



# Trees on private lots

## If a tree falls in the forest – who pays for it?



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Many municipalities have sewer lines, water lines, or other services that cross residents' properties. When these pipes need to be replaced, repaired, or upgraded, the overlying area typically needs to be excavated and removed. If only soil and grass is removed, replacement costs for the municipality are minimal. But, when trees are located on top of these pipes, municipalities might be faced with very high costs.

### Replacement Costs

A threshold question for many municipalities when dealing with these kinds of issues is often the cost: What are trees worth?

If a small tree needs to be cut down, and the same species and size can be readily purchased, the answer is straightforward: The value of the tree is the cost of the purchase and installation of a replacement. In this case, some municipalities may simply compensate the residents without considering whether they are legally obligated to do so. The difficulty arises with larger, older, or uncommon trees that cannot simply be replaced with something similar, because nothing similar is available for purchase.

The value of a tree should be determined by an arborist, who will consider the species, condition, size, and location of the tree. Arborists input this information into a formula called the "trunk formula method," which suggests an amount of compensation for the tree. (A detailed explanation of the trunk formula, and a sample calculation, can be found in the article *Tree Appraisal* by Lindsey Purcell.<sup>1</sup>)

### Liability for Replacement

After determining the value of the tree, municipalities will want to assess whether or not they are liable for replacing the tree.

The first step to determining liability is to look at the title to the property. A municipality might have an easement on the property that relates to the sewer or water line. This easement may prevent the property owner from planting or having trees within the easement – in which case, the municipality may not be liable for the tree's value at all.

If there is no easement, or the easement that is in place does not carry a clear protection for the municipality, it is helpful to review the case law.

### Reviewing Case Law

Courts across Canada have addressed the issue of damage to trees between neighbours in a number

<sup>1</sup> <https://www.extension.purdue.edu/extmedia/fnr/fnr-473-w.pdf>.

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of cases. These cases provide information that is helpful in a municipal context.

Case law suggests that property owners have the authority to cut roots or branches of trees that are on their own property, even if the trunk of that tree is on a shared property line or on someone else's property. In these cases, the property owner who cut roots or branches that overhang their own property will not be found liable in either nuisance or trespass, even if the tree is killed from these actions (*Anderson v Skender*, 1993 CanLII 2772; and *Glashutter v Bell*, 2001 BCSC 1581).

In *Durham v Bennett* (2009 ABPC 66), the decision suggests that where a tree is being removed because it is problematic, the owner of the tree should not be allowed to plant any replacement trees in the same location such that the same problem will arise again (paragraphs 8-9). This case supports municipalities in requiring that any replacement trees not be placed near their municipal services. As stated by the court, courts will use: "standards of 'fairness' and 'reasonableness' in establishing the appropriate measure of value of the property to be replaced" (paragraph 8).

In addition to trespass and nuisance, in some cases, municipalities might be concerned with their liability in "disturbance" or "injurious affection" under applicable legislation, such as Ontario's *Expropriations Act*, R.S.O. 1990 c. E26 (sections 18, 21, and 22). These might apply if the municipality needs to expropriate land or expropriate an easement on the land.

In *Starr v Municipality of Metropolitan Toronto* (1969, 1 LCR 40), the City of Toronto expropriated land in order to lay new sewer lines through both temporary and permanent easements. This work required cutting down trees valued at approximately \$27,000, adjusted for inflation. There was evidence that similarly sized trees could not be replanted for logistical reasons and that smaller replacements would cost \$5,000. The judge awarded \$8,000, which accounted for both the cost to replace the trees with smaller trees and their value as a privacy screen.

The *Starr* case is important for two reasons. First, it clearly illustrates that municipalities can be liable under the

*Expropriations Act* for either "disturbance" or "injurious affection." Second, it indicates a reluctance of judges to award the full value of a tree to a plaintiff where it would be a persistent problem for a replacement tree to exist in the same location. This second principle can also be seen in *Durham v Bennett*, 2009 ABPC No 2587 (paragraphs 5, 9, and 10).

#### Municipal Best Practices

If a municipality needs to cut down a tree on one of its residents' properties and does not have the protection of an easement, the first best practice would be to have a conversation between staff and the property owners. Some property owners will be satisfied with smaller replacement trees or another similarly low-cost resolution.

If a resident wants a resolution that is more expensive than purchasing and planting trees from a nursery, a municipality should retain an arborist to appraise the tree. With this information, a municipality can decide whether to get its legal team involved to assess liability or offer compensation to the property owners.

If an agreement is reached as to compensation, best practice would be to have minutes of settlement and a release drafted for the property owner to sign, which makes the agreement final and prevents either party from later bringing the issue to court.

Proactive measures that municipalities can take to reduce liability include ensuring that there is a properly worded easement in place where municipal services are located under or near private property. Ideally, this easement would stipulate that there shall be no trees planted or present within the easement and that a municipality shall not be liable to replace any trees within the easement. In addition to limiting liability, this type of clause prevents trees from being planted too close to the municipal service, where a tree's roots could interfere with municipal services.

A municipality intending to implement or update this kind of easement should consult with a lawyer to ensure the easement is properly drafted. This is one area in which money spent on legal services may pay dividends later by reducing municipal liability. **MW**