



Civil Resolution Tribunal

Date Issued: September 26, 2018

File: SC-2017-005320

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Conway v. Hutchison*, 2018 BCCRT 557

B E T W E E N :

Ian Conway

APPLICANT

A N D :

Yvonne Hutchison

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Susan E. Ross

INTRODUCTION

1. The applicant, Ian Conway, and respondent, Yvonne Hutchison, are next door neighbours. Their dispute concerns the applicant's claim of the cost of removing and replacing a wood fence and ivy hedge that separates the properties and which

the respondent unilaterally cut down and left lying along the applicant's property. Both parties are unrepresented.

2. The applicant claims the fence and hedge were on his property and he did not agree to them being taken down. The respondent says the fence was old and decaying and she was entitled to cut down the fence and hedge because they were on her property.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because the photo and documentary evidence plus the parties' accounts of events are sufficient to resolve the issues in this dispute without an in-person hearing.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

7. The issues in this dispute are:
 - a. On whose property were the fence and hedge located?
 - b. What are the applicant's damages from loss of the fence and hedge?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
9. The applicant's property sits to the west of the respondent's. His front yard and her driveway are separated by a low concrete retaining wall. The fence and ivy hedge ran along the west side of the retaining wall for approximately 67 feet. The ivy had inter-grown into the fence and some growth on the west side of the hedge extended over the retaining wall.
10. In early June 2017, the respondent unilaterally cut away stalks of the west side of the hedge and then informed the applicant that he needed to remove the fence and hedge because the fence was falling over. The applicant told the respondent he was about to leave on a two-month trip and would see what could be done when he returned. When the applicant returned, the respondent had cut down the fence and hedge and left them lying along the applicant's property on the west side of the retaining wall.
11. A landowner is entitled to cut branches or roots of a neighbour's trees which extend over the property line, but may not enter the neighbour's land without permission or cut growth that is on the neighbour's side. When a fence, tree or hedge straddles the property line, the legal consequences become more complicated as both landowners have an ownership interest. See *Anderson v.*

Skender, 1993 CanLII 2772 (BC CA), *Demenuk v. Dhadwal*, 2013 BCSC 2111, and *Glasshutter v. Bell*, 2001 BCSC 1581.

12. The applicant's photographic evidence shows a survey pin in the ground in front of the south end of the retaining wall. This evidence points to the retaining wall straddling the two properties. It also indicates that both the fence and hedge, perched on the west side of the retaining wall, are on the applicant's property.
13. The applicant says he did not commission a survey for this dispute because he understood the respondent to agree that the fence and hedge were on his property. He searched for but could not find a survey pin at the north end of the property, but says that from the location of survey pin at the south end of the retaining wall it makes sense that the wall was built to run along the property line.
14. The respondent has no survey either. Her photographic evidence shows a string drawn from the south survey pin in a line that diverges to the west of the retaining wall to meet a newer fence she built to divide the back yards of the properties. One photo shows the string dissecting a remaining fence post stump. Another photo shows the string running to the east of a remaining fence post stump. She says the newer fence sits two inches on her side of the property line, but provided no explanation or evidence for that assertion.
15. The evidence of the property line is imperfect. However, given the location of the survey pin at the south end of the retaining wall, I find it more likely than not that the retaining wall was built to straddle the property line with all the fence posts being on the applicant's side.
16. If the retaining wall does angle into the respondent's property, as she says, then her string from the south survey pin to the newer fence between the back yards of the properties does not establish that the fence and ivy hedge were on her property. At most, it shows that one or more of the northern posts of the fence straddled both properties. There is no evidence the fence or hedge was a source of danger necessitating immediate removal.

17. I also note that the respondent's submission states: "I did not tell Ian that the hedge and fence were on his side, I said the fence and ivy were his." I do not accept that the respondent thought the applicant was responsible for a fence and hedge situated on her property. I find it much more likely, and conclude, that the respondent urged the applicant to do something about the fence and hedge because she understood them to be his responsibility and on his property. I find that this was also why she cut them down when he was away.
18. Although a survey would be preferable to give certainty on the location of the property line, the tribunal has a mandate to adjudicate disputes on a scale that is proportional to the amount at stake. On the evidence provided, I find it more likely than not that the fence and hedge are on the applicant's property. Nothing in this decision prevents either party from obtaining a survey to clarify the location of the property line. I conclude that the respondent's cutting down of the fence and hedge without the applicant's permission was trespass on his land and destruction of his property.
19. I now turn to the issue of the applicant's damages. The applicant claims damages for removing the cut down fence and hedge, building a new fence and re-planting a hedge. He has provided an estimate from Blair's Fencing Co. for \$500 (plus taxes) for the removal and \$1,768.20 (plus taxes) for materials and labour to replace the fence. The photographic evidence shows that when the parties' submissions in this dispute were completed, the cut down fence and hedge had been removed but no new fence had been built. The applicant had tried to get the respondent to remove the cut down fence and hedge. She refused and I accept that applicant was required to take responsibility for complying with municipal by-laws for clean up of an unsightly property. There is no evidence of cost of re-planting a hedge.
20. It is uncontested that the ivy hedge was inter-grown into the fence, at least one fence post was leaning and a couple of others could have been rotten. The applicant says he intended to explore shoring up the fence when he got back from

his trip and it was still in reasonable condition to remain in place. The respondent says the fence was at the end of its life. She has provided photos of when it was new in 2000, of rot in some of the cut fence posts, and statements from two fence material suppliers that a fence of this type has a lifespan of 8-10 years and should be replaced with the rot that was evident in two of the posts the respondent showed them.

21. I find that the applicant is entitled to compensation for his cost of removing the cut down fence and hedge, but not for a new fence given the age and condition of the fence that was cut down. I award the applicant \$560 for the respondent's trespass and for removal of the cut down fence and hedge from his property. I make no award for re-planting a hedge because there is no evidence of that cost and, in any case, the ivy was so inter-grown with the fence that they were integral to each other.
22. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Because the applicant has been successful on liability and partially successful on damages, I find that he is entitled to recover \$125 in tribunal fees.

ORDERS

23. Within 30 days of the date of this order, I order the respondent Yvonne Hutchison to pay the applicant Ian Conway a total of \$690.58, broken down as follows:
 - a. \$560 for the respondent's trespass on the applicant's property and his cost of removing the cut down fence and hedge;
 - b. \$5.58 in pre-judgment interest under the *Court Order Interest Act* calculated from December 5, 2017, the by-law enforcement deadline for the applicant to remove the cut down fence and hedge from his property; and
 - c. \$125 in tribunal fees.

24. The applicant is entitled to post-judgment interest, as applicable.
25. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
26. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Susan E. Ross, Tribunal Member