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TREE PROTECTION: TREES, UNLIKE DOGS, ARE ALL BARK AND NO BITE

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I. INTRODUCTION

Government regulation of trees in British Columbia generally falls into two camps. There is the Provincial Government-level management of forests and forest industry practices. This regulation seeks to balance resource extraction with nature preservation, including consequent impacts on wildfires and flooding.[3]

At the urban and suburban level trees take on a different role. The value of an urban forest is the aesthetic and environmental benefits of a healthy tree canopy. There is ample literature to establish the importance of urban forests, describe to include "components such as parks, woodlands, street trees, greenways, private trees and shrubs, green walls

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[3] See, for example, "A tipping point': how poor forestry fuels floods and fires in western Canada", Cecco, Leyland, The Guardian, 16 Nov 2021.

and urban orchards".[4] Recognition of the importance has encouraged a recent reversal in the trend towards tree removal:

> *Most cities in Canada reported a drop in canopy cover from the 1980s to the 2000s. A good example of this is found in Vancouver, which went from 22.5-percent canopy cover in 1995 to 18 percent in 2013. This trend seems to have stabilized or in some cases even reversed as cities have moved to more planting and maintenance programs.*[5]

A critical difference in the urban "forest" is that the trees are spread across hundreds or thousands of private properties and the highway boulevards that front those properties. What individual owners want to do with "their" trees may not be consistent with a collective responsibility to protect our urban forests. Local government regulatory powers seek to address this tension, a purpose the court reflected on in a recent decision involving excessive pruning:

> *The material Trees adorn an urban landscape, these form, as the contemporary language suggest, part of Vancouver's urban forest. When we choose to own real property in an urban setting, we implicitly engage in a regulatory realm, including regulations respecting the landscaping, protection, propagation, care and maintenance of trees that are found on one's property. Unlike the growth of trees in their natural forest habitat, where Mother Nature performs its duty of their stewardship, trees inside urban centres, such as Vancouver, require care by the property owners as I reflected when articulating the Law section above. Whether they reside or actively use the property or have rented it out, owners of property have [a] lawful duty to conduct all of the activities set out in the Bylaw to properly steward and protect trees.*[6]

This paper provides a review of the regulatory tools that municipalities and local governments use to protect urban forests and environmentally sensitive areas through tree protection bylaws and the regulation of development. Regulation depends on

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[4] Various authors: "The social and economic values of Canada's urban forests: A national synthesis"; April 2016. The writers thank Cecil Konijnendijk, former professor of urban forestry at the University of British Columbia who directed us to a number of authoritative reports on the importance of urban forests.

[5] "Tree canopy cover in Canadian communities". Rosen, Mike. Canada's Local Gardener, Volume Two, Issue Four. https://issuu.com/pegasuspublicationsinc/docs/canadaslocalgardener_vol2_iss4_digital/s/13326102

[6] *R. v. Boykiw.* 2021 BCPC 33 at paragraph 49 (Z. Makhdoom J.J.)

enforcement, and this paper discusses some strategies for achieving effective enforcement in relation to trees.

II. TREE BYLAWS – THE TREE CANOPY

Municipalities that seek to protect their tree canopy will principally rely on two types of bylaw. The first type of bylaw seeks to protect the municipality's own (e.g. public) trees that are located on highways, in parks and on other public property. The second type of bylaw seeks to regulate the cutting of trees on private property within the municipality. Regional Districts can equally use bylaws to protect the trees located on Regional District lands but have a narrower power to regulate private trees. With private trees, local governments must also be mindful of statutory limits on the power to regulate trees.

A. Trees in parks, public spaces and on highways within a municipality

In theory, the mere fact that a tree is located on land owned by a municipality, be it a park, land dedicated as highway[7] or another public space, should be enough to discourage unwanted tree cutting. No private individual has any right to cut a public tree and the only tree cutting should be that which is authorized by council directly or through a delegated authority. Unfortunately, people do cut or otherwise kill municipal trees without permission, often to open up views or remove branches that overhang on their property.[8] A municipality's authority to regulate, prohibit and impose requirements in relation to municipal services provides the power to simply prohibit any and all cutting and trimming of the municipality's trees, unless expressly permitted.[9]

Municipalities may also seek to (carefully!) impose requirements on adjacent owners to trim public trees on highway (boulevard) located between the road and the owner's property line. Section 39(e) of the *Community Charter* allows for the imposition of this type of requirement:

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[7] Pursuant to section 35 of the *Community Charter*, S.B.C. 2003, c. 26, a municipality owns all land within its boundaries that is dedicated as highway, subject to some limited exceptions.

[8] See e.g. "Socialite in scandal over chopped trees". Armstrong, Jane. Globe and Mail, August 22, 2000. https://www.theglobeandmail.com/news/national/socialite-in-scandal-over-chopped-trees/article18425236/ and "Have you seen the cottonwood killer? Kelowna RCMP seeks witnesses after deliberate poisoning of mature tree" https://www.cbc.ca/news/canada/british-columbia/kelowna-tree-vandalism-1.6853141 (May 24, 2023).

[9] *Community Charter*, s. 8(a) [services]; s. 8(3)(b) [public places] and s. 36(1) [use of highways].

> *39 A council may, by bylaw, do one or more of the following:*
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> *…*
>
> *(e) require persons to take specified actions for the purposes of maintaining the cleanliness or safety of a highway that is next to property that they own or occupy, or that is affected by property that they own or occupy;*

Prohibiting residents from chopping down or otherwise killing municipal trees but also requiring residents to trim municipal trees to prevent highway obstructions is a difficult balance to achieve.

B. Municipal tree protection bylaws

Section 8(3)(c) of the *Community Charter* gives municipalities the authority to regulate, prohibit and impose requirements in relation to "trees". The ordinary meaning of tree ("a woody perennial plant having a single usually elongate main stem") is expanded with the *Community Charter* definition: "trees" includes shrubs. Subject to the statutory limitations discussed below, a municipality can use a tree protection bylaw adopted under section 8(3)(c) of the *Community Charter* to regulate the cutting of trees and shrubs to help protect the municipal tree canopy. A municipal council's ability to impose requirements could be applied to permit tree cutting in certain situations, but require the person cutting the tree to plant and maintain a replacement tree.

C. Statutory limits on municipal tree protection bylaws

A municipality's power to regulate and prohibit the cutting of trees on private property is not absolute. Some of the statutory limits are set out or described in section 50 of the *Community Charter*. That section precludes a tree protection bylaw from preventing development to a permissible density (unless compensation is paid). This may have the practical effect of only protecting the trees on the periphery of a parcel when there is new development.

Section 50 of the *Community Charter* also provides an express exemption for tree cutting for utility works on land owned or held by the utility. This partially reflects a statutory immunity for BC Hydro,[10] but also covers other utilities.

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[10] *Interpretation Act*, s. 14; *Hydro and Power Authority Act*, s. 3.

Section 50 also refers to lands and trees subject to certain statutory regimes relating to tree harvesting that will prevail over a tree protection bylaw. These are lands trees subject to a permit or other tenure under the *Forest Act*, R.S.B.C. 1996, c. 157 or trees that are subject to a management agreement under the *Private Managed Forest Land Act*, S.B.C. 2003, c. 80.

Although not mentioned in the *Community Charter*, the court has confirmed that a tree protection bylaw will prohibit tree cutting that is needed to carry out the activities authorized by a permit under the *Mines Act*, in accordance with the terms and conditions set out in the permit.[11]

With regard to farming, section 46(4) of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 provides that: "a local government bylaw or a first nation government law that is inconsistent with [the *Agricultural Land Commission Act*], the regulations or an order of the commission has, to the extent of the inconsistency, no force or effect." This can effectively preclude the application of tree protection bylaws to land within the Agricultural Land Reserve. It is a little more complicated for farmland outside of the reserve. In the case of agricultural land outside of the Agricultural Land Reserve, owners have been unsuccessful in resisting interlocutory injunctions on the basis of alleged defences arising from the *Farm Practices Protection (Right to Farm) Act*, because those owners were not able to prove that they were farmers or farming.[12] There is some lingering uncertainty as to the scope of application of the *Farm Practices Protection (Right to Farm) Act* to tree cutting for the commencement or expansion of farming by a farmer. This issu was engaged with regard to section 50(2) of the *Community Charter* in *McHattie v. Central Saanich (District)*[13]discussed below with regard to agricultural land use.

D. Regional district tree permit bylaws

Regional Districts do not have a power equivalent to section 8(3)(c) of the *Community Charter*, but a regional district can create tree permit areas under section 500 of the *Local Government Act.* The areas for which a permit may be required are those that the regional board considers vulnerable to flooding, erosion, land slip or avalanche as tree cutting permit areas.

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[11] *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12 at paras 140-141.
[12] *Nanaimo (Regional District) v. Buck*, 2012 BCSC 572; *Squamish (District) v. 0742848 B.C. Ltd.*, 2021 BCSC 301
[13] 2023 BCSC 175.

This power may be seen as similar to the power to impose development permit requirements as discussed in Part IV of this paper. The principal statutory object for the creation of tree cutting permit areas is to protect land from flooding, erosion, land slip or avalanche rather than to protect the trees themselves.

E. Land use bylaws and tree cutting

For local governments seeking to preserve forested areas and tree canopies, a question may arise as to whether this can be achieved through a zoning bylaw adopted under Part 14 of the *Local Government Act*. The principal problem is that the common law right to harvest trees from land known as a *profit à prendre* is a right that the court has interpreted as been separate from the "use of land" that local governments may regulate with a zoning bylaw.[14] Without this ability to simply prohibit tree cutting as a use of land, local governments are left to focus on regulating uses that may involve significant incidental tree cutting. The risks of permitting a use that is inconsistent with a treed lot was evident in *McHattie*, referred to above. In that case, the court considered a land use bylaw that permitted non-ALR land to be used for farming purposes. The court accepted that clearing some of the land of trees was part of the expansion of farming activities on adjacent lands and that such tree clearing could not be prohibited by a tree protection bylaw because it would prevent (agricultural) development to the density permitted under the applicable zoning bylaw.

F. Remedies for tree cutting contrary to bylaw

Contraventions of local government bylaws usually trigger the same suite of four enforcement measures: civil proceedings[15], bylaw notice enforcement[16], municipal ticket information[17] and long form information.[18] If a tree protection bylaw includes the planting of replacement trees for authorized cutting, it may also require the planting of replacement of trees unlawfully cut, such that the municipality can enter onto the land an

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[14] See *Denman Island Local Trust Committee v. 4064 Investments Ltd.*, 2001 BCCA 736 at para. 79; *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12 at para. 116 citing *Vernon (City) v. Okanagan Excavating (1993) Ltd.*, 1993 CanLII 1641(B.C.S.C.), aff'd 1995 CanLII 3229 (B.C.C.A.)

[15] *Community Charter*, s. 274; *Local Government Act*, s. 420.

[16] *Local Government Bylaw Notice Enforcement Act*, S.B.C. 2003, c. 60; *Local Government Act*, s. 415.

[17] *Community Charter*, s. 265; *Local Government Act*, s. 414.

[18] *Community Charter*, s. 263; *Local Government Act*, s. 413.

plant trees at the owner's expense if the owner does not comply with such a requirement[19].

With tree cutting on private land, bylaw notices and municipal ticket informations might be seen as imposing too small a sanction. Prosecution by a long form information may be preferred because of the potential for higher fines and prohibition orders. Where tree cutting is ongoing and the local government wants to stop the cutting as soon as possible, seeking an interim or interlocutory injunction through a civil proceeding is likely necessary.

A claim brought through civil proceedings (petition or action) could potentially seek a remedial injunctive order to address the consequences of the tree cutting. Such an order would require the owner perform the planting of replacement trees and the performance of other restoration and maintenance works. The appropriateness of such an order within a civil proceeding commenced under section 274 of the *Community Charter* was considered by the Court in *Denman Island Local Trust Committee v. Ellis*[20]at paras. 54-56:

> *As the trial judge found, s. 274(1) should be interpreted broadly and purposively, and the purpose of the provision is to give local authorities broad powers to approach the court to ensure that their bylaws are not flouted (at para. 78). If the court were not authorized to order remediation, the purpose of the provision would be frustrated. Bylaws that prohibit particular actions, such as the removal of trees, would be largely unenforceable.*
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> *The appellant also argues that the legislature did not intend for s. 274 to be used by municipalities to seek remediation orders. This can be inferred, he says, from the existence of express remediation powers in ss. 72 and 74 of the Community Charter, which give municipalities broad powers to declare a nuisance and order that remedial work be done. …*
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> *The appellant's inference is not supportable. Sections 72 and 74 of the Community Charter deal with a municipality's power to make remedial orders with respect to nuisance whether or not a bylaw has been violated. Section 274(1) of the Act, by contrast, deals with a local authority's power to ask the court to enforce its bylaws. The express power to make remedial*

[19] *Community Charter*, ss. 17, 258.
[20] 2007 BCCA 536 [*Ellis*].

orders with respect to nuisance has no bearing on the implied power to seek remedial orders to enforce bylaws.

Similar considerations arise with enforcement remedies with tree-cutting on public land, except that rather than seeking an order compelling the owner to perform remedial planting, the local government should seek damages for trespass to compensate the local government for the costs of doing this remedial work itself together with aggravated and punitive damages.

III. ENFORCEMENT OF TREE PROTECTION BYLAWS

The effective enforcement of tree protection bylaws can face a number of challenges. These include:

A. Identifying the applicable bylaw
B. Proving the application of permit requirements;
C. Proving identification of an unlawful tree cutter
D. Identifying the tree(s) unlawfully cut;
E. Stopping aggressive pruning, topping and removing of trees on a property that the owner argues is tree maintenance;

This section will discuss some of the methods that British Columbia municipalities use to protect trees through both bylaw provisions that are drafted to address the above issues and the types of evidence that is used to prove a contravention. Given the number of potential issues that could arise in enforcement, this represents an admittedly limited discussion.

A. Boundary Trees

Trees, due to their size, often extend across property line boundaries. Private trees can extend over highway and public trees can extend over private land. Since it is quite common in suburban areas for a house's front lawn to extend into the dedicated highway, what appears to be a private tree close to the sidewalk or curb might be a public tree. Uncertainty over rights and responsibilities for so-called "boundary trees" (trees that have a trunk on a property line) is often an issue in assessing common law maintenance obligations. Nevertheless, if the municipality seeks to take enforcement action in relation to an owner's obligation to not allow the cutting of a tree on their property without a permit, the municipality should ensure that the cutting involved a tree with a trunk on the

owner's property and that the cutting is captured within the wording of the prohibition in the tree protection bylaw.

B. Tree cutting permits

Tree protection bylaws commonly prohibit the removal of a tree from a property without first obtaining a permit. For example, section 6 of the City of Surrey Tree Protection Bylaw, 2006, No. 16100 provides:

> *6. No person shall cut, remove or damage any protected tree or cause, suffer or permit any such tree to be cut, removed or damaged, except where permitted by and in accordance with the terms of this Bylaw*

Part 7 of the bylaw provides for a process to obtain a permit to cut a "protected tree"[21]. The criteria for issuing a permit are set out in section 29 of the bylaw and includes issuance of a permit to deal with hazardous trees, trees that impair, interfere with or presents a risk or hazard to a utility, trees that interfere with the permitted use of the property and trees which cannot be accommodated by modifying construction plans "without causing the owner undue hardship".

As with most tree protection bylaws, the protection is only afforded to "protected" trees[22] and there are further exemptions for city owned trees, trees "cut, removed or damaged" pursuant to *Hydro and Power Authority Act* or the *Oil and Gas Activities Act* and trees on other government land.

In Surrey's bylaw "protected tree" has a number of definitions, but the most important in this bylaw, like most municipal tree protection bylaws, is the definition of a protected tree by size:

> *...any tree, including multi-stemmed trees, within the City, regardless of species, having a D.B.H.[23] of 30 centimetres [11.8 inches] or more or, where measurement of the D.B.H. is impossible or impractical, any tree with a*

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[21] There are also more restrictive provisions to deal with "significant trees".

[22] Section 3 of City of Surrey Tree Protection Bylaw, 2006, No. 16100.

[23] "D.B.H." is defined in section 2 of the bylaw as "the diameter of a tree at breast height or 1.4 metres [4.6 feet] above the highest point of the natural grade of the ground measured from the base of a tree. For multi-stemmed trees, the three (3) largest stems shall be measured 1.4 metres [4.6 feet] above the highest point of the natural grade and the D.B.H. of the tree shall equal the cumulative total of the D.B.H. of the three (3) largest stems.

> *stump having a diameter of 30 centimetres [11.8 inches] or more, measured at the natural grade of the ground*;

On the one hand, the tree bylaw does not seek to protect the smallest sapling that might sprout in the garden despite it being a nascent tree. On the other hand, this definition takes into account the fact that by the time the municipality learns that a protected tree has been removed without a permit, the tree is gone and cannot be measured.

In the case of bylaws that only define trees by a diameter or circumference measured above the ground, it may be difficult, without expert testimony, to establish that dimension of the tree for the purposes of enforcement by a prosecution or a civil proceeding. A municipality may seek to measure the stump and show that, given the size of the stump, the tree must have had a sufficient diameter above ground. Neighbours may also be able to give rough estimates as to the size of the tree before it was cut, but this evidence may lack precision or reliability.

What the City of Surrey bylaw does not do is seek to reverse the onus of proving that a tree is not a protected tree. This is a common deficiency in municipal tree protection bylaws as it foregoes an opportunity to place the onus of proving the availability of an exemption on the property owner. Subsection 98(2) of the *Offence Act* places the burden of "proving that an exception…prescribed by law operates in favour of the defendant is on the defendant". A municipal council could impose a general requirement to obtain a permit for the cutting of all trees, but also include an exemption for defined smaller trees.

The City of Vancouver's Protection of Trees By-law no. 9958 takes advantage of subsection 98(2) of the *Offence Act* by applying the bylaw to all trees, including hedges.[24] Section 3 of the City of Vancouver's bylaw then provides:

> ***Exemption for small trees***
>
> *2.2 This By-law does not apply to a tree that has a trunk or stem the diameter of which, or two or more trunks or stems the combined diameter of the two or three largest trunks or stems of which, measured 1.4 m above the existing grade of the ground adjoining its base, is less than 20 cm, except for a replacement tree or a tree that is part of a hedge.*

Section 4.1 of the bylaw provides:

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[24] City of Vancouver's Protection of Trees By-law no. 9958, section 2.1.

> *4.1 A person must not cut down or kill a tree on a site, remove a tree from a site, relocate a tree on a site, or plant a replacement tree on a site, except in compliance with this By-law and the tree permit issued for such removal, relocation, or replacement.*

If an owner or contractor is charged with cutting down a tree without a permit, once the act of cutting the tree in contravention of section 4.1 has been proven by the prosecutor, the onus will shift to the owner or contractor charged to establish that the tree was exempt under section 2.2 of the bylaw. Just what evidence that a court will accept to prove that a tree is exempt may depend largely on the court, but a municipality should still seek to tender evidence such as historic photos, stump measurements or the testimony of neighbours to avoid the tree cutter being the only one providing testimony or other evidence as to the size of the tree.

C. Identifying the tree cutter

Unlike continuous contraventions, such as unlawful uses of land or unsightly premises, unlawful tree cutting can occur in an instant such that there is some doubt as to who did what exactly where and when.

In the case of the identity of the tree cutter, prosecuting the unlawful cutting of municipal trees can be particularly challenging if the cutter is not caught in the act. Suspicions that a park tree was cut by a resident of an adjoining property are insufficient to support a prosecution. There may, however, be sufficient circumstantial evidence to support commencement of a civil action. In the case of trees on private property, a municipality may be able to enforce a prohibition against an owner "allowing a tree to be cut" that supplements a prohibition against a person cutting the tree. Enforcement officials should also keep in mind that multiple people can be liable for the unlawful cutting of a tree even if only one person did the actual cutting. In a prosecution, a person who aids or abets in the offence is also a party to that offence.[25] In a civil proceeding, such as a claim for damages arising from the cutting of a municipal tree, multiple parties may be found jointly liable if they all acted in furtherance of a common purpose that involved the commission of an unlawful act.[26]

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[25] *Offence Act*, s. 85.

[26] See e.g. *Mainland Sawmills Ltd. v. U.S.W., Local 1-3567*, 2007 BCSC 143.

D. Identifying the trees cut

Even where the proper defendant can be identified, an effective prosecution still requires the unlawful tree cutting to be sufficiently alleged. An example of how challenging this can be was illustrated in the case of *Vancouver (City) v. Laffy-Stadnyk*.[27] In that case, the court was presented with a 28-count information alleging contravention of what was then section 10A of the City of Vancouver's tree protection bylaw. This section prohibited removal of a tree without first obtaining a tree permit. In the Information against the defendants each count was worded exactly the same. From paragraph 4 of the decision, the court, "as a reference point" read one of the counts:

> *Between February 11, 2003, and February 16, 2003, Kathryn Laffy-Stadnyk, Allan Wiseberg and William Glover, unlawfully did remove a tree at 4725 West 4th Avenue, Vancouver, British Columbia, without first obtaining a tree permit for the removal of said tree, contrary to the form of the enactment in such case made and provided, Section 10A Bylaw 7347.*

The court noted, at paragraph 6:

> *Each of these counts simply add the words, "unlawfully did" in front of removing a tree. It adds a date on which this allegedly occurred; that being between February 11th and February 16th, of 2003. It adds, of course, the name of the defendants and it adds the place, 4725 West 4th Avenue.*

The issue before the court was the sufficiency of the particulars of the offences. At paragraph 14 of the decision, the court said:

> *Both counsel agree that the principles of law that are involved here are, first, whether or not the charge contains sufficient details to give the accused reasonable information and to identify the transaction referred to in each count; secondly, that each count must relate to an individual and separate transaction; and third, that each court decision as to whether or not sufficient details are given to the accused, providing reasonable information and identification of the transaction, will depend upon the facts of each case and the nature of the charge. Counsel also agree that the court can look at the disclosures made to defence, in order to come to a conclusion as to whether or not together, the Information and particulars disclosed, give*

[27] 2004 BCPC 439.

> *sufficient information to the defence to be able to meet the test of reasonableness in terms of knowing what it is exactly that they have to meet.*

The importance to criminal justice in Canada of the defence's argument and the rationale for the court's ultimate decision is a subject that goes beyond the scope of this paper. It may be sufficient to say that while considerable effort was made by the prosecution to illustrate the location, size and species of the trees that were removed from the subject property on a sketch and corresponding photographs that were provided in disclosure, that information did not illustrate which trees related to the individual counts in the Information, a technical requirement of the *Offence Act*. At paragraph 21 of the decision, the court said:

> *The consequence is that when one looks at the sketch, the photos, and the Information, the required or necessary nexus between the draft sketches, the photos and the Information is not made out to bring clearly to the attention of the defendants, which trees are involved in which counts.*

The writers both have experience with a post-*Laffy-Stadnyk* practice of preparing informations that refer to the location, size (or remaining stump size) and species of each tree removed as well as providing, by way of disclosure, further particulars that assisted in the identification of the trees that were removed. These further particulars can include detailed investigator's reports which included photographs of the trees that were removed and historical aerial photographs from the municipality's database that showed the canopy of the trees before the removal took place.[28]

An example of a successful prosecution for illegal tree cutting occurred in *Saanich (District) v. Visser Van Ijzendoorn*.[29]The District of Saanich had issued several municipal ticket informations against the property owner who had cut down protected trees located on his property without a permit, contrary to section 7 of Saanich's Tree Protection Bylaw No. 9272.

The arboricultural inspector for the District, who was qualified by the court "to provide expert testimony in the identification of tree species, assessing tree health, pruning and removal of trees and measurements of tree species"[30], "prepared and signed a separate municipal ticket for violation of section 7 of Saanich's Tree Protection Bylaw for each tree

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[28] The majority of trial decisions are not reported.
[29] 2017 BCPC 160 [*Visser Van Ijzendoorn*], appeal dismissed at 2017 BCSC 2292.
[30] *Visser Van Ijzendoorn*, at para. 21.

that he had identified and tagged in the steep slope area of the Property".[31] Each municipal ticket information not only referred to size and species of the tree that was removed, it also cross referenced the tree to the tag by number.

Although the defendant attempted, in a rather indirect manner, to argue that he was concerned that the trees presented a hazard, the apparent real purpose of the tree removal was to improve the view of the ocean from his property:

> *Mr. Gallagher added that he took photos of the site and then returned topside where he observed that, at the rear of the Property, virtually all of the trees had been "greatly reduced in size" such that there was now a clear view of the ocean from the Property.*[32]

Although two of the 12 tickets were withdrawn by the District, the court found the defendant guilty of the remaining 10 tickets and the defendant was fined $1,000 for each ticket.[33]

E. Pruning

Defining and regulating all actions that modify a tree in a harmful way can be challenging. Some trimming or pruning can be innocuous or even beneficial for a tree, but other cutting can accelerate the tree's demise. Permits are customarily not required to prune a tree. However, it is well established that excessive pruning will not only dramatically alter a tree's appearance, but it may also well damage or kill a tree.

Many tree protection bylaws contain prohibitions aimed at prohibiting the "damaging" of a tree, a measure that seeks to distinguish harmful cutting from maintenance pruning. Some bylaws will seek to describe prohibited levels of pruning, such as imposing a limit on the amount of pruning that a person may do. The City of Vancouver goes so far as to prohibit the climbing of certain trees using climbing gaffs, spurs or spikes.

An alternative approach is to prohibit pruning that has a specified outcome with regard to the health or shape of the tree. As discussed below, seeking to define and enforce such an outcome-based prohibition in pruning can be a complicated endeavor. In any

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[31] *Visser Van Ijzendoorn*, at para. 28.

[32] *Visser Van Ijzendoorn*, at para. 24.

[33] See early comments regarding potential concerns that municipal ticket information fines do not adequately address tree cutting offences, such that civil proceedings or long form offences seeking remedial orders pursuant to paragraph 263.1(1)(d) of the *Community Charter* may be preferred.

event, without some regulation limiting excessive pruning, a property owner (or a neighbour) can effectively kill a protected tree without running afoul of the prohibition against cutting a tree without a permit.

1. Express limits on the amount of pruning

Section 27 of the City of Surrey's Tree Protection Bylaw provides an example of an attempt to address this issue by describing excessive pruning:

> *27. A tree cutting permit is not required for the pruning of a protected tree, other than a significant tree. Pruning must follow sound arboriculture practice. The pruning and treatment of diseased trees in accordance with sound arboricultural practice, shall be practiced where possible and practical as an alternative to the cutting or removal of a protected tree. The following is not considered sound arboricultural practice:*
>
> > *(a) removal of branches in the upper 50% of the total height of the protected tree;*
> >
> > *(b) the removal of more than twenty-five percent (25%) of the protected tree's total branches or limbs; and*
> >
> > *(c) the topping of a protected tree, other than topping carried out under an issued tree cutting permit in the circumstances described in Section 27.2.*

There are exceptions to the limitations placed by section 27 provided they can be justified in an arborist report and approved by the City.[34]

The attempt of this provision to distinguish harmful pruning from tree maintenance may make it inadvertently difficult to prosecute. First, the term "sound arboriculture practice" may be found by the court to be somewhat imprecise. To determine whether a given incident, such as the removal of a significant number of limbs of a tree, does or does not constitute sound arboriculture practice requires expert testimony.

Second, the portion of the section that seeks to define certain acts as being "not considered sound arboricultural practice" (subsections 27(a), (b) and (c)) is different from adding a specific prohibition of those activities. A bylaw could seek to prohibit pruning

[34] City of Surrey's Tree Protection Bylaw, ss. 27.1 and 27.2.

that is either an unsound arboricultural practice or an act that results in a specified amount of cutting.

Third, even if a prescribed quantity of cutting defines the offence, it may be difficult to prove that the total amount of cutting occurred at a particular time for the purpose of laying charges.

2. Prohibitions based on the consequences of pruning

In contrast, the City of Vancouver's Protection of Trees By-law applies an outcome-based approach to pruning. Paragraph 8.2 of that bylaw provides:

> ***Treatment of a tree***
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> *8.2 A person must not:*
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> *(f) prune a tree to the extent that it is unlikely ever to regain its characteristic appearance;*

If the reader is unsure what "characteristic appearance"[35] means, then that may illustrate a potential challenge in prosecuting this type of provision. Section 8 of the *Interpretation Act*[36] directs a court to give such provisions "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", however this does not necessarily mean that the court will accept the application of this provision even where the drastic pruning that leaves the tree bare of branches in large parts of what remains.

In *R. (City of Vancouver)* v. *Michael Richter*,[37] an unreported decision, the court was faced with opposing expert opinions that resulted in a debate over what constituted "characteristic appearance". Did it refer to the species of tree or the appearance of the original tree? If it referred to the species, it could be argued that even a ravaged scotch pine still could be identified as a scotch pine. Faced with two opposing opinions, the court found that that the City was not able to prove its case beyond a reasonable doubt.

In *R. v. Boykiw*[38], however, the City of Vancouver prevailed. In that case, a residential developer purchased a property and retained a tree cutter to prune all the branches of

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[35] This is common to many remedial bylaw provisions, another example being paragraph 8.2 (h) of the bylaw which prohibits a person from pruning, cutting, or altering a tree so as to create a risk to the health or future health of the tree.
[36] RSBC 1996, c. 238.
[37] 2019, unpublished, Provincial Court of British Columbia, Vancouver Registry #36185-1.
[38] 2021 BCPC 33 [*Boykiw*].

five Western Red Cedar trees back to the trunk of the tree. What the developer did not tell the cutter was that the trees were located on a neighbouring property and that the cutter was trespassing when he and his forces climbed the trees to lop off the limbs.

Both the tree cutter and the developer were charged under a 15 count Information, with three charges for each of the trees that were pruned. Those charges were, in short:

A. Remove bark from or cause any damage contrary to section 8(2)(a) of the bylaw;
B. Prune those trees hence compromising their characteristic appearance to the extent that it is unlikely ever for these to regain their characteristic appearance contrary to section 8(2)(e) of the Bylaw; and
C. Climb retention trees using climbing gaffs, spurs, or spikes contrary to section 8(2)(f) of the Bylaw.

Early in the proceedings the tree cutter retained by the developer entered into a plea arrangement with the City. The tree cutter pled guilty to three charges in the Information related to the damage to three of the trees and the rest of the charges were withdrawn by the City. The cutter was then called as a witness by the City in the prosecution of the charges against the developer. [39]

In his report and evidence, the City's landscape inspector described the extent of the pruning of the five Western Red Cedars, saying that the "limbs were removed on the east portion of the tree that was overhanging the property line, right to the trunk of the tree". While not all the limbs were removed, the majority had been removed. Although not called as an expert[40], he opined that the trees had lost their characteristic appearance.

The landscape inspector's report also noted the presence of fresh spur marks on the trees.

Paraphrasing from his report, the landscape inspector referred to aerial imagery in the report that "shows all these trees with a full canopy which is spherical and full". He went on to say that the:

> *...spherical canopy form would be considered typical of such coniferous trees. The resulting canopies have had a significant number of limbs removed from their once spherical forms creating now lopsided trees.*

[39] The cutter was fined $500 for each offence after a joint submission by the defendant and the City.
[40] The landscape inspector likely could have been qualified as an expert (but for his employment with the City), since, as the court noted, he was a certified arborist engaged in arboreal culture for almost 30 years.

The landscape inspector opined that the missing canopy will not be replenished and that the tree is "unlikely to ever regain its natural characteristic".[41]

The City's expert opined that the pruning directed by the developer was not warranted. The City's expert inspected the trees almost 13 months after the pruning took place and he said:

> *...I did not observe new growth in the impact area since the completion of the pruning (one year plus). With the current growing season, new growth should be visible. It is very obvious that the trees have been severely pruned with an intentional over-elevation of the crowns. The pruning actions are not justified in the current context. I say with confidence that these trees are unlikely to ever regain their prior-to form or condition given the extent of limb removal on the east side as a result of pruning.*

The court observed that the expert's findings and opinions were "basically on all fours" with the landscape inspector's findings.[42]

The defendant developer presented expert testimony intended to rebut that presented by the City. The court found his evidence unpersuasive, noting that:

> *All of his observations concerning the individual Trees seemed consistent with the "advice" he received from the accused. Mr. Mennie, persuasively contradicts many of his findings. During cross examination, Mr. Serban replaced specificities by proffering generalities.*[43]

Between the time of the trial and the date the reasons were delivered, the reasons for decision in *Richter* were released. The court had no difficulty distinguishing the case at bar from *Richter*:

> *The last minute reference to the case of City of Vancouver v. Michael Richter, et.al, (2019, unpublished, Provincial Court of British Columbia, Vancouver Registry #36185-1) a decision of my learned colleague, His Worship Christopher Maddock, was very helpful. I must distinguish that case on the fact that while Justice Maddock conceptually and factually could not prefer evidence of one over [the] other of two experts, who gave contradictory*

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[41] *Boykiw* at paragraphs 40 to 41.
[42] *Boykiw*, at para 44.
[43] *Boykiw* at para 53

> *evidence. Thus leaving him in a quandary. Hence reasonable doubt. Applying the second branch of R. v. W.(D.), (1991) 1991 CanLII 93 (SCC), 1 SCR 742, he acquitted the accused. In the case at Bar, findings and opinions of both experts are at odds with one another. Following my analysis above, I have attached lesser weight [to] Mr. Serban's findings. I have no doubt in my mind that these Trees would never regain their characteristic appearance. Furthermore, damage to the barks and the use of spurs for climbing may further weaken these Trees.*[44]

Further, with respect to the determination of the ultimate issue in counts 2, 5, 8, 11, and 14 of the Information, the court had earlier said:

> *Respectfully, even if there wasn't any expert evidence, albeit contradicted by another expert, available, I do not need an expert to tell me that these trees have lost their characteristic appearance.*[45]

The court found the developer guilty on the first 14 counts, acquitting him on Count 15, as the court found reasonable doubt that the fifth tree was climbed using spurs.

IV. TREES AS PART OF A PROTECTED ENVIRONMENT

A municipal "tree bylaw" under section 8(3)(c) of the *Community Charter* is a form of tree-specific regulation that may be adopted for both aesthetic and environmental purposes. There are other regulatory tools that can control tree cutting for the purpose of protecting the environment. The investigation and enforcement of compliance with these regulatory tools can raise some unique considerations.

A. Development permit areas

A local government official community plan bylaw may designate development permit areas pursuant to section 488 of the *Local Government Act* for the purpose of controlling subdivision, construction and land alteration. The court has confirmed that the removal of trees constitutes land alteration[46], so development permit areas that control land alteration could have the effect of prohibiting tree removal without a development permit. For development permit areas adopted specifically for the purpose of "protection of the

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[44] *Boykiw* at paragraph 55.
[45] *Boykiw* at para 50.
[46] *Ellis*, cited above.

natural environment, its ecosystem and biological diversity"[47] section 491(1) of the *Local Government Act* expressly includes the authority to issue development permits that:

> *require protection measures, including that vegetation or trees be planted or retained in order to:*
>
> *(i) preserve, protect, restore or enhance fish habitat or riparian areas,*
>
> *(ii) control drainage, or*
>
> *(iii) control erosion or protect banks.*

A development permit requirement can operate to protect trees within a development area for other reasons, including because they are "specified natural features of the environment" as contemplated by section 491(1)(d) of the *Local Government Act* or because the trees stabilize slopes and are therefore necessary to protect development from hazardous conditions.[48] The fact that alteration of land is controlled within a development permit area does not necessarily mean that trees cannot be cut. It can mean that a development permit will be required before doing so.[49]

Tree cutting contrary to the purposes of development permit requirements can occur in two ways. Either the trees are cut without a development permit when one was required, or the tree cutting was done in contravention of the conditions of a development permit. In both cases there is a statutory contravention of section 489(c) or (d) of the *Local Government Act*, but tree cutting done in contravention of an issued development permit could trigger an opportunity to use security to correct the damage to the environment (*Local Government Act*, s. 502(3)).

For investigative purposes bylaw enforcement officers will need to identify what tree cutting has been done, so the scope of remedial planting can be identified. Stopping further cutting and replanting for the purpose of correcting the damage caused likely constitutes the best form of enforcement. In the absence of security, the local government should respond to contravening tree cutting by requiring remedial planting in accordance with a new development permit and seeking an injunction to compel such planting if not done voluntarily. Although contraventions of section 489 of the *Local Government Act*

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[47] *Local Government Act*, s. 488(1)(a)).
[48] *Ellis*, cited above.
[49] *Hammer Head Equities Inc. v. Rossland (City)*, 2023 BCSC 73.

can be the subject of long form prosecutions, offenders might treat enforcement solely through fines as a licence to avoid development permit requirements.

B. Tree protection covenants

Local governments often have covenants registered under section 219 of the *Land Title Act* that protect trees located on private land. Subsections 219(4) and (5) of the *Land Title Act* allow a local government to register a covenant requiring the owner to protect, preserve and maintain a specified "amenity" on the land, which amenity could include "plant life value relating to the land that is subject to the covenant".

Although a tree protection covenant may seek to fulfil the same policy objectives as a bylaw, the enforcement of a tree protection covenant can be quite different in practice. First, a contravention of a covenant is an interference with a property right and not a contravention of a bylaw. Consequently, bylaw enforcement remedies such as municipal ticket informations, prosecutions and bylaw notices will not be available. Second, the covenant is subject to the interpretative principles applicable to contracts rather than to legislation. The interpretation of contracts focuses on discerning the agreement between parties, whereas the interpretation of legislation focuses on the regulatory purpose of the legislative body.

Another significant difference between tree protection by bylaw and by covenant, is that the court will apply a different legal test in determining whether to impose an injunction in response to prohibited tree cutting. A local government has a stronger entitlement to an injunction when it can show an apparent breach of a bylaw for the purpose of obtaining an interlocutory injunction or has proven a breach of a bylaw when seeking a permanent injunction.

A further difference between covenants and bylaws is that covenants can become obsolete or unenforceable if longstanding contraventions are ignored. With a regulatory bylaw, the bylaw is in force until it is repealed. The fact that a local government did not take enforcement action in response to a longstanding contravention of a bylaw does not preclude future enforcement action.[50] The public interest remains in the enforcement of the tree bylaw even if the bylaw was not enforced in response to every contravention.

In contrast, a failure to take enforcement action in response to a contravention of a covenant could affect the future enforceability of that covenant. In *Capital Regional*

[50] *Salt Spring Island Local Trust Committee v. Guinness*, 2010 BCSC 1218.

District v. Millstream Industrial Park Ltd.[51], the court refused to grant an injunction enforcing a section 219 covenant because the local government had been found to acquiesce to the defendant's breach during the previous five years. For this reason, contraventions of a tree protection covenant should be promptly investigated and enforced in a manner that would refute any suggestion of acquiescence.

V. CONCLUSION

The importance of trees and the urban tree canopy encourages the adoption of tree-protective regulations within municipalities and for certain areas within regional districts. However, this single goal engages different powers and different enforcement challenges as local governments must deal with trees on both public and private land, must deal with people who unlawfully cut down their own trees and those that cut down the trees belonging to others, and must deal with potential difficulties in distinguishing permissible pruning from destructive damage to trees. A clear understanding of which regulations apply to the trees at issue and how those regulations can be effectively enforced is critical to local government tree protection.

[51] (1990) 8 R.P.R. (2d) 312 (BCSC).