



TREES & THE LAW

BY JULIAN DUNSTER

Trees & trespass Have you done your due diligence?

The concept of due diligence is defined by Black (see reference, below) as: "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances."

One of the more common court cases involving tree concerns deals with trespass: that is, one party removing or damaging trees that do not belong to them. Sometimes this occurs as a result of deliberate removal in order to enhance view corridors or eliminate a perceived nuisance (such as leaf litter or root encroachments). Other times the damage is accidental or inadvertent.

One of the biggest reasons for accidental trespass is the mistaken belief that a fence line will always be located accurately and will therefore be a good indicator of the property line location. Usually, a qualified surveyor will be able to accurately determine where the property actually lies, using local monuments and iron pins as the benchmarks for a legal survey. Occasionally there will be disagreement between surveyors as to which reference point is correct. The Court rules on which survey is to be accepted in these instances.

For tree care companies undertaking work on any property, it is always prudent to undertake some due diligence before cutting down or pruning trees close to

property lines. As a starting point, the contract between your company and your client (you do have a written contract, don't you?) should ensure that the onus for determining the exact property line location is placed on the client, not you. Wording along the lines of: "Company X accepts no responsibility for either incorrect or incomplete materials and/or incorrect or incomplete information. Any survey boundaries marked on plans, or on the ground, are not the responsibility of Company X" is a good starting point. Even so, you should take the time to point out this clause to the client.

It is very common for fences to be incorrectly located: often many metres away from the property line. So due diligence in these instances means that you notify your client that they should check where the property line is located and that, if there is any doubt, they should get it surveyed to be sure. Even where the iron pins are clearly visible, make sure that it is the client who identifies and approves them, not you. Do not simply accept their word for the accuracy of the line. There are instances where subdivided lots include multiple iron pins laid out over periods of time by different surveyors, possibly using different reference points. Once the property line is surveyed and established, the surveyor should provide a signed and



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sealed drawing identifying legal property descriptions, dates, dimensions and compass bearings.

If your client does not want to pay the expense of a survey, be very careful. Even when you have a good contract duly signed by your client, you should still be cautious. Do not prune back overhanging limbs or encroaching roots beyond where the property line is deemed to be. This issue often causes some difficulties for well-trained arborists. They know that leaving a series of stubs is not good practice, but from a legal point of view the Courts may not care about good pruning practice. If good practice means that you have to cross a vertical projection of the property line, then you are trespassing, no matter if it is only by a small amount. You may be able to deal with that issue by asking your client to obtain a written agreement from the adjacent property owner that stipulates it will be alright for you to prune back to the tree trunk. If you don't have that, don't do it.

If you see the neighbour and ask him/her if it is okay to prune back across the line, be very explicit in the discussions. Get his or her name, make a note of the time and date of the discussions, and follow up with a written note to them stating that "To confirm our discussions on <insert date and time>, you have agreed that it will be acceptable for us to prune back the branches from your tree located at <insert address and brief locational description> that overhang the property of <insert your client's name and address>." You can write this out in duplicate and get a signature at that time if the person is amenable to this.

Be sure that the person you deal with is the property owner, and not a tenant or relative or friend who in fact does not have the authority to make these decisions. If in doubt, wait until you can be sure you do have the correct permission.

These issues may seem trivial for pruning work. But they become very critical when clearing work is undertaken. If you take down the wrong tree, you have not only trespassed but now you have exposed yourself and your client to the potential for a damage claim. If the tree straddles the property, even by a small amount, then it is very likely to be a tree jointly owned.

That means that both parties owning land on either side of the tree have a legal interest in the tree. If you cut it down, the other party may disagree and

sue for lost values. Of course, if the property line is clearly marked before work commences, and you deliberately cross the line to remove trees, you now enter the area of willful trespass. The value of the tree cut down would be the same. The potential penalty awarded by the Court is likely to be the appraised value plus punitive damages, which are often two to three times that value. If your client tells you it's okay because they have the permission of the neighbour, ask to see that in writing. If it's not there, don't do it. It's simply not worth the risk. The value of the work is trivial compared to the stress and costs of being sued. These principles apply as much to neighbours as to private property next to City or municipal lands. They apply to City or municipal workers trespassing on private lands, and even in some cases to utility workers or contractors pruning back trees for statutory right of way clearances. There is no shortage of cases where trespass has attracted large and unpleasant penalties later on.

By following these simple steps, you can conduct your own due diligence and save yourself a lot of stress and money later on. Ignoring the due diligence aspects of tree work can be very expensive -- large enough to constrain your cash flow, ruin your insurance premiums (you do have insurance, don't you?), and seriously damage your company's reputation. Reference: Black, H.C. 1990. *Black's Law Dictionary*. 6th Edition. West Publishing CO. St. Paul, Minnesota.



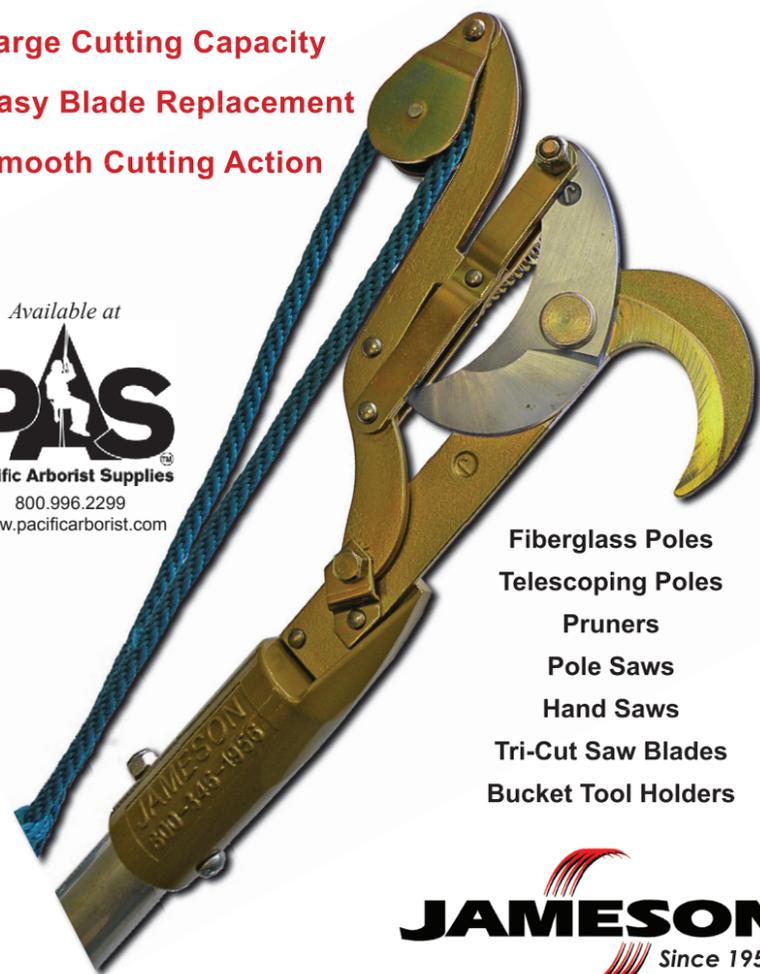
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