TREES & THE LAW

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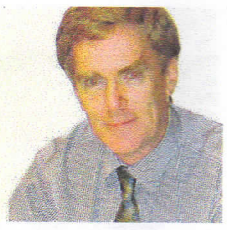

A key to tree appraisal

In litigation, assignment is critical

Identifying and defining both the appraisal problem and the appraisal assignment is a critical step in the appraisal process. The appraisal problem is a statement of the client's question about value and its context. The appraisal assignment is the set of services that the appraiser completes to solve the appraisal problem and report the assignment result.[1] Each appraisal problem is defined by several elements including the intended use of the appraisal, and the type of value (or assignment result) that is appropriate and relevant for that intended use.

In litigation, the intended use of the appraisal is connected to the court action being pursued which frequently involves a claim for damages in the form of monetary compensation for a loss. The lawyers involved look to the law (statutes and case law) for a measure of damages, that is, the rule, set of rules or "yardstick" by which the amount of damages is calculated. The legal measure of damages is the basis for the type of value (or assignment result) that the appraiser identifies in the appraisal problem.

If there was only one legal measure of damages that applied to all tree losses, then the tree appraisers in a litigation would be solving similar appraisal problems and the issue would be simply the accuracy and reliability of their data, analyses and assignment results.

But there is not a single, "one size fits all" measure of damages for tree losses. Measures of damages for tree losses vary widely both across and within jurisdictions, between statutes and case law, with fact patterns and over time as the law changes. The measure of damages — for the same tree loss — could be:

- the cost to restore the trees as they existed before the loss
- the cost to restore the lost benefit or utility of the lost trees
- the diminution or loss of the market value of the property as a result of the trees being damaged or removed
- the market value of the trees as a commodity[2]

Each lawyer will argue what the appropriate, proper, or relevant legal measure of damages is, and instruct "their" expert (the appraiser) accordingly. Let's assume the plaintiff has suffered a loss, and their lawyer argues that damages should be based on the cost to restore pre-existing conditions. The defendant's lawyer acting for the person alleged to have caused the loss, might argue that damages should be based on the diminution in the market value of the property. The tree appraisers in this example, both acting properly, would be solving different appraisal problems and have fundamentally different assignments.

When tree appraisers solve different appraisal problems, the lawyers may simply argue their cases and present the results of the appraisal experts. And the court decides which lawyer's argument, and which measure of damages the law will support. Sometimes, however, a lawyer or even an appraiser will argue that the other appraiser developed an opinion based on the wrong measure of damages or that the other appraiser should have developed an opinion based on a different measure of damages.

This issue arose in Romkey v. Osborne.[3] The assignment, and how it was undertaken, played a pivotal role in the decision and provides a useful reference on several fronts. Plaintiff Romkey owned land that contained a right of way in favour of Osborne. At issue was the extent of the right of way and what was or was not permitted within it. Differences in opinion about this had resulted in removal of trees on Romkey's land. The plaintiffs retained an arborist to provide an opinion about the cost to replace the trees cut down. He relied on the Guide for Plant Appraisal, 9th Edition and used a combination of trunk formula method for the larger trees removed and wholesale prices and installation costs for the smaller trees. Taken together, the total replacement cost came to $78,555 for the eighty trees removed.

In cross examination, Romkey's arborist was asked why he chose the trunk formula method and not other approaches. He was referred to the 9th Edition where it was noted that: (1) appraised value should be reasonable, (2) a plant appraiser should consider the market value of the entire property when valuing the landscape and (3) in situations involving damage to plants in or near easements, the nature of the easement rights is relevant to the value of the lost vegetation. Referring to the 10th Edition of the Guide for Plant Appraisal , the defendant's lawyer noted that Trunk Formula "may result in estimates of tree value that are greatly out of proportion to the value of the land and other property improvements, or to what people would actually pay for a replacement tree."

Romkey's arborist answered that market value had no relevance to his assignment, which was very clearly to " . . . determine the cost to replace the trees and restore the privacy lost by the Romkeys when Mr. Osborne cut them down." Nor was any interpretation of easements within his area of competence. He had simply completed his assignment by solving the appraisal problem he was given. Finally, he noted that even if using the10th Edition to guide his assignment, he would still use the Trunk Formula for part of his valuation.

The judge found that the trespass had " . . . clearly interfered with the Romkeys' property rights and their use and enjoyment of the property . . . As a result, . . . the Romkeys have spent the last two years living on a property that no longer offers the same privacy and tranquility that drew them to it in the first place." The defendant argued that the arborist's appraisal was unreasonable because not only did it fail to consider market value, but it also failed to determine the extent of the easement rights before valuing the trees affected.

The judge disagreed. The arborist " . . . was asked to assess the cost to replace the trees cut by Mr. Osborne and restore the privacy that was lost when they were removed. He was not asked to determine the resulting diminution in property value to or to interpret the right of way . . . those factors were not relevant to the task he was asked to undertake." The arborist's appraised value was found to be " . . . a reliable estimate of the cost to the Romkeys to replace the trees and return their property to its pre-trespass condition. Whether replacement value is the appropriate measure of damages is a separate question."

The judge went on to note that while the aim of awards for trespass is to place the damaged party "in the same position as before the trespass," and that can be achieved with a diminution in property value, it can also be accomplished with an award based on reinstatement or replacement. Citing Patterson[4] at 35.

35 The overriding consideration in trespass cases is that the plaintiff should as nearly as possible be placed in the same position as before the trespass, and generally this is considered done if the plaintiff is paid the amount of the diminution of the value of the property caused by the trespass. However, there are cases where it is reasonable, in order to fairly compensate the plaintiff, to make an award based on a consideration of the cost of reinstatement or replacement, even though such an award may exceed the diminution of the value of the property caused by the trespass.

Looking at Wilson v. Hatt [5] where the defendants objected to the use of the trunk formula because they felt that the plaintiff did not value the trees highly prior to their removal, the judge in that case noted, . . . the appellants' submission ignores the fact that determining how a person is to be made "whole" when they lose property requires an assessment of the actual value to which the owners assigned that property.

As the respondents note at paragraph 29 of their brief, the "Learned Adjudicator's role was not to determine the market value of the Trees in the abstract. He instead was tasked with valuing the appellants' loss" (emphasis in original). The appellants themselves, at page 4 of their brief, cite the following passage from Remedies in Tort (vol 4 (Toronto: Carswell, 2011) ch. 27 at 27-162.84.1):

The value of lost property is determined by assessing the actual value of the property to the plaintiff. As a general rule, market value is the best evidence of value but it is not always conclusive since it may not be ascertainable or may not establish the property's value to the owner. Some other elements which may assist in determining value are: i) the cost of replacing the lost property; ii) the value of comparable property; iii) the original cost of the property; and iv) the amount for which the property is insured.

In Romkey, the judge noted that the Romkeys had very clearly placed a high value on the trees cut down as they created an effective privacy screen. Consequently, the arborist's development of the replacement value was " . . . consistent with the value the Romkeys' subjectively assigned to the trees, and it is reasonable, in order to fairly compensate the Romkeys, to make an award based on replacement value." The final award was adjusted downwards to allow for the trees that could have been legally removed from the easement.

The case clearly highlights that identification and definition of the assignment is essential It drives the entire appraisal process: identify the problem, solve the problem and report the results. Romkey also clearly shows that market value is not the exclusive, or even preferred, measure of damages for tree loss. Replacement value is equally important and may in fact be the better determinant of lost values. And finally, the case suggests that the arborist carrying out the appraisal has discretion to use the 9th not the 10th Edition of the Guide for Plant Appraisal.

Julian Dunster is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice, please consult a lawyer. His book Trees and the Law in Canada contains additional information on these matters. See www.treelaw.info.

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[1] Cullen, Scott. 2018. Tree appraisal: Understanding the appraisal problem, scope of work, and assignment. Arboricultural Consultant 51(1):3-6.

[2] For example, standing (stumpage) or felled timber, or cordwood.

[3] Romkey v. Osborne, 2019 NSSC 56

[4] Patterson v. Municipal Contracting Ltd., [1989] N.S.J. No. 108, 1989 CarswellNS 108 (S.C.T.D),

[5] Wilson v. Hatt, 2012 NSSC 349, [2012] N.S.J. No. 579,