



# Civil Resolution Tribunal

Date Issued: May 24, 2019

File: SC-2018-006224

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Pearson v. Rutherford*, 2019 BCCRT 631

**B E T W E E N :**

Loren Pearson

**APPLICANT**

**A N D :**

William Douglas Rutherford

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

### **INTRODUCTION**

1. This is a dispute, between neighbours, about the location of a fence.
2. The applicant Loren Pearson and the respondent William Douglas Rutherford own properties that share a backyard border. The applicant says the respondent built a fence partly on the applicant's property.

3. After asking the respondent to correct the situation, the applicant hired a land surveyor to prove that the fence was on his property. The applicant seeks an order to have the fence removed from his property, and reimbursement of \$703.89 for the survey work.
4. The respondent agrees that he built a fence in the spring of 2018. He attached his fence to the corner of a fence built by Mr. Pearson. The respondent says he was “under the impression that Mr. Pearson had built the fence on the property line rather than further back into his property.”
5. The respondent agrees that he built his fence without a survey. He says that, once the applicant objected to the fence placement, he removed the portion that was over the property line.
6. The respondent says he is not liable for the survey cost because he did not “ask for a survey” and complied with requests to remove the fencing that was over the property line. He asks that the dispute be dismissed.
7. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

8. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.
9. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a “he said, he said” scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there

is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

10. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.
11. 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.
12. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.
13. This dispute also engages the question of whether the tribunal has jurisdiction to order the removal of a fence that is encroaching on adjoining land. For the reasons detailed below, I find that it does not.

## **ISSUES**

14. The central issue in this dispute is whether the respondent constructed a fence on the applicant's property and, if so, whether he is responsible to pay the cost for the survey the applicant obtained to outline their properties.

15. A second issue is the applicant's request that the respondent remove any part of the fence that remains on the applicant's property.

## **EVIDENCE AND ANALYSIS**

16. In this civil claim, the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them here only to the extent necessary to explain and give context for my decision.

17. In late 2017, the applicant had a fence built, inset from his side of the property line. He says, and I accept, that he incurred significant survey expenses to ensure accurate placement of his fence.

18. On April 9, 2018, the applicant noticed that the respondent had built a fence on the west side of his property but attached to the applicant's fence physically. It is undisputed, and I find based on the survey documents in evidence, that parts of the respondent's fence crossed onto the applicant's property.

19. That day, the applicant left a handwritten note for the respondent. In it, the applicant explained that he had his property surveyed, and that his own fence was located well inside his property line. The applicant requested that the respondent remove the fence boards that were fixed to the applicant's fence and repair any damage after the removal. The applicant also requested that the respondent remove any items leaning on his fence or otherwise on the applicant's property.

20. The respondent then removed some parts of his fence that were on the applicant's property, including detaching his fence from the applicant's fence. I find that the respondent did not remove all portions of the fence that were over the property line at that time. Rather, he waited until the applicant made a further request, based on further survey work.

21. Between April 20 and May 3, 2018, the applicant had J.E. Anderson and Associates (J.E. Anderson), a surveyor company, conduct further survey work at the property, including preparing a site model. The applicant says, and I accept, that he

requested this additional survey work to demonstrate that the respondent's fence continued to encroach on the applicant's property.

22. On May 25, 2018, J.E. Anderson invoiced the applicant \$703.89 for the survey work. It is uncontested, and I infer, that the applicant paid the invoice at that time.
23. The sketch plan of the property line survey prepared by J.E. Anderson shows a portion of the respondent's fence, at the north west corner of the applicant's lot, that comes over the property boundary and into the applicant's lot.
24. The applicant then wrote to the respondent a second time saying that the survey showed that the respondent's fence was still on the applicant's property. The respondent says that he immediately went and removed this "extended" part of his fence. He then told the applicant that he had removed the offending piece of fence.
25. I find that the respondent, by his own admission, built his fence without properly confirming the property boundaries. When first informed of the problem by the applicant, he removed only part of the offending fencing. After the applicant wrote again, mentioning the J. E. Anderson survey, the respondent says he removed the fence extension.
26. It is unclear, on the evidence before me, whether any portion of the respondent's fence remains on the applicant's property currently. Having said that, with respect to the applicant's claim for an order that the respondent remove any remaining portion of the fence, I find that the tribunal lacks jurisdiction to order this relief. The *Property Law Act*, at section 36(2) says that an owner may apply to the British Columbia Supreme Court to order removal of a fence that encroaches on adjoining land.
27. The tribunal's small claims jurisdiction, outlined at section 118 of the Act, includes claims for debt or damages, recovery of personal property, specific performance of agreements relating to personal property or services and relief from opposing claims to personal property. Section 118 does not include injunctive relief addressing the real property issue of encroachment. For these reasons, I refuse to

resolve the applicant's claim for removal of any encroaching fencing, under section 10(1) of the Act.

28. In *Graham v. Golden Gate Developments Inc.*, 2013 BCSC 1890 (CanLII) both parties claimed to recover costs of their fence surveys, in a situation where they were trying to confirm the correct boundary line to deal with a neighbourly dispute involving fence placement. The Court declined to order the remedy because neither neighbor "improperly caused the incurring" of the expenses.
29. I distinguish *Graham* from the present dispute. I find that the respondent wrongly caused the applicant to need a survey. I say this because the respondent built his fence, trespassing onto the applicant's property, without taking any measures to confirm property boundaries. He then failed to completely address the situation when the applicant brought it to his attention, leaving the fence extension in place. Had the respondent confirmed the boundaries himself prior to starting on his project, the applicant would never have incurred these survey expenses.
30. I find that the respondent must pay the applicant the \$703.89 claimed for the surveying work.
31. 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. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of \$125 in tribunal fees.

## **ORDERS**

32. Within 30 days of the date of this decision, I order the respondent to pay the applicant a total of \$840.22, broken down as follows:
  - a. \$703.89 as reimbursement for the cost of the property survey,

b. \$11.33 in pre-judgment interest under the *Court Order Interest Act*, calculated from the May 25, 2018 date of the J. E. Anderson invoice to the date of this decision, and

c. \$125 in tribunal fees.

33. The applicant is entitled to post-judgment interest, as applicable.

34. 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.

35. 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.

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Julie K. Gibson, Tribunal Member