IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thompson v. Hay,*
2024 BCSC 1524

Date: 20240820
Docket: S131160
Registry: Kelowna

Between:

Richard John Thompson

Plaintiff

And

Scott Leonard Hay

Defendant

And

Richard John Thompson

Defendant by Counterclaim

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:	L. Nykolaychuk
The Defendant, appearing in person:	S. Hay
Place and Dates of Hearing:	Kelowna, B.C. July 19 and 30, 2024
Place and Date of Judgment:	Kelowna, B.C. August 20, 2024

2024 BCSC 1524 (CanLII)

I. Introduction

[1] These are supplementary reasons following a judgment given in favour of the plaintiff on April 10, 2024.

[2] In brief, this case involves a dispute between the parties over easement rights. The defendant's predecessor in title had granted an easement to the plaintiff in order to permit the plaintiff road access to his property. The dispute arose when the defendant constructed a fence along the access road, not just within the easement but within the bounds of the roadway itself, in a manner which, I found, interfered with the plaintiff's easement rights. Although the plaintiff removed the fence, exercising what I found to be his right to abate a nuisance or trespass, I concluded that it was necessary that an injunction issue to prevent future breaches of the plaintiff's easement rights.

[3] There were other aspects to the judgment, including an order rectifying the easement plan to correct a surveying error, but these are not at issue post-trial.

[4] In the judgment, which may be found at 2024 BCSC 583, I left it to the parties to determine the terms of the injunction, with leave to return to Court in the event they were unable to agree. The was set out in the reasons for judgment as follows:

> [200] Judgment is granted in favour of the plaintiff, with orders as follows:
>
> …
>
> b) an order, in terms to be settled by the parties, restraining the defendant, his agents, servants, etc., from interfering with the plaintiff's easement rights, including by constructing a fence or other obstruction in an area that the parties will define, with leave to address the matter if the parties cannot agree;

[5] The parties have been unable to agree, and so the parties have returned to make further submissions on the matter.

[6] The brief parameters at issue are as follows. The easement area, as shown in the registered plan, is 20 metres wide for most of its length, but it is 24.66 metres wide at its southern end, where the terrain is flatter. In the northerly portion of the area, the average width of the roadway (meaning both the travelled portion of the

2024 BCSC 1524 (CanLII)

road together with the road shoulder) is approximately 5.8 metres, although it averages 6.7 metres over its entire length.

[7] One of the difficulties in setting the injunction parameters is the fact that the road is not uniformly centred within the easement. This favours the setting of the parameters by reference to the road centre rather than the easement boundaries.

II. Positions of the Parties

A. Plaintiff

[8] The plaintiff notes that the average width driving surface of the road is 6.7 metres and that, in addition, there are road shoulders on each side and, in some areas, pullouts to enable vehicles to pass. Although there are no pullouts within the 345 m area where the fence had been constructed, there are pullouts in the southerly portion of the road in an area where the defendant has said he intends to construct more fencing.

[9] The plaintiff says the injunction should enjoin any fence construction within 9 metres of the centreline of the easement. He derives this figure by taking half the average width of the travelled portion of the road (3 to 3.5 metres), then adding amounts for road shoulder, pullouts, areas that slope to the toe of ditches or the toes of the slopes themselves, and adding 3 metres for a standard utility setback for such things as utility poles. In the plaintiff's estimation, these necessary allowances add up to about 9 metres.

[10] The plaintiff emphasizes that the geography of the area is varied, the road is quite long, and the critical area is rugged and steep. The plaintiff also emphasizes that he is willing to cooperate with the defendant for any necessary works such as fencing, but that he needs to be given notice of any work the defendant intends.

[11] The plaintiff's position is that if the injunction is set at less than 9 metres from the centre of the easement, then the injunction should be set by reference to the centre of the road, not the easement, as the road is not uniformly centred within the easement.

2024 BCSC 1524 (CanLII)

B. Defendant

[12] The defendant says that 9 metres is an unnecessarily wide prohibition. He says that the injunction generally is a serious usurpation of his rights as landowner.

[13] The defendant also notes that the parameters proposed by the plaintiff would mean he would have to remove his fence near two cattleguards that are located at each boundary of his property. At the cattleguard locations, the road is single lane only, 5.2 m wide, and the defendant has fencing that meets the road perpendicular to the cattleguards. This fencing is distinct from the fence that was removed, which was parallel to the road.

[14] The defendant notes several references by the experts in this case that the road is not a “road” as per accepted roadbuilding standards, but instead it is a driveway or low-volume road providing access to just two residences. This means the allowances shown in those standards for slopes and utility setbacks do not apply. In any event, some portions of the road have no toe to the slope because the slope extends hundreds of metres to the river below.

[15] The defendant notes the remote location of these properties, which are accessed by two one-lane bridges over the Columbia River, then by a forest service road. He emphasizes that general access to this area involves single lane roadways and the subject road has a fluctuating pattern of widening and narrowing, meaning it too is not in any way a two-lane road.

[16] The defendant referred to several documents, not appended to an affidavit, that he produced for the first time at this hearing. One document appears to be from a provincial government website and another purports to be an online publication from the District of Lake Country. The former refers to a standard width of 6 metres for driveways located outside municipal boundaries, and the latter refers to a minimum width of 4.5 metres for driveways located within that municipal district. The defendant says the latter standard should be a sufficient allowance in this case.

2024 BCSC 1524 (CanLII)

C. Plaintiff's Reply

[17] The plaintiff made the following points in reply:

a) The injunction would not affect the defendant's cattleguard fence as it will only prohibit future construction;

b) The injunction does not usurp the defendant's property rights as those rights are already restricted by the easement terms. The injunction merely ensures the existing rights of the plaintiff are not interfered with; and

c) The additional guidelines referred to by the defendant were not in evidence at the summary trial and, in any event, they do not assist. The defendant's proposed limit of 4.5 metres is impractical given that the average width of the subject road is 6.7 metres.

III. Discussion

[18] I conclude that the most appropriate reference point for the injunction is the centre of the existing road, as shown on the survey that was part of the evidence in this case. I come to that conclusion because the survey shows that the road is not centred within the easement, but rather its location varies within the easement.

[19] Setting the width parameters of the injunction is no straightforward matter. Generally, I conclude that the prohibition against the construction of a fence or other obstruction must account for the width of the road, the already-existing shoulders on both sides, and a further setback to eliminate or minimize any "shy zone", a concept that was the subject of discussion in my reasons for judgment.

[20] I agree that the defendant's proposal of a 4.5 metre injunction width is both inappropriate and unworkable given that the driving surface alone is, on average, 6.7 metres wide.

[21] I also note the further roadbuilding and driveway allowance references relied upon by the defendant at the post-judgment hearing were not part of the evidence at the summary trial and so they would not have been admissible at this hearing

2024 BCSC 1524 (CanLII)

without an order made following a “fresh evidence” application. Though inadmissible, I have considered them in a general sense and have found them to be of limited utility in any event, given the much more specific, relevant and admissible evidence led at trial.

[22] I accept that the subject road is not a public road and so standards applicable to public roads provide only limited guidance, but the subject road is also not an short urban or suburban driveway. Nor is it a rural driveway in terms of its dimensions, as distinct from its purpose, as the average width of its driving surface alone (that is, leaving aside the shoulders of the road) is wider than the alleged and inadmissible 6 metre standard referred to by the defendant. It is an unusually long rural access road that is approximately two kilometres in length. Other factors unique to the subject road include the steep slopes present over a significant portion, the need to ensure vehicles can pass safely given the topography and winter conditions typical in the area, and the need to ensure that snow removal and roadway maintenance can be efficiently, effectively and safely carried out.

[23] From these considerations and from the admissible evidence generally, I conclude that the injunction should be set at 7 metres from the centre of the roadway. I derive this by taking the average driving surface width, rounded up (7 metres), and adding a road shoulder allowance on each side (2 metres each, or 4 metres in total) and a further allowance of 1.5 metres on each side (3 metres in total) to eliminate issues with a “shy zone”. The 14 metre total is then divided in half to achieve the parameter from the centre of the roadway.

[24] I emphasize that these reasons address the terms of the injunction only. The order to be submitted should make clear that: (1) the easement terms remain in effect and are not altered by the injunction; and (2) the injunction does not restrict or otherwise affect the defendant’s ability to repair or replace existing fencing associated or connected with the cattleguards, or the cattleguards themselves.

[25] The plaintiff’s proposed injunction terms permit construction within the injunction area where the defendant consents, a term with which I agree.

2024 BCSC 1524 (CanLII)

IV. Conclusion

[26] The injunction ordered on April 10, 2024 is settled in the form submitted by the plaintiff, but with the injunction area fixed at 7 metres from the centre of the road as that road is shown on the survey that was part of the evidence in this case.

[27] The order should also state that, for clarity: (1) the easement terms remain in effect and are not altered by the injunction; and (2) the injunction does not restrict or otherwise affect the defendant's ability to repair or replace existing fencing associated or connected with cattleguards, or the cattleguards themselves.

"Blok J."

2024 BCSC 1524 (CanLII)