



# Civil Resolution Tribunal

Date Issued: November 28, 2022

File: SC-2022-000739

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Heidarian v. Shay*, 2022 BCCRT 1282

BETWEEN:

ZOHREH AREZOO HEIDARIAN

**APPLICANT**

AND:

ANTHONY SHAY

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Chad McCarthy

## INTRODUCTION

1. This dispute is about landscaping work along a shared property line between neighbours. The applicant, Zohreh Arezoo Heidarian, says the respondent, Anthony Shay, entered her yard without her consent and trimmed shrubs and a tree. Mrs. Heidarian claims \$1,000 for damage to her magnolia tree, damage to the fence and

shrubs “on the property line,” and the expenses of coping with the emotional distress of the incident.

2. Mr. Shay says Mrs. Heidarian gave him permission to enter her yard and trim the tree and shrubs, which were pressing on overhead power lines. He says he owes nothing.
3. The parties are each self-represented in this dispute.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute’s parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Although the parties’ submissions each call into question the credibility of the other party to some extent, the credibility of interested witnesses cannot be determined solely by whose demeanour appears most truthful in a courtroom or tribunal proceeding. Determining the most likely account includes assessing its harmony with the rest of the evidence. Further, in the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Here, I find I can properly assess and weigh the written evidence and submissions before me. Keeping in mind that the CRT’s mandate includes proportional and speedy dispute resolution, I find that an oral hearing is not necessary in the interests of justice.

6. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
8. Mr. Shay uploaded additional email evidence after the deadline had passed. Mrs. Heidarian commented that the evidence did not support Mr. Shay's position, but she did not directly object to its admission. I allow the evidence because it is relevant, and it is not unfair to Mrs. Heidarian to do so.
9. In her submissions, Mrs. Heidarian made a new claim for the costs of cleaning up a mess Mr. Shay allegedly left in her yard, and a penalty under a city bylaw. However, Mrs. Heidarian did not ask the CRT to amend the Dispute Notice to include these additional claims, so I find they are not properly before me. As a result, I decline to address these additional requests for cleanup costs and bylaw penalties.

## **ISSUE**

10. The issue in this dispute is whether Mrs. Heidarian gave Mr. Shay permission to enter her property and trim shrubs and a tree. If not, does Mr. Shay owe \$1,000 in damages, including for the expenses of coping with emotional distress?

## **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, as the applicant Mrs. Heidarian must prove her claim on a balance of probabilities, meaning "more likely than not." I have read all the parties' submissions and evidence but refer only to the evidence and arguments that I find relevant to provide context for my decision.

12. This dispute involves the law of trespass. According to *Manak v. Hanelt*, 2022 BCSC 1446 at paragraph 39, citing *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCSC 515, trespass to land has 3 elements: a direct intrusion onto land, intentional or negligent interference with the land, and physical interference with the land. Motive or purpose for trespassing is not relevant to liability. Further, *Lahti v. Chateauvert*, 2019 BCSC 1081 said at paragraph 8 that mistake is not a defence to trespass. *Lahti* also indicates that voluntarily entering onto another's land is enough to show the required interference intent for trespass.
13. *Manak* states at paragraph 40 that consent is a defence to a trespass claim, and the burden of proving consent rests on the defendant asserting consent. As explained below, Mr. Shay alleges consent by Mrs. Heidarian. So, Mr. Shay bears the burden of proving that consent.
14. The following facts are undisputed. Mrs. Heidarian lives in a house next door to Mr. Shay's daughter and her family. I will refer to the daughter's property as the neighbouring yard or the neighbouring property. Mr. Shay sometimes helps his daughter with household chores.
15. On January 26, 2022, Mr. Shay went to Mrs. Heidarian's front door and asked her permission to trim shrubs and trees. Mrs. Heidarian consented to Mr. Shay performing some trimming, although the parties disagree about exactly what she consented to and whether it was to occur on Mrs. Heidarian's property or not. On January 27, 2022, Mr. Shay and another person entered Mrs. Heidarian's property and trimmed some shrubs near the property line between her yard and the neighbouring yard, as well as a magnolia tree on the opposite side of her yard. While Mr. Shay was still in the yard, Mrs. Heidarian came out of her house and objected to Mr. Shay's presence and trimming activities.
16. Mrs. Heidarian says she never consented to Mr. Shay entering her yard or trimming anything inside her yard. Mr. Shay says Mrs. Heidarian consented to him entering her yard, and to him trimming both the shrubs and the magnolia. He also says that Mrs. Heidarian's husband consented to similar trimming in previous years.

17. Regarding the husband's alleged consent, Mr. Shay says that Mrs. Heidarian's ex-husband previously gave him permission to enter Mrs. Heidarian's yard and trim the shrubs and magnolia away from overhead power lines, because they continually grew toward the lines. Mrs. Heidarian says she divorced her husband shortly after moving into the house in 2015, and he has not lived there since. Mrs. Heidarian says no occupant of her house had given tree and shrub trimming consent since 2015, if at all. The parties agree that Mrs. Heidarian first met Mr. Shay on January 26, 2022.
18. I find the evidence does not show that Mrs. Heidarian's ex-husband previously consented to tree and shrub trimming on Mrs. Heidarian's property. Even if the ex-husband had consented, I find that consent would no longer be valid due to the passage of time and the change in possession of Mrs. Heidarian's property.
19. So, I find this dispute turns on the extent of the verbal consent provided by Mrs. Heidarian. As noted, Mr. Shay bears the burden of proving that Mrs. Heidarian consented to him entering her yard and trimming the shrubs and magnolia tree.
20. There were no witnesses to the parties' conversation where Mr. Shay asked for vegetation trimming consent. There is also no written record of the consent.
21. I find submitted photos showed a wooden fence near the boundary between Mrs. Heidarian's yard and the neighbouring yard. The photos showed that tall shrubs and trees on Mrs. Heidarian's side of the fence pressed against the fence, extended above the fence, and some of their branches leaned over the fence and well into the neighbouring yard. I find none of the documentary evidence before me shows exactly where the property line is in relation to the fence and the adjacent shrubs. However, Mrs. Heidarian says the adjacent shrubs are "hers," which Mr. Shay does not directly deny. On the evidence before me, I find the shrubs were likely planted within Mrs. Heidarian's yard, but some of their branches grew over the fence and into the neighbouring property. I find the magnolia tree on the opposite side of the yard was far from the parties' shared property line, and its branches did not overhang the neighbouring property.

22. Mrs. Heidarian says she only consented to Mr. Shay trimming the shrub and tree branches that overhung the neighbouring property, and only from the neighbouring property, not by entering her yard. I note that the fence gates into Mrs. Heidarian's yard were undisputedly wired closed, so Mr. Shay later climbed over the fence to access Mrs. Heidarian's yard and perform the trimming. Mrs. Heidarian says Mr. Shay damaged the fence when he climbed over it.
23. Mrs. Heidarian says Mr. Shay needed her permission to trim the overhanging branches in the neighbouring property because they were her trees and shrubs. In contrast, Mr. Shay says he would not have bothered to ask permission to trim only the overhanging branches because he would not have needed it. He says this shows that it is more likely that he asked and received permission to enter Mrs. Heidarian's yard and trim the trees and shrubs there.
24. Mr. Shay is correct in saying that a homeowner is entitled to trim the branches of a neighbour's tree, but only to the extent those branches extend over the property line onto the homeowner's property. See *Anderson v. Skender*, 1993 CanLII 2772 (BCCA) at paragraph 15. However, although Mrs. Heidarian was mistaken about Mr. Shay needing her permission to cut overhanging branches in the neighbouring yard, I find that mistaken belief is consistent with her submission that she only gave consent to cut overhanging branches in the neighbouring yard. So, I find that mistaken belief does not make Mrs. Heidarian's version of events less likely.
25. Mr. Shay says Mrs. Heidarian consented to the trimming because the shrubs and magnolia tree encroached on overhead power lines. He says he climbed over the fence because he did not want to bother Mrs. Heidarian by asking to walk through her house, and not because he was trying to perform the trimming when Mrs. Heidarian was absent as Mrs. Heidarian alleges. Even if the plants encroached on power lines and Mr. Shay climbed over the fence for convenience, I find that is not sufficient to show that Mrs. Heidarian actually consented to Mr. Shay entering her yard and trimming the shrubs and tree on her property.

26. I find this is a “she said/he said” situation. On the evidence before me, I find that the parties’ submissions on what Mrs. Heidarian consented to are equally likely and equally credible. I find each party’s submissions on that topic are no more likely than the other party’s submissions. So, I find the evidence on this point is equally balanced. As noted, Mr. Shay bears the burden of proving it is more likely than not that Mrs. Heidarian consented to him entering her property and trimming the shrubs and trees there. I find Mr. Shay has not met that burden.
27. For the above reasons, I find Mr. Shay entered Mrs. Heidarian’s property and trimmed her shrubs and trees without her consent. I find those actions meet the definition of a trespass to land.
28. I turn now to damages. *Manak* noted at paragraph 48 that, absent extenuating circumstances, 3 types of damages are available for trespass:
- a. Nominal damages if the owner has not proven any actual loss,
  - b. Actual damages suffered by the owner, or
  - c. A sum that should reasonably be paid for the use of the land.
29. I find that Mr. Shay’s brief entrance onto Mrs. Heidarian’s land, which was of no more than minor benefit to him, should not reasonably result in Mrs. Heidarian being paid for that use. Further, *Skrypnyk v. Crispin*, 2010 BCSC 140 noted at paragraphs 23 and 25 that nominal damages are often only \$1, to recognize the infringement of the right to land. Here, Mr. Shay’s trespass undisputedly involved altering Mrs. Heidarian’s property, and in particular her magnolia tree. So, given the types of damages noted in *Manak*, I find it appropriate to award Mrs. Heidarian her actual damages suffered, and not nominal damages.
30. Turning to the value of the actual damages, as noted Mrs. Heidarian’s \$1,000 claim is in part for damage to her magnolia tree, her shrubs along the property line, and the fence.

31. I find the evidence does not show Mr. Shay caused any fence damage, and I note that it is also unclear who owns the fence. So, I award nothing for fence damage.
32. Turning to plant damage, I find none of the evidence shows that Mrs. Heidarian was required to trim any specific plants away from power lines. Further, Mr. Shay does not directly argue that Mrs. Heidarian would have had to trim them anyway.
33. Mrs. Heidarian says that the trimming damaged the health of her shrubs and magnolia. Mr. Shay submitted an email from a person, JR, who said that Mrs. Heidarian's magnolia and another plant appeared healthy and undamaged. I place little weight on JR's email because nothing before me shows that JR is qualified to provide a reliable opinion on plant health. I find there is no evidence before me from a proven professional gardener or arborist. Further, I find the submitted photos showed a few brown leaves on some plants, but no obvious signs of poor health. So, I find the evidence does not show that Mr. Shay's trimming damaged any plant's health.
34. I also find the photographs in evidence did not adequately show the shrubs along the property line before they were trimmed. I am unable to determine whether the trimming significantly changed the shrubs' appearance or value. So, I find Mrs. Heidarian is not entitled to any damages for the shrubs.
35. However, I find submitted photographs taken before and after the trimming show that Mr. Shay removed the top of the magnolia tree, reducing its height by several feet. I find that the trimmed tree no longer had the same shape, was smaller than before, and likely provided less shade. So, I find that the trimmed tree likely had less value than it did before it was trimmed.
36. *Skrypnyk* awarded \$3,000 in general damages for a temporary loss of use of land and loss of amenities, including the loss of trees. *Manak* awarded \$500 for a nuisance which resulted in a trespass that caused a loss of plants. Given *Skrypnyk* and *Manak*, I find Mrs. Heidarian is entitled to damages for the partial loss of the magnolia tree. As noted, there is no proven arborist or professional gardener



evidence before me to confirm the actual change in value of the tree. In the circumstances of this dispute, and having weighed all of the evidence, including the nature and extent of the tree trimming shown in photos, I find Mrs. Heidarian is entitled to \$300 in general trespass damages for the partial loss of her magnolia tree.

37. Mrs. Heidarian also claims for the expenses of coping with the emotional distress of the trespass, including counselling. However, she provided no receipts or other documentation showing that she incurred any counselling expenses or other expenses, and no medical evidence documenting that she suffered any significant emotional distress. So, I decline to order the repayment of any emotional distress coping expenses.
38. For the above reasons, I allow Mrs. Heidarian's claim for trespass damages in the amount of \$300.

### ***CRT Fees, Expenses, and Interest***

39. The *Court Order Interest Act* (COIA) applies to the CRT. I find that under the COIA, Mrs. Heidarian is entitled to pre-judgment interest on the \$300 owing. I find this interest is reasonably calculated from January 27, 2022, the date of the trespass, until the date of this decision. This equals \$2.68.
40. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. Mrs. Heidarian was partly successful in this dispute, so I find she is entitled to half of the \$125 she paid in CRT fees, which equals \$62.50. Neither party claimed CRT dispute-related expenses.

## ORDERS

41. I order that, within 30 days of the date of this decision, Mr. Shay pay Mrs. Heidarian a total of \$365.18, broken down as follows:
- a. \$300 in damages for trespass,
  - b. \$2.68 in pre-judgment interest under the COIA, and
  - c. \$62.50 in CRT fees.
42. Mrs. Heidarian is also entitled to post-judgment interest under the COIA, as applicable. I dismiss the remaining aspects of Mrs. Heidarian's claim.
43. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

---

Chad McCarthy, Tribunal Member