



TREES & THE LAW

BY JULIAN DUNSTER

Do you own the tree?

If not, mistakes can be expensive!

Trespass, whether intentional or inadvertent, often leads to a claim for damages for loss of privacy, amenity, sunlight, shade or a diminution in overall property values. In reviewing the dozens of cases across Canada it is clear that there are common threads running through most of the incidents. These can be summarized as follows:

1. The defendant did not bother to check ownership and just assumed the tree in question was his/hers.
2. The defendant knew it was not his/her tree but thought the transgression would either not be noticed, or if it was, would not be a big deal to the plaintiff.
3. The defendant assumed permission would not be granted so went ahead and hoped that forgiveness would be forthcoming.
4. The defendant devolved the duty to check ownership to the contractor, who got it wrong, deliberately or unintentionally.

Regardless of the reason for trespass, the results can be expensive. A range of defence strategies are offered in an attempt to reduce potential damages. A common one is that permission had been given to enter the plaintiff's property, often in the form of a recollection that, "we talked about it and you agreed."

In reality, unless there is a carefully written form of written agreement that specifies what is to be done, where, and how, it is wise to assume that there is no permission. A verbal agreement is worth next to nothing, and in the event that a subsequent claim is made it is one person's recollection versus the other's.

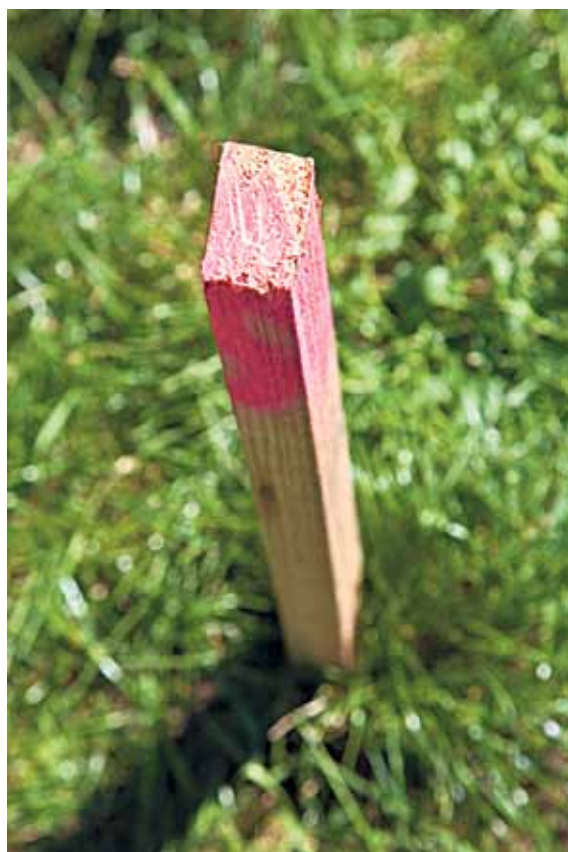
Ovens v. Kirkman et al (2006 BCSC, 394) is a good example of this. In that case three Douglas-fir trees were wrongly cut down, leading to an award of \$16,000 in general damages, \$5,000 in punitive damages, plus special costs.

In some cases, legitimate tree removal on one side of the boundary moves into trespass with subsequent claims that property values have been diminished. Karnz v. Shidfar (2011 BCSC 686) is such a case. The loss of value due to the wrongful removal of ten trees was claimed to have diminished the Kranz's property by \$150,000 to \$175,000. Having considered all the evidence the judge awarded \$42,000 for cost of restoration, \$20,000 for loss of enjoyment and \$35,000 in punitive damages; a total of \$97,000 plus costs.

Not all awards are so high. In Graw v. Rockwell (2010 BCSC 1295) the award was \$2,125 for the timber value, \$5,875 for restoration costs and \$2,000 for loss of use and enjoyment.

Even when plants have been installed by a relative, years before removal, it is unwise to automatically assume they were actually planted in the right place. In Rowe v. Thompson (2011 BCSC 430) a laurel hedge was pruned in the belief that it was solely on the defendant's property. In fact it was not, leading to an award in damages of \$6,050 in damages for trespass plus a further \$6,050 in compensatory and punitive damages.

Of course wilful trespass is a different category altogether. Here, the defendant was well aware of the property line location, but ignored it anyway, usually in an attempt to improve their own property values.



If in doubt about the locations of a property line, get a professional survey done that includes tree locations

Cook v. Bhanwath and Davidson (1998 BCSC 424) is a case where trees were cleared from the adjoining property at the direction of the landowner. The contractor was named as a third party. The judge found that the cutting was deliberate and awarded \$25,000 for restoration damages, \$2,000 for clean-up costs, \$8,000 for loss of amenities and \$15,000 in punitive damages. The contractor then appealed and was awarded double costs against the defendant, in effect recognising that they were the 'unwitting instrument' of the defendant in committing the trespass.

What these and many other cases constantly suggest is that people need to be far more careful in determining the exact location of property lines. Several key points:

1. Never assume that the fence accurately depicts the boundary.
2. If in doubt get a professional survey done that accurately depicts tree locations.
3. Never ever rely on a verbal agreement. Put it in writing, be sure the document describes in detail the work to be undertaken, and have all involved parties sign it before any work commences.
4. As a landowner, be sure any contractors are equally aware of the property line and have them acknowledge in writing that they have been told of its location.
5. Conversely, as a contractor, be sure to place the onus for determining the property line location onto the land owner. Get this in writing so that it is clearly not your responsibility to check the

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location. That being said, common sense suggests that if you are not certain, check with the property owner and again, confirm the results in writing.

Getting a boundary survey and staying on the correct property is almost always cheaper than paying damages after the fact.

*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. Additional case law can be found in the book **Arboriculture and the Law in Canada**. Copies are available from Julian Dunster. www.dunster.ca*

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