Hartley vs. Cunningham/Scharper: Landmark ruling for Homeowners with Trees on Their Property

Six things you need to know about this decision

Background:
In January 2013, Kathy Hartley decided she wanted to get rid of a tree whose trunk grew across her property line with her neighbors, the Scharpers. The majority of the trunk grew on Hartley’s property, but the canopy, roots and portions of the trunk grew on the Scharper’s side. Without informing her neighbors, Hartley obtained a permit to destroy the tree from Toronto’s Urban Forestry—the City based its decision solely on the report submitted by Hartley. No independent visit was made to the tree before the permit was issued.

The Scharpers hired certified arborists who established that the tree was healthy and objected to the tree’s removal. Hartley sued her neighbors, claiming full ownership of the tree and with the intention to destroy it. The Scharpers hired Clayton Ruby to defend them and won their case based on the Ontario Forestry Act (section 2) which protects trees whose trunks grow across property lines. This is the first time that the Forestry Act has been applied in an urban context.

• **Question 1**: Can one homeowner arbitrarily cut down a tree whose trunk is growing across a property line?
  **Answer:**
  No—not without the neighbor’s explicit consent. It is now a criminal act to injure or cut down a tree whose trunk grows across a property line. Consequences include a fine of up to $20,000 and jail time.

• **Question 2**: What if the majority of the trunk grows on one neighbor’s property? Doesn’t this mean that it is his or her tree?
  **Answer:**
  No. Even if the majority of the tree grows on one side, it is still a shared tree and therefore common property. In other words, it is not a percentage game. Even if the tree’s trunk grows only a few cm on one side, it is still a shared tree and the tree cannot be injured or removed without the co-consent of both homeowners.

• **Question 3**: What is the trunk of a tree?
  **Answer:**
  The trunk of a tree includes everything from where the base of the tree meets the roots (the root collar) to where the tree sends out its first branches (leaders). So the trunk includes everything from the base (sometimes this is located below the ground) up to where the tree begins to branch. If any portion of this trunk crosses the property boundary, the tree is common property and cannot be injured or removed without co-consent.
**Question 4:** My neighbor claims that the base of the tree at ground level is completely on his/her side and that therefore the tree belongs to them. Is this true?

**Answer:**
No. Using the definition above, the court ruled that if any portion of the trunk crosses the boundary line, it is a co-owned tree. The trunks of trees are irregular, so sometimes a trunk will not cross a property line at ground level, but may nevertheless cross the property line below ground (at the root collar) or further up. If the trunk of the tree crosses the property line at ANY point between the root collar and where it branches, it is common property, and therefore protected by the Ontario Forestry Act. The ruling established that there is no ONE arbitrary point on the trunk of a tree where it must cross a property line—anywhere along the trunk is sufficient.

**Question 5:** My neighbor claims that if the City of Toronto gives a homeowner a permit to remove or injure a tree, this mean the permit-holder can automatically do so even in the case of boundary trees. Is this true?

**Answer:**
No. The City of Toronto does not require co-consent between neighbors BEFORE issuing a permit to destroy a boundary tree. Instead, the fine print on the permit states that the permit applicant is still responsible for all “civil and common law” issues. This means that the permit-holder must abide by all property rights laws before going ahead with either injuring or destroying the tree. The important point to remember is that the Tree permit does not confer sole property rights on the permit-holder. If the tree is co-owned, the permit holder still needs the neighbor’s consent. Many permit holders interpret their permit to mean the City is giving them permission to just go ahead and do what they want, but this is incorrect. The City is merely saying that you can go ahead and remove or injure this tree, but if you violate other property laws in so doing you are still responsible for the consequences.

**Question 6:** Why doesn’t the City require co-consent between neighbors of boundary trees BEFORE issuing a permit to destroy or injure a boundary tree?

**Answer:**
In 1997, the City of Toronto required the PRIOR co-consent of homeowners before issuing a tree removal permit in cases involving boundary trees. In 1998, however, developers lobbied City Council to have this removed from Toronto’s Tree Protection By-laws claiming that it impeded development. They were successful, and the prior consent clause was removed.