

TREES & THE LAW

BY JULIAN DUNSTER



Understanding trespass

Across Canada trespass is by far the most common court action involving trees. Most cases of trespass involve entering onto a property without invitation or permission, and inflicting some degree of damage, but trespass is still actionable even if no damage occurred.

Trespassers sometimes claim they had permission to be there, but it is up to the defendant to prove that they did in fact have leave and licence to be on the property, and this requires persuasive evidence to support the claim made. Permission may be granted before or after a trespass is committed, and if the defendant can prove that the plaintiff has acquiesced to the entry upon his or her land, then there can be no claim of trespass. Importantly however, the lack of objection or silence by the plaintiff, is not automatically the same as consent to allow the activity in the first place, or to sanction its continuance. In all cases the court reviews the incident to determine what happened, when, how, by whom and why?

Common types of trespass are:

- **Technical trespass:** the boundary line was crossed, but the damage caused was minimal and not wilful.
- **Inadvertent trespass:** the boundary line was crossed by mistake, usually because the boundary line was genuinely believed to be at a different location.
- **Wrongful trespass:** the boundary line was crossed because of indifference, or negligence in determining where it was located.
- **Wilful trespass:** the boundary line was crossed deliberately and damage was caused in the full knowledge that it was beyond the boundary line.

Trespass incidents include extensive industrial logging out in the hinterland, logging of adjacent rural properties, or tree cutting between adjacent residential properties.

The starting point in trespass is to know the exact location of the property line on the ground. That means that there must be



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a current and accurate survey that is not in dispute. If the court finds that the trespass was genuinely accidental or inadvertent (as opposed to a claim that it was accidental, which is subsequently proved false), the damages may be more leniently assessed, than trespass that was wilful.

Between these two extremes lies wrongful trespass. The damage claimed as a result of the trespass has to be substantiated by the Plaintiff. A lack of compelling evidence or, at best only showing nominal damage, will affect the extent of damages to be assessed and may lead to the claim being dismissed. In some instances the trespass claimed may in fact be allowed by statute. For example licensed land surveyors often have a statutory right to enter onto property and clear vegetation in order to conduct a survey, so any damage they cause, within reason, cannot be claimed as trespass.

The reasons for trespass are varied but contain a common thread: the defendant either mistakenly or willfully trespassed onto the plaintiff's land and cut, damaged or removed trees and shrubs. Common rea-

sons trees are damaged during trespass are:

- to improve conditions of the property owned by the defendant.
 - to get more sunlight
 - to improve views
 - to enhance the selling price of a property
 - to acquire more timber than is allowed
 - careless or willful disregard for boundaries
- Many different types of awards have been made by the courts in cases involving the cutting, damage or removal of trees under trespass. The single most important lesson is that anyone involved in logging, site clearing, tree pruning or, any other form of site preparation has a very strong duty of care to accurately locate the boundary lines of the property, and work with a vertical projection of that, below and above ground. That applies to contractors, owners or an owner's representative.

Knowing the exact boundary line location and accurately marking it on the ground is essential. The responsibility for

determining it and demarcating it on site should be agreed upon in writing before any work is undertaken.

If there is any doubt, the location of the boundary line must be clarified by a licensed surveyor before the work is undertaken to avoid trespass. For people pruning overhanging branches or encroaching roots under the self help rule (which does not apply in Quebec), the moment the boundary is crossed, no matter by how much, a trespass has been committed and may attract punitive damages.

Respecting boundary location is the only test that really matters. Implementing correct pruning techniques is totally subordinate to that test. Trees that are located across a boundary are boundary trees and will be jointly owned, so cannot be removed without joint consent of all owners.

*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. This article is extracted from the forthcoming book *Trees and the Law in Canada* due for publication in 2018.*

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