year as the next revision to Ontario statutes, two significant pieces of legislation which are relevant to this case were enacted by the Provincial Government.

[87] The first is the *Forestry Act*, *1927*, S.O. 1927, c.12 which was given Royal Assent on 5 April 1927. Although it contained no provisions at the time dealing with boundary trees, it is this legislation in which the subject offence concerning such trees was eventually to be transferred.

[88] At the same time, the province proclaimed the *Tree Planting Act, 1927,* S.O. 1927, c.69, and repealed the former *Ontario Tree Planting Act*. It too was given Royal Assent on 5 April 1927.

[89] *The Tree Planting Act* of 1927 consolidated the four subsections from former section 2(1) – (4) and replaced them with two separate sections. Indeed, these provisions comprised the entirety of the new Act:

> 2. An owner of land may with the consent of the owner of adjoining land, plant trees on the boundary between such lands, and every tree so planted shall be the common property of such owners.
>
> 3. Any person who ties or fastens any animal to or injures or destroys any tree growing for the purposes of shade or ornament upon a boundary line between lands, or who suffers or permits any animal in his charge to injure or destroy or who trims, cuts down or removes any such tree without the consent of the owners thereof, shall incur a penalty not exceeding $25.

[90] As can be seen from the above, the sole subject of the 1927 version of the *Tree Planting Act* was boundary trees. Significantly, it also became an offence, for the first time since the enactment of the legislation in 1883, to allow an animal to damage a boundary tree, or to remove such a tree without the consent of the joint owner.

[91] Over the course of the next 70 years, the *Tree Planting Act* remained virtually unchanged. The revision of Ontario Statutes in 1927 (R.S.O. 1927, c.255) added the term “summary conviction” before “penalty”, but left unchanged the maximum punishment amount of $25.

[92] No further changes were made in the revision of 1937 (R.S.O. 1937, c.292).

[93] However, in the next revision of Ontario Statutes in 1950 (R.S.O. 1950, c.399), the legislation was renamed *The Trees Act*, a title it would retain for almost 50 years until the time of its repeal in 1998. In addition, tree conservation provisions were added so that the Act no longer exclusively regulated boundary trees, and counties and

municipalities were given the authority to pass by-laws restricting and regulating the cutting of trees. Municipal reforestation was also the subject of the new law.

[94] The relevant sections of the *Trees Act* governing trees on boundary lines read as follows:

> 1. An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between such lands, and every tree so planted shall be the common property of the owners.
>
> 2. Every person who ties or fastens any animal to or injures or destroys any tree growing for the purposes of shade or ornament upon a boundary line between lands, or who suffers or permits any animal in his charge to injure or destroy or who trims, cuts down or removes any such tree without the consent of the owners thereof, shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than $25.

[95] For the next 40 years, the revision of Ontario statutes took place over 10 year intervals. Insofar as the *Trees Act* was concerned, no changes of consequence occurred to the boundary trees provisions.

[96] The 1960 revision (R.S.O. 1960, c.406) renumbered the sections as 2 and 3, without altering any of the wording.

[97] In 1970 (R.S.O. 1970, c.468), neither the section numbers nor its contents was altered.

[98] For the 1980 revision (R.S.O. 1980, c.510), the maximum penalty now read $1,000, a sum that had been increased the preceding year by *The Trees Amendment Act, 1979* (S.O. 1979, c.51, s.2). This legislation was given Royal Assent on 22 June 1979. It added a number of definitions to the Act (although not for boundary trees), and enacted additional provisions so that they numbered 14 in total.

[99] The last revision of Ontario statutes in 1990 (R.S.O. 1990, c.T.20) saw no changes made to the *Trees Act*. Accordingly, its final version prior to its repeal nine years later was in this form:

> 2. An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between such lands, and every tree so planted shall be the common property of the owners.
>
> 3. Every person who ties or fastens any animal to or injures or destroys any tree growing for the purposes of shade or ornament upon a boundary line between

> lands, or who suffers or permits any animal in the person's charge to injure or destroy or who trims, cuts down or removes any such tree without the consent of the owners thereof, is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

[100] At about the same time, in the mid 1990's, the government of the day embarked on a "red tape" reduction review of provincial statutes that appeared to be unnecessary or duplications of other enactments. Evidently, the *Trees Act* and the *Forestry Act* were among the statutes so considered. The result was the repeal of the former by the *Red Tape Reduction Act* (S.O. 1998, c.18, Sched. I, s.65), which was given Royal Assent on 18 December 1998, and the transfer of the boundary tree provisions into the *Forestry Act* (R.S.O. 1990, c.F.26) pursuant to S.O. 1998, c.18, Sched. I, s. 21, where they have remained ever since.

[101] The new boundary tree provisions set out in s.10 of the *Forestry Act* were reduced to three sections, and marked the first substantial revision of the legislation since the 1927 law which created the destruction of boundary tree offence. The new provision read as follows:

> 10. (1) An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between the two lands.
>
> (2) Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands.
>
> (3) 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.

[102] Subsections (1) and (2) are essentially restatements of the earlier legislation which provided the authority to plant boundary trees with the consent of the owner of the adjoining land, and stated that such trees were the common property of the co-owners.

[103] Subsection (3) reflects the greatest change to the previous versions of the offence creating provision of destroying a boundary tree. Gone was the prohibition against allowing an animal to cause damage to such trees; the non-consensual conduct of trimming, cutting down or removing a boundary tree was replaced by simply injuring or destroying a tree in such circumstances.

[104] The general penalty provision for any contravention of the *Forestry Act*, including the boundary tree offence, is a fine of up to $20,000, or to imprisonment for not more than three months, or to both (s.19(1)).

[105] Section 10 of the *Forestry Act* has not been amended or changed since its enactment in 1998

Case Law involving Boundary Trees

[106] Although the offence of destroying a boundary tree has thus been on the books for 90 years, first under the *Tree Planting Act*, followed by the *Trees Act*, and more recently the *Forestry Act*, prosecutions have been rare. The case at bar is an exception. On the other hand, this may be due, in part, to the authority of municipalities to enact by-laws regulating the removal of trees, which the provincial legislation authorizes, and enforcement proceedings over boundary trees taking place under this local regime. (see, for example, chapter 813-16 of the *Toronto Municipal Act* which sets out the criteria for issuing a permit to remove a tree, and the penalty for doing so without one).

[107] Despite the lack of boundary tree prosecutions under s.10(3) of the *Forestry Act*, or its predecessor legislation, a number of civil actions involving disputes by neighbours over the removal of boundary trees have been considered by the courts. These decisions assist in the interpretation of the current legislation, including the boundary tree offence.

[108] While the *Forestry Act* (and its predecessor legislation) contains no definition of what constitutes a boundary tree, it has been held that a tree is a boundary tree for the purposes of the Act if it crosses the boundary line “from its point of growth away from its roots up to its top where it branches out to limbs and foliage”. In other words, it is not only the point at which the trunk emerges from the soil that governs: see *Hartley* v *Cunningham*, 2013 ONSC 2929 at para. 14, aff’d, 2013 ONCA 759.

[109] It is no coincidence that the subject of many of these boundary tree dispute cases is the Norway maple. According to David J. Nowak and Rowan A. Rowntree, “History and Range of Norway Maple” (1990), 16 (11) Journal of Arboriculture 291, the Norway maple tree is the most frequently planted and occurring street tree in Europe and America. It gained in popularity following the spread of Dutch elm disease which wiped out many street trees on tree-lined roads and rural landscapes in the early 1900’s. In contrast, the Norway maple was “one of few species available in large enough quantities to meet replanting needs” (291).[5]

[110] The Norway maple tree was introduced to North America by the American botanist John Bartram in 1756. Among its earliest admirers was George Washington, who planted two of them in his garden at Mount Vernon in 1772. This tree is shade tolerant when it is young and grows in “nutrient-sufficient” soil; as it matures it requires more light for optimal growth. Its normal lifespan is between 100 and 150 years. (292-293)

[111] The hardiness of the Norway maple tree, though, has not endeared itself to everyone. The North American Native Plant Society notes that this fast-growing maple tree can reach a height of 30 meters or 100 feet, and thrives as a street and shade tree "due to its vigorous growth and tolerance of poor soil, compaction and pollution". However, it also produces large quantities of seeds which are dispersed randomly by the wind. The seeds can germinate in dense shade and the seedlings grow rapidly. As a result, the Norway maple can "out-compete other native trees," and has been declared an invasive species in a number of American States, and banned in New Hampshire and Massachusetts.[6]

[112] Whatever one's opinion of Norway maple trees, when they are situated on property lines or bound on adjoining lots, there is no unfettered right to remove them. Trees that are near or on boundary lines between adjacent properties have been the subject of actions between property owners "since rights in land first began to be recognized": R.H.K. [Notes and Legislation] ,"The Property Rights of Adjoining Landowners in Trees on and Near the Boundary Line" (1939), 13 Temp. L.Q. 370. Where a tree is on the boundary line between adjoining landowners, it is generally held that "one tenant in common therein may enjoin his neighbor from cutting down or otherwise destroying the subject of the tenancy." (374).

[113] Two such civil cases in Ontario involving Norway maple trees on adjoining property, as previously noted, are particularly relied upon by the appellant and respondent in this provincial offences appeal in support of their respective positions.

[114] In *Freedman* v *Cooper*, 2015 ONSC 1373, the authority put forward by the appellant, Justice Perell granted an application which permitted a neighbor (Freedman) to remove a boundary tree adjoining the property of Cooper. A large branch from this Norway maple tree had fallen and damaged the roof of a neighbouring property (not the Cooper property). However, after Ms. Freedman obtained a permit from the municipality to remove the tree, Cooper withheld his consent. This resulted in Freedman bringing an application in Superior Court for permission to remove the boundary tree over the co-owner of the tree's objection.

[115] The factual backdrop to this case was Ms. Freedman had retained a certified arborist to remove the branch of the tree that had fallen on to the roof of one of her neighbours, as a result of an ice storm. The tree had lost one-third of its canopy. The arborist advised that the tree itself should come down due to the damage it suffered from the storm. Another arborist provided a second opinion, confirming that the tree should be removed for safety reasons. Subsequently, the Freedmans obtained a written report from the first arborist recommending that the tree should come down for safety purposes. They presented the report to Mr. Cooper, and told him that there would be no cost to him as the matter would be covered by insurance. However, Mr. Cooper stated

that he would seek legal advice and ultimately spoke to another arborist. He decided not to agree to the removal of the tree, as he felt the tree was “quite secure”

[116] Justice Perell found that both of the parties who were co-owners of the boundary tree (Freedman and Cooper) had been put on notice that the tree, which had already caused damage to a neighbour’s property, presented “a continuing danger” As such, Freedman had done “the responsible thing, and she took steps to abate the patent nuisance”, even offering to do so at her own expense notwithstanding that the co-owner of the boundary tree, Cooper, had “a shared responsibility” (para. 38).

[117] Perell J. stated that since the danger posed by the particular boundary tree was no longer inherent, but rather a patent risk, it was not open for Cooper to object to its removal on the basis that all trees pose inherent dangers. He added:

> Mr. Cooper was obliged as a matter of law to take steps to abate the nuisance. When he failed to do so, he became liable to have the court to direct him to do so (para. 39).

[118] In the result, the Court ordered that Cooper “not interfere” with Freedman’s removal of the tree, and to indemnify her for half of the expenses of doing so.

[119] The respondent relies, in turn, on Justice Moore’s decision in *Hartley* v *Cunningham*, 2013 ONSC 2929, aff’d 2013 ONCA 759, where the Court considered a dispute over whether a large Norway maple tree could be removed by the applicant, over the objection of her neighbours. In this case, the dispute also extended to determining who was the lawful owner of the tree. The applicant sought a declaration that she was the sole owner of the tree, so that she could have it removed without her neighbour’s consent. On the other hand, as the Court noted, if the tree was 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.” (para. 4)

[120] There was expert evidence before the Court that indicated that the tree in question was in “a reasonably safe condition” and could be retained “by application of a dynamic tethering system to its three main stems.” (para. 8) The respondents were prepared to pay for this procedure, but the applicant remained opposed to it.

[121] As noted earlier, Justice Moore ruled that the applicant was not the sole owner of the tree as it was, in fact, a boundary tree within the meaning of the *Forestry Act*. Being the common property of the owners of adjoining lands, its ownership was shared by the parties. The application to remove the tree without the consent of the respondent was therefore dismissed.

[122] The *Freedman* v *Cooper* and *Hartley* v *Cunningham* decisions have been considered and applied in a number of other boundary tree cases. In *Gallant* v *Dugard*, 2016 ONSC 7319, 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. This would wake his partner and himself up when they were sleeping at night.

[123] The evidence before the Court was that the falling of the nuts would typically occur over a period of three to five weeks each year. The tree had also been pruned so as to minimize the number of nuts falling on the applicant's property; it was claimed, though, that there were no other practical measures that could be taken, absent cutting the tree down, which the respondent refused.

[124] Gray J. observed that the basis for the applicant's claim to remove the tree was based on nuisance, that is, the nuts falling from the tree on to the applicant's roof caused a substantial interference with his use and enjoyment of his property. On the other hand, the respondent's position was that there was no substantial interference with the applicant's use and enjoyment of his property, and in any event the interference was not unreasonable.

[125] Citing *Freedman* v *Cooper*, the Court held in order for the injunction to be granted, the applicant was required to demonstrate that the interference with the use or enjoyment of his property was substantial, and, if so, that the interference was unreasonable. However, it was held that he failed to establish both components of the test. That is, any interference with his use or enjoyment of his property was not substantial, nor was any such interference unreasonable. In the result, the application for an injunction to issue requiring the respondent to remove the boundary tree was dismissed.

[126] The *Hartley* v *Cunningham* decision, in turn, was applied by Himel J. in *Laciak* v *Toronto (City),* 2014 ONSC 1206, a case where there was an appeal by Ms. Laciak against a decision of the Property Standards Committee which compelled her to do maintenance work on a tree on her property which the City considered was a potential hazard. In fact, the tree's roots were on three adjoining properties. As a result, the appellant 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. Ms. Laciak relied on the *Hartley* decision in support of her position.

[127] Justice Himel accepted this argument, and ruled that the costs of doing the work on the tree could not be made against only one of the co-owners. Citing *Hartley* v *Cunningham* she stated at para. 14:

> Justice J.P. Moore noted that if a tree is co-owner, then the owners must all consent to the removal or maintenance of the tree. He held that trees with trunks growing across property lines are common property and cannot be destroyed or injured without the consent of the neighbor. In fact, it is an offence under the *Forestry Act* to remove such a tree without everyone's consent.

[128] Himel J. went on to note that where there is common ownership of a tree, "consent of all the owners to removal or maintenance is required". (para.19). In the instant case, however, the City had ordered that the tree be pruned and maintained, which type of activity did not fall under the prohibition in s.10(3) of the *Forestry Act* against "a person who 'injures or destroys' a tree growing on a boundary from doing so without the consent of the land owners". (para. 20) There was also no evidence as to whether any of the neighbouring owners of the tree consented to the work or not. The Court therefore ordered that the City was required to address the issue of the repair of the tree with all of the owners, before proceeding further.

[129] Both *Cooper* v *Freedman* and *Hartley* v *Cunningham* were recently cited in *Davis* v *Sutton*, 2017 ONSC 2277. In this small claims appeal case, there was 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.

[130] Ricchetti J. upheld the trial judge's decision. Applying *Freedman* v *Cooper*, the Court noted that where a boundary tree constitutes a nuisance, "the *Forestry Act* does not apply to requiring the consent of both owners of the boundary tree" (para.32). On the other hand, where there is common ownership of a tree, as found in *Hartley* v *Cunningham*, consent of all the owners is required for removal or maintenance, that is, "In the normal course, the consent of all owners of the boundary tree is required to cut or maintain the boundary tree" (para. 38)

[131] In *Davis* v *Sutton*, like *Cooper* v *Freedman*, it was found that the boundary tree constituted a nuisance, thus entitling the co-owner to a self-help remedy, without contravening the *Forestry Act,* which otherwise would make it an offence to do so in the absence of consent of the other co-owner(s). As Justice Ricchetti explained at paras. 40-41:

> In *Freedman* v *Cooper*, 2015 ONSC 1372, the court determined that the *Forestry Act* did not apply where the boundary tree constituted a nuisance. In *Freedman*, the owner sought a court order to cut a boundary tree being concerned that, without the consent of the neighbor, Freedman might be charged under s.10(3) of the *Forestry Act* for cutting a boundary tree. The court concluded that the section of the *Forestry Act* did not apply but rather the common law applied. Applying the common law of nuisance, the court found that the boundary tree in question was a nuisance and, pursuant to common law, the neighbor had the right to abate the nuisance by cutting the tree.
>
> Accordingly, if the "boundary" cedars were a nuisance, the *Forestry Act* continues to specify that the boundary tree(s) is jointly owned but the *Forestry Act* does not prohibit a party from taking self-help (or seek a judicial declaration to this effect) where the boundary tree constitutes a nuisance and one co-owner has refused to consent to its removal. In this case, the learned trial judge found that the cedars constituted a nuisance and the *Forestry Act* "does not apply in this case." Having found that the cedars constituted a nuisance, the trial judge's conclusion by the learned trial judge is consistent with the applicable legal authorities.

[132] In one of the few reported prosecutions for destroying trees under the *Forestry Act*, *R* v *Vastis*, 2006 ONCJ 151, a developer was found guilty of clearing a woodlot in an environmentally sensitive area. It was alleged that he did so to build a golf course; the defence was that the trees were cleared for farming purposes. Noting that a golf course contractor had been retained by the defendant to assist him in determining which areas should be cleared, the Court rejected his explanation.

[133] The trial Justice went on to find that the defendant had not exercised any due diligence as he failed to "take reasonable steps as required by law" (para. 150). In the words of the Court at para. 156:

> Mr. Vastis decided to clear large areas of what was a pristine forested area. The trees were on his land but he did not consider the consequences of destroying many acres of trees or the long-term effects on the environment. He did not take the appropriate steps to make certain he was abiding by all the regulations and by-laws that are in place to protect Environmental Sensitive Areas. Considering all the evidence it is clear to me that this was done without any concerns to the environment, and in total contempt of the rules. This was someone trying to get ahead of the regulations and attempt to develop a golf course without proper oversight or approvals.

[134] The *Vastis* decision was followed in *R* v *Geil*, 2011 ONCJ 888 at para. 40, a case of undertaking development on a property without obtaining an authorization of a development permit, contrary to the *Conservation Authorities Act* of Ontario.

Application of Law to Facts of Case

[135] There is a certain attraction, at first blush, to the appellant's position in this provincial offences case. He was concerned about the condition of a hazardous boundary tree on his property line, received a permit from the City to take it down, and had he not done so could have been held liable for any damage it caused. Moreover, his neighbours were well aware of his desire to remove the tree, but would not agree that he do so. As a result, he had no choice but to have the tree taken down on his own, without their consent. In these circumstances, it is argued, he should not be found to have committed the destroying boundary tree offence, contrary to s.10(3) of the *Forestry Act*.

[136] However, on closer analysis, it is my respectful view that this position is not supported by the record before the trial court, nor the case-law upon which the appellant relies.

[137] To begin, it must be recalled that the permit or Certificate of Exemption issued by the City to remove the boundary tree made it clear that the appellant was not relieved of the responsibility of ensuring that the rights of the co-owner were addressed. Indeed, this condition of the permit was expressly set out, as 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." Addressing any such conflict between the co-owners only after the removal of the boundary tree would obviously render this condition in the permit moot, as well as frustrate and undermine its utility.

[138] The trial Justice found, though, that the appellant appeared not to consider that this condition in the permit applied to him, as he took no steps after receiving the permit to attempt to secure the consent of the co-owners of the boundary tree to remove it, or otherwise resolve the outstanding legal issues between them in the dispute over the tree. To this end, the trial judge accepted the respondents' evidence they were unaware of any such communication to them about taking down the Norway maple tree following the issuance of the permit in December, 2009. That is, it was only at the trial proceedings themselves, some six years later, that they saw a written request from Dr. Gross to cut down the tree. Indeed, the last time the respondents heard anything at all from the appellant about the boundary tree was at the Committee of Adjustments in 2007, when they successfully opposed his application to remove it in order to enlarge his driveway.

[139] 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.

[140] 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.

[141] 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*.

[142] 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.

[143] 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 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.

[144] 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.

[145] 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.

[146] 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.

[147] 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.

[148] 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.

[149] 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.

[150] 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.

[151] 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.

[152] 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.

[153] The appellant's stated reason for taking down the boundary tree was that it constituted an imminent hazard and needed to be removed immediately. In fact, a period of almost three and one-half years passed from the issuance of the permit to cut down the tree, until its actual removal. Not only is this the antithesis of immediacy based on a danger posed by the tree, there appeared to be no further issues with the Norway maple tree over this period. That is, there was no evidence before the Court that the tree's condition had deteriorated or otherwise worsened since the permit was issued. As the trial Justice put it, the appellant's explanation for his conduct over this period of time was "problematic" and "contradictory".

[154] As the civil cases on point illustrate, where the boundary tree constitutes a nuisance, whether inherent or patent in nature, one may resort to self-help and take steps to abate and remedy it. Indeed, the first tree planting legislation in Ontario recognized the potential for boundary trees to cause "a nuisance in the highway or other public thoroughfare", and prohibited owners of trees from so planting them. (*Tree Planting Act*, 1883, s.4).

[155] While this legislation was subsequently amended, and the current version makes no reference to "nuisance" boundary trees, common law defences are recognized by s.80 of the *Provincial Offences Act*, and thus continue to operate. In addition, the permit issued by the City authorizing the tree's removal makes explicit reference to the requirement of addressing any common law or civil law issues in relation to the subject tree, including, presumably, nuisance.

[156] However, the lack of urgency in the appellant's actions in waiting so long to remove the imminent hazard said to be caused by the boundary tree negates whatever common law recourse to nuisance would have justified the self-help defence put forward. That is, it was not reasonable, as found by the learned trial justice, to claim that the Norway maple boundary tree constituted a danger, or nuisance, and that it needed

to be removed immediately, yet not get around to doing so until three and one-half years later, simply because the appellant was too busy. It is implicit, in other words, in the trial judge's findings that any interference claimed by the appellant with respect to his use or enjoyment of the land due to the tree's condition was neither substantial nor unreasonable, as evidenced by the lengthy period of time that passed before he removed it.

[157] The findings of fact by the trial Justice of the Peace are entitled to deference. He had the advantage of hearing and seeing the witnesses. He found the appellant's explanation for acting unilaterally in removing the boundary tree not to be credible. This finding has the effect of undermining the appellant's defence, whether styled as one of due diligence in attempting to comply with the regulatory standard set out in s.10 the *Forestry Act* in respect of destroying boundary trees without consent of the co-owner, or under the common law and resorting to the self-help remedy to abate a nuisance caused by the tree.

[158] To return to the language of the strict liability offence of destroying a boundary tree, contrary to s.10(3) of the *Forestry Act*, it was not in dispute that the prosecution proved beyond a reasonable doubt that the appellant committed the prohibited act or *actus reus* of removing the Norway maple tree without the consent of the co-owner, the respondents.

[159] The burden of proof then shifted to the appellant to demonstrate, on the balance of probabilities, that he exercised due diligence or reasonable care. However, the trial Justice viewed his conduct as being unreasonable, which was incompatible with exercising due diligence. Alternatively, his defence of reasonably believing in a mistaken set of facts which, if true, would render his act innocent, was rejected, given the basis put forward for regarding the tree as an imminent hazard or nuisance, yet waiting for three and one-half years to abate and remedy it.

[160] The appellant's defence having thus not been established, the verdict of guilty was properly imposed.

Conclusion

[161] While prosecutions under the *Forestry Act* may well be rare, they are available in cases such as this one where one of the joint owners of a boundary tree proceeds to remove the tree without seeking the consent of the other.

[162] The appellant could have avoided this conflict with the law by resorting to the very application process that he cites in support of his legal position, that is, having a court rule that as a co-owner of a boundary tree, he was legally entitled to have it removed over the objection of the co-owner, based on an evidentiary record to do so, including

the steps he had taken to obtain the consent of the other co-owner, and the merits of the reasons for wishing to cut down the tree, notwithstanding the opposition of the co-owner.

[163] In this case, however, the appellant had the tree taken down first, rather than seeking consent from the co-owner, or approval of the court, beforehand. It is clear that there was no basis in law or fact for the appellant to act in the manner he did, without attempting to obtain his neighbour's consent at a time proximate to the removal of the tree. Indeed, the permit issued by the City to remove the tree expressly imposed this condition of addressing the rights of the co-owners of the boundary tree. Instead, the appellant took matters into his own hands. There was no evidence supporting his position to do so, apart from his own testimony and belief based on the issuance of the permit by the City.

[164] Here the supposed imminent hazard posed by the boundary tree was neglected for three and one-half years. Indeed, it appeared that the appellant had been attempting to remove the tree in question since 2007, and was met with opposition from the respondents throughout. As for his conduct in ultimately removing the tree after such a lengthy time period following the issuance of the permit on the basis of an imminent hazard in 2009 – over a holiday weekend in the Spring of 2013, when the neighbours were absent – the trial justice found the appellant's explanation for his actions was simply not believable.

[165] To put it shortly, the appellant's conduct in proceeding, on his own, to remove this Norway maple tree on the property line with his neighbours, the respondents, was manifestly unreasonable, having regard to all the circumstances..

[166] There is no basis for interfering with the findings of fact made by the trial Justice of the Peace which resulted in this determination. Respectfully, it is difficult to see how the learned trial Justice could have arrived at any other conclusion, based on the record before him.

[167] In the result, the verdict of guilty imposed by the learned Justice of the Peace for destroying the boundary tree without consent, contrary to s.10(3) of the *Forestry Act*, was properly imposed

[168] The appeal must therefore be dismissed

Dated: 1 November 2017

R. Libman J.

[1] Written reasons for sentence were released on 11 December 2015: see 2015 ONCJ 773, [2015] O.J. No. 6702 (QL), 2015 CarswellOnt 20632.
[2] The authorization to remove the tree issued by the City of Toronto, Parks, Forestry and Recreation is actually entitled “Confirmation of Exemption” from the by-law which prohibits destruction of trees. However, it is often referred to as a “permit” throughout the trial.
[3] The Reasons for Judgment are reported at 2015 ONCJ 254, 2015 O.J. No. 2429 (QL), 2015 CarswellOnt 15066.
[4] The appellant abandoned his appeal against sentence.
[5] For a history of Dutch elm disease, see L. Mittempergher and A. Santini, “The history of elm breeding” (2004), 13 (1) Invest Agrar: Sist Recur For 161 at 162.
[6] North American Native Plant Society on Norway Maple, retrieved http://www.nanps.org/index.php/conservation/alien-invaders/103-norway-maple