



# Civil Resolution Tribunal

Date Issued: October 19, 2023

File: SC-2022-007498

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Poirier v. Cant*, 2023 BCCRT 896

BETWEEN:

JOSEPH ARTHUR POIRIER and SHELLEY RAY POIRIER

**APPLICANTS**

AND:

THOMAS EDWIN CANT

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Megan Stewart

## INTRODUCTION

1. This dispute is about property boundaries.
2. The applicants, Joseph Arthur Poirier and Shelley Ray Poirier, and the respondent, Thomas Edwin Cant, are neighbours. Mr. Cant put in a new concrete driveway that the Poiriers say encroaches on their property. The Poiriers say they had to have a

land survey done and build a new fence to “restore the correct property boundary”. The Poiriers claim \$1,309.71 for the survey, \$2,541 for the new fence, and \$201.60 for lawyers’ fees, for a total of \$4,052.31 in damages.

3. Mr. Cant disputes the Poiriers’ claim. He says no survey of his property was available at the time he put in the new driveway. Further, Mr. Cant says he acted in good faith by having the driveway contractor measure using a “string line” along the original wooden fence between the Poiriers’ property and his property to determine the property line. So, Mr. Cant says he is not responsible to pay the claimed amount.
4. Mr. Poirier represents the Poiriers. Mr. Cant is self-represented.

## **JURISDICTION AND PROCEDURE**

5. These are the Civil Resolution Tribunal’s (CRT) formal written reasons. 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.
6. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
7. 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.
8. 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.

## ISSUES

9. The issues in this dispute are:
  - a. Is Mr. Cant's new driveway a trespass to the Poiriers' property?
  - b. If so, are the Poiriers entitled to the claimed \$4,052.31 for the cost of the land survey, the new fence, and the legal fees?

## EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the Poiriers, as the applicants, must prove their claims 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 argument I find necessary to explain my decision.
11. The following background is undisputed. Around June 2022, Mr. Cant replaced a leaking water line on his property, and subsequently built a new concrete driveway. The driveway construction included sawing off part of a middle fencepost in the original fence between the Cant and Poirier properties, and replacing a corner fencepost with a new fencepost. At the time of the water line replacement and new driveway construction, Mr. Cant did not have a survey of his property performed. As discussed below, Mr. Cant says when he built the driveway, he believed it was on his property but now admits it encroaches on the Poiriers' property.

### ***Trespass***

12. Though they do not use this term, I find the Poiriers essentially argue Mr. Cant's new driveway's encroachment is a trespass to their property. Trespass to land occurs when someone enters the land of another without lawful justification, or places, throws, or erects some material object on the land without a legal right to do so (see *Lahti v. Chateauvert*, 2019 BCSC 1081 at paragraph 6, citing G.H.L. Fridman *The Law of Torts in Canada* by 3rd ed. (Toronto: Carswell, 2010) at page 29).

13. The Poiriers say efforts to resolve the driveway issue with Mr. Cant were unsuccessful. So, on their lawyer's advice, in August 2022 they hired McElhanney Associates Land Surveying Ltd. (McElhanney) to survey their property and determine its boundaries. I find the undisputed photo evidence of McElhanney's survey shows Mr. Cant's new driveway encroaches on the Poiriers' property by about 8.5 inches at the widest point.
14. Mr. Cant says at no time during his driveway construction did the Poiriers express concerns about it, though I find he does not go as far as to suggest the Poiriers consented to any encroachment on their land. Mr. Cant also says he made genuine efforts to determine whether a survey of his property had been conducted before starting to build the driveway, by requesting his property file from the municipality and asking McElhanney if it had done a survey of his property. Mr. Cant says his efforts turned up no pre-existing survey. Mr. Cant does not explain why he did not have a survey done before building the driveway. Regardless, he says his driveway contractor used a string line to establish the property line.
15. In submissions, Mr. Cant admits "there is no doubt that the assumption made when determining the string line for the forms to pour the concrete was out by a few inches, as Mr. Poirier's survey points out." So, I find Mr. Cant accepts the McElhanney survey that shows his driveway encroaches on the Poiriers' property. I note Mr. Cant says he had his own survey completed in February 2023 by JE Anderson & Associates. Despite referring to a survey receipt he says he submitted, there is no such receipt in evidence. In any case, Mr. Cant does not say the JE Anderson & Associates survey shows a different property line to the one established by the McElhanney survey.
16. Mr. Cant says in February 2023, he also offered to cut away the driveway along the survey line and have his contractor put aggregate of the Poiriers' choosing beneath the new fence. It is undisputed that the Poiriers asked Mr. Cant to cut the driveway in August 2022 before building the fence, but he refused. Mr. Cant says Mr. Poirier requested some time to consider his February 2023 offer, but there is no evidence the Poiriers ever accepted it, or that the driveway has been cut.

17. In these circumstances, I accept the property line established by the McElhanney survey is accurate, and I find Mr. Cant's driveway is a trespass to the Poiriers' land.

### **Damages**

18. In *Manak v. Hanelt*, 2022 BCSC 1446, the court set out 3 types of damages available for trespass, absent extenuating circumstances:

- a. Nominal damages if the owner has not proven any actual loss,
- b. Actual damages suffered by the owner, or
- c. Damages equal to a sum that should reasonably be paid by the trespasser for the use of the land.

19. Here, Mr. Cant's driveway's trespass undisputedly involved altering the Poiriers' property. So, I find it appropriate to award the Poiriers their actual proven damages.

20. First, the Poiriers claim \$1,309.71 for the survey McElhanney conducted, which is supported by an invoice in evidence. In *Graham v. Golden Gate Developments Inc.*, 2013 BCSC 1890, the court declined to order either party to pay for fence surveys because neither had "improperly caused the incurring" of the survey expenses (see paragraph 85). Based on *Graham*, I find that for Mr. Cant to be liable for the land survey fee, the Poiriers must prove he improperly caused them to incur that fee.

21. It is undisputed that the reason the Poiriers had the survey done was to prove Mr. Cant's new driveway encroached on their property. So, I find Mr. Cant's driveway's trespass caused the Poiriers to improperly incur the survey fee, for which Mr. Cant is liable. I order Mr. Cant to pay the Poiriers \$1,309.71 for the survey fee.

22. Next, the fence. The Poiriers say Mr. Cant's interference with the original wooden fence damaged it, which required them to replace it with a new chain link fence. The Poiriers say the original fence was on their property, and Mr. Cant had no right to saw off, remove, or replace any of its fenceposts. Mr. Cant disagrees, and says the fence

appeared to be on the property line, and could be considered co-owned by the parties.

23. Pictures submitted by both parties show the original fence ran perpendicular to the street, with the property line established by the McElhanney survey diverging from the fence as it approached the street in a narrow, upside-down V shape. Based on these pictures, I find it unclear whether the start of the fence (that is, the part furthest from the street) was on the property line. However, I find the pictures clearly show the disputed fenceposts, which were further along the fence and closer to the street, were entirely within the Poiriers' property and were not co-owned. So, I find Mr. Cant was not entitled to interfere with the fenceposts as he did.
24. However, for the following reasons, I find Mr. Cant's interference does not make him liable for the cost of the Poiriers' new fence.
25. The Poiriers do not dispute Mr. Cant replaced the original fence's corner fencepost with a new fencepost. However, they say the fact that he sawed off a middle fencepost while building his new driveway damaged the fence. The Poiriers say this caused them to have to build a new chain link fence that followed the property line on their land. I disagree. I find none of the pictures submitted by either party show Mr. Cant's replacement of the corner fencepost or sawing of the middle fencepost damaged the original fence to the extent it needed replacement, or at all. That is, I find the Poiriers have not proven they suffered a loss because of Mr. Cant's interference with the fenceposts.
26. The Poiriers say the other reason they needed to replace the original fence was to restore the boundary between the properties. However, I find the boundary did not require restoration. Even though Mr. Cant's driveway encroached on the Poiriers' land, that did not change the property boundary. I find the boundary was as established by the McElhanney survey, without the need for a fence. If the Poiriers wished to build a new fence along the property boundary to provide physical separation between the 2 properties, that was their choice. However, I find their

decision to do so on their own land is not Mr. Cant's responsibility, and he is not liable to pay for it.

27. To be clear, the Poiriers do not say how the encroaching driveway impacts their use of their property, and that they built the new fence to prevent Mr. Cant from using the part of the driveway that encroached. So, I find the Poiriers have not proven the new fence was necessary to address this aspect of the driveway's encroachment.
28. For these reasons, I dismiss the Poiriers' claim for reimbursement of the cost of the new fence.
29. Finally, the Poiriers claim \$201.60 for legal fees they say they incurred to get advice on the boundary issue before starting this CRT dispute. The Poiriers' claim is supported by a receipt from their lawyers. However, legal fees are not generally recoverable as damages (see *Voyer v. C.I.B.C.*, 1986 CanLII 1226 (BCSC)). Rather, at the CRT they are recoverable in the context of dispute-related expenses, which are reasonable expenses and charges the CRT considers directly relate to the conduct of the proceeding. While the Poiriers' claimed legal fees pre-date this proceeding, they could be considered dispute-related expenses, as they were arguably incurred in contemplation of litigation. However, even if they are dispute-related expenses, CRT rule 9.5(3) says the CRT may order reimbursement of legal fees charged only if there are extraordinary circumstances. I find there are no extraordinary circumstances here. So, I find the Poiriers are not entitled to the \$201.60 for legal fees, and I dismiss this part of their claim.

## **CRT FEES, EXPENSES, AND INTEREST**

30. The *Court Order Interest Act* (COIA) applies to the CRT. I find the Poiriers are entitled to pre-judgment interest on the \$1,309.71 damages award from September 15, 2022, the date of the McElhanney survey invoice, to the date of this decision. This equals \$55.21.

31. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As the Poiriers were partly successful, I find they are entitled to reimbursement of half their CRT fees, which is \$87.50. I have addressed the Poiriers' claim for reimbursement of their legal fees above, and otherwise, the Poiriers did not claim dispute-related expenses.

## **ORDERS**

32. Within 30 days of the date of this order, I order Mr. Cant to pay the Poiriers a total of \$1,452.42, broken down as follows:

- a. \$1,309.71 in trespass damages for the cost of the land survey,
- b. \$55.21 in pre-judgment interest under the COIA, and
- c. \$87.50 in CRT fees.

33. The Poiriers are entitled to post-judgment interest, as applicable.

34. I dismiss the balance of the Poiriers' claims.

35. 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.

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Megan Stewart, Tribunal Member