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AWARD OF DEPUTY REFEREE ON APPEAL

Line Fences Act, section 10

CITY OF KAWARTHA LAKES

OFFICE OF THE CITY CLERK
KAWARTHA LAKES

BRIAN DONALDSON)
DEPUTY REFEREE)

Thursday, December 15, 2016

BETWEEN:

Jeffrey Hehl
(Appellant)

-and-

Brian McCausland
(Respondent)

BACKGROUND:

This decision deals with an appeal by Jeffrey Hehl of an Award made by the fence-viewers of the City of Kawartha Lakes which deals with the fencing of the property boundary between two adjoining rural properties in that municipality. Both the property of which Mr. Hehl is a registered owner and that of Brian McCausland are located in the geographic township of Ops to the east of the town of Lindsay. The City of Kawartha Lakes was formed on January 1, 2001 through the amalgamation of all municipalities in the County of Victoria to form a single-tier municipality. Although Jeffrey Hehl has owned his property in Ops township for more than 20 years, he does not reside there; his principal residence is in New Jersey. For practical reasons, he was unable to attend the fence viewing; at the appeal hearing, he was represented by a friend. Two additional individuals are shown on title as registered owners of the Hehl property – William Rogers and Regina Rogers. They have not made any representation despite receiving formal notice, and no information has been provided about their interest in the property. My decision, i.e., my Award, therefore treats Jeffrey Hehl as the *de facto* owner of his property.

In response to a question, Brian McCausland stated at the hearing that he would like to purchase the land owned by Jeffrey Hehl and that he has submitted an offer to do so. At present, however, the two properties are under separate ownership and my decision is based on the assumption that this will continue to be the case. If, at some future point, Mr. Hehl does agree to sell his property to Mr. McCausland, my decision will become null and void.

Hearing:

The hearing was held in the City of Kawartha Lakes from 11:00 a.m. to 12:00 noon on Thursday, December 15th in City Hall, which is located at 26 Francis Street in Lindsay. In attendance were: (1) Glenn Vengroff, a resident of Oshawa who represented Jeffrey Hehl, the appellant; (2) Brian McCausland, the respondent, who is a resident of the municipality; and (3) Ralph MacEachern, one of the three viewers of the City who made the Award which was the subject of this appeal. Judy Currins, the City Clerk, was in attendance *only* prior to the commencement of the hearing. She made arrangements for the hearing in the absence of former Deputy Clerk John Paul Newman, who had made all previous arrangements before moving to a new position at the Township of Scugog. I am grateful to Mrs. Currins for her assistance and to the attendees for their helpful participation.

The Dispute:

In this dispute, the two properties are located in concession 10 of Ops township south of Cheese Factory Road. Brian McCausland's property, which is significantly larger than that of Jeffrey Hehl, fronts on Cheese Factory Road; Mr. McCausland pastures livestock on his property. Jeffrey Hehl's oddly shaped property, located to the south of the McCausland property, fronts on Lilac Road, a municipal highway that is *not* maintained in either summer or winter by the City of Kawartha Lakes for travel by motor vehicles. Glenn Vengroff said at the hearing that Jeffrey Hehl hopes to establish a permanent residence on his property at some point and to move from his current residence in New Jersey. According to Mr. McCausland, only the ten acres comprising the narrow portion of Mr. Hehl's property closest to Lilac Road are workable for agricultural purposes; these are currently leased out for the growing of cash crops. Because of the shape of the Hehl property, the boundary with the McCausland property consists of three separate portions. A map attached to the signed version of this decision illustrates this clearly. (This map is *not* attached to the electronic file version of this decision.) There is no dispute about the location of the boundary between the properties.

There is an existing split rail fence along all three portions of the common boundary which was constructed many years ago. As part of an ongoing effort to upgrade all of his fences, Brian McCausland would like to replace this split rail fence with a new post and rail fence suitable for the fencing of livestock that will need very little maintenance for the foreseeable future. In the absence of an agreement of Mr. Hehl, whom it proved difficult to contact, he applied to the municipality to have the fence-viewers arbitrate the dispute. The viewers conducted an on-site viewing without the participation of or representation from Mr. Hehl and made their Award on September 12th, 2016, which was then circulated to both owners by the then Deputy Clerk.

Fence-Viewers' Decision:

As noted above, three fence-viewers of the City of Kawartha Lakes – Ralph MacEachern, Jim Fulton and Charlie Clarke - issued their Award on September 12th, 2016.

In their Award, the fence-viewers specified that:

- A new fence to mark all three portions of the boundary between the adjoining lands of Brian McCausland and Jeffrey Hehl, as described in Schedule "A" to the Award, shall be constructed, maintained and kept up;
- The new fence shall replace the existing split rail fencing that is now in place, and Brian McCausland shall be entitled to receive 100% of any materials that can be salvaged;
- The new fence shall be a 9 strand page wire fence as described in Schedule "B";
- Brian McCausland shall be responsible for 25% and Jeffrey Hehl shall be responsible for 75% of the cost of constructing the page wire fence described in Schedule "B";
- If either owner wishes to have a fence of a higher standard, that owner shall be responsible for 100% of the additional cost of the work;
- Brian McCausland shall be responsible for obtaining a minimum of two quotes and Jeffrey Hehl may also obtain quotes, if he wishes;
- The quotes shall be submitted to the Clerk's Office no later than October 5th, 2016, and the lowest compliant quote shall be selected for the construction of the fence;
- The fence shall be constructed by the successful contractor who, upon completion of the work, shall invoice Brian McCausland for the full cost;
- Brian McCausland shall be responsible for paying the contractor for the full cost of constructing the fence and, upon request, Jeffrey Hehl shall be responsible for paying his share of 25% of that amount to Brian McCausland;
- Brian McCausland shall be responsible for 25% and Jeffrey Hehl shall be responsible for 75% of the maintenance of the entire fence;
- If at any time livestock are housed on both properties *or* on neither property, each owner shall be responsible for 50% of the maintenance of the entire fence;
- The work shall be commenced not later than October 5th, 2016 and completed not later than December 1st, 2016;
- The costs of the proceedings in the amount of \$407, consisting of \$307 for the fees of the fence-viewers and \$100 for the municipality's administrative fee, shall be divided equally between Brian McCausland (\$203.50) and Jeffrey Hehl (\$203.50).

Appeal:

Jeffrey Hehl filed his appeal on October 4th, 2016, which was the final day of the appeal period. This was a source of disappointment to Brian McCausland, who was planning to have the construction of a new fence started as soon as the appeal period had expired. Nonetheless, it is

important that Mr. Hehl's appeal be heard, especially since he was not able to attend the viewing by the municipality's fence-viewers in September. On that point, it is also important to remember that the appeal hearing on December 15th constituted a new hearing of the matter, and that Mr. Hehl was able to have Glenn Vengroff represent him at this hearing.

In his notice of appeal, filed with a Notary Public in New Jersey, Mr. Hehl said that he does not want a fence on his property and that he cannot pay for it. At the appeal hearing, Glenn Vengroff focused instead on the apportionment of the cost of the new fence in the Award, and suggested that, as prescribed in subsection 8(1) of the *Line Fences Act*, Mr. Hehl should be made responsible for only 50% rather than 75%. Brian McCausland did not appear to object to Mr. Vengroff's suggestion; his main concern appears to be to have a new fence constructed.

Ralph MacEachern, one of the fence-viewers who made the Award, said that one of their reasons for making Jeffrey Hehl responsible for 75% of the cost of the new fence was because of the amount of time and expense that would be involved in excavation work Mr. Hehl's side of the boundary line. He also said that this is not an issue on Brian McCausland's side of the boundary line because Mr. McCausland farms right up to the line.

On this point, Mr. McCausland said that he believes that, in order to protect a newly constructed fence from damage by falling trees, it is desirable that trees be cleared for 30 feet on Mr. Hehl's side of the boundary line. This would require a considerable amount of time, work and expense by a contractor. Mr. Vengroff expressed concern about this on Jeffrey Hehl's behalf and there was some discussion between the two about a possible compromise. This is an important issue because there is no legal authority of which I am aware for either fence-viewers or a line fence referee to require the clearance of 30 feet of trees from private property on one side of a boundary line. This matter will be discussed further in the next section.

DISCUSSION

There is no dispute about the type of fence prescribed in the Award of the fence-viewers or about the equal apportionment of the costs of the proceedings between the owners. As a result, my decision reiterates the position of the fence-viewers on these matters, with an additional \$90 fee added to the overall costs in accordance with By-law 2015-124 of the City of Kawartha Lakes. This will increase the cost of the proceedings from \$407.00 to \$497.00.

There are five issues that I would like to discuss in this section: (1) the apportionment of the cost of the new fence; (2) the responsibility for maintenance and repair of the new fence;

(3) the clearance of trees on Jeffrey Hehl's side of the boundary line; (4) the selection of a contractor; and (5) the date for the completion of the construction of the new fence.

1. Apportionment of the Cost of the New Fence

I do not believe that the Award is consistent with clause (b) of subsection 8(1) of the *Line Fences Act*, which states that both owners shall be made responsible for one-half of the cost of a fence unless the fence-viewers consider that such an Award would be unjust in the circumstances of the case. Pages 23 and 24 of "A Guide to the *Line Fences Act*" provide a useful discussion of this issue. In this case, however, it does not seem to me that there was justification for making Jeffrey Hehl responsible for 75% of the cost of constructing the fence, especially since Brian McCausland has livestock. As a result, my decision makes both owners responsible for 50% of the construction of the fence.

2. Responsibility for Maintenance and Repair of the New Fence

For the same reason, I believe that the Award was "unjust" in making Jeffrey Hehl responsible for 75% of the maintenance of the entire fence. Moreover, this provision seems impractical to me, given the fact that Jeffrey Hehl is an absentee owner, whereas Brian McCausland has a vital interest in ensuring that the fence is in good repair for pasturing his livestock. At the hearing, Brian McCausland made the point that there will not be much need for maintenance of the newly constructed fence. As a result, my decision makes Brian McCausland responsible for the routine maintenance of the fence.

Since Jeffrey Hehl does not reside on his property, it seems more practical to make Brian McCausland responsible for repairing any damage that occurs to the fence. However, Jeffrey Hehl should be responsible for the cost of repairing the fence from damage originating from his property caused, for example, by the falling of a tree. My decision therefore makes Mr. Hehl responsible, in such cases, for reimbursing Mr. McCausland for the full cost of the repair work, including labour and materials.

3. Clearance of Trees of Jeffrey Hehl's Side of the Boundary Line

According to Brian McCausland, it is desirable that the trees on Jeffrey Hehl's property be cleared for a distance of 30 feet from the boundary line. The reason is to protect the new fence from damage caused by trees falling from Mr. Hehl's property. There was some discussion of this matter at the appeal hearing, with Glenn Vengroff expressing reservations about this incursion onto Mr. Hehl's property. I understand Brian McCausland's desire to protect the new fence from damage, but neither the fence-viewers nor I have legal authority to require the clearance of trees from private property for a distance of 30 feet from the boundary line. It seems to me that subsection 11(4) of

the *Line Fences Act* is relevant to this issue. It permits an owner or a person acting on that owner's behalf, in doing or completing work pursuant to an Award [or, by extension, an appeal decision], to "enter on the property of the adjoining owner to the extent that it is necessary to do or complete the work, but in making such entry or doing or completing such work shall do no unnecessary spoil or waste". In my opinion, this would mean that work on the the Hehl property would have to be limited to cleaning the fence row to the extent necessary to permit the new fence to be constructed on the boundary. If, however, the owners can reach agreement permitting more tree clearance to be undertaken on the Hehl property, that is a private matter between them. [At the hearing, Glenn Vengroff offered to help facilitate such an agreement.]

My position, which is reflected in my decision, is that I have no legal authority to order any work to be undertaken on Mr. Hehl's property other than sufficient cleaning of the fence row to permit the construction of the new fence. This restriction will not, however be applicable if the two owners are able to reach an agreement permitting the clearance of trees along the boundary line on the property of Jeffrey Hehl.

4. Selection of a Contractor for Construction of the New Fence

Brian McCausland, as required by the Fence-Viewers' Award, obtained two quotes and submitted them to the Clerk's Office. The City of Kawartha Lakes selected Tom Thurston, who submitted the lowest compliant quote, as the successful contractor for the construction of the fence. Despite the delay caused by the consideration of the appeal from Jeffrey Hehl, I believe that the selection of Tom Thurston as the successful contractor is appropriate and my decision confirms this. If, as it appears, a portion of the quote provided by Mr. Thurston was based on the clearance of 30 feet of trees from Mr. Hehl's property, it will need to be reviewed and revised to the extent necessary.

5. Date for Completion of the the New Fence

Consideration of Jeffrey Hehl's appeal makes it necessary to establish a new date for the completion of the construction of a new fence. At the hearing, Brian McCausland suggested the completion date be pushed back until the late fall of 2017 in order to take account of the difficulties created by the wetness of the area, especially earlier in the year. As a result, my decision establishes December 1st, 2017 as the completion date.

AWARD

THIS AWARD, which replaces the Award of the Fence-Viewers of the City of Kawartha Lakes dated September 12th, 2016, affects the following lands in the geographic township of Ops that form part of the municipality of the City of Kawartha Lakes:

- The property owned by **Jeffrey Hehl (Appellant), William Rogers and Regina Rogers**, being concession 10, part lot 24;

-and-

- The property owned by **Brian McCausland (Respondent)**, being concession 10, part lots 24 and 25, known municipally as 392 Cheese Factory Road, Lindsay, Ontario K9V 4R3.

IT IS ORDERED THAT:

1. A new fence shall be constructed to mark the entire boundary between the properties starting at the southwestern corner of the McCausland property, then continuing in an easterly direction for approximately 940 feet, then continuing in a southerly direction for approximately 660 feet, and then continuing in an easterly direction for approximately 1,320 feet to the southeastern corner of the McCausland property.
2. The new fence shall replace the existing split rail fencing that is now in place, and Brian McCausland shall be entitled to 100 per cent of any materials that can be salvaged.
3. The new fence shall be a 9 strand page wire fence with 2 steel posts to every 1 wooden post with 6 inch tops every 16.5 feet; the anchor posts shall be wooden with 8 inch tops and braced and located at the southwestern corner of the McCausland property and continuing on the existing property line to the southeastern corner of the McCausland property; the fencing contractor shall determine the location of the braced panels.
4. In accordance with the recommendation of the City of Kawartha Lakes, Tom Thurston of Dunsford, Ontario shall be selected as the contractor for the construction of the fence;
5. Brian McCausland shall be responsible for asking Mr. Thurston to review his quote of October 3rd, 2016 in light of this Award, especially sections 8 and 9, to determine

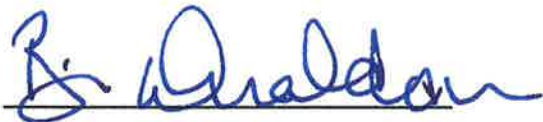
whether revisions to the prices are necessary, and this quote, after review, shall be submitted to the Clerk's Office before the construction of the fence is commenced.

6. Brian McCausland and Jeffrey Hehl shall each be responsible for 50 per cent of the cost of constructing the new fence as described in sections 1 and 3 of this Award.
7. If either owner wishes to have a fence of a higher standard constructed on the property line, that owner shall be responsible for 100 per cent of the additional cost of the work.
8. In accordance with subsection 11(4) of the *Line Fences Act*, the contractor may enter the property of Jeffrey Hehl in order to construct the fence to the extent necessary to construct the fence on the boundary line, for example, by cleaning the fence row.
9. The contractor shall not do any other work on the property of Jeffrey Hehl, such as the clearing of trees adjacent to the boundary line, except with the agreement of Mr. Hehl.
10. When the construction of the fence has been completed, Brian McCausland shall be responsible for paying the full amount of the invoice to the contractor.
11. Jeffrey Hehl shall be responsible for paying 50 per cent of this amount to Brian McCausland within twenty-eight days following the day on which written notice is given by Mr. McCausland to Mr. Hehl requesting payment of this amount.
12. Work on the construction of the fence described in sections 1 and 3 of this Award shall be completed no later than December 1st, 2017;
13. Brian McCausland shall be responsible for the routine maintenance of the new fence.
14. Both Brian McCausland and Jeffrey Hehl shall be responsible for the cost of repairing any damage to the fence that originates on their property, such as the falling of a tree.
15. Brian McCausland shall be responsible for ensuring that any damage to the fence is repaired in a timely manner regardless of its cause.
16. If such damage originates on the Hehl property, Jeffrey Hehl shall be responsible for reimbursing Brian McCausland for the cost of the repair work, including materials and

labour, within twenty-eight days following the day on which written notice is given by Mr. McCausland to Mr. Hehl requesting payment of this amount.

17. If, at some point in the future, Jeffrey Hehl becomes resident on his property, the routine maintenance of the fence shall become a joint responsibility of the two owners.
18. The costs of the proceedings in the amount of \$497.00, consisting of \$307 for the fees of the fence-viewers and the municipality's administrative fees of \$100 for the viewing and \$90 for the appeal, shall be divided equally between Brian McCausland (\$248.50) and Jeffrey Hehl (\$248.50), which amounts shall be payable to the City of Kawartha Lakes.
19. There are no further costs to the owners of the appeal hearing.
20. For the purposes of this Award, written notice may be given by any method that is practical in the circumstance, including e-mail.

Dated at Cobourg, Ontario this 28th day of December, 2016.

A handwritten signature in blue ink, appearing to read "B. Donaldson", written over a horizontal line.

Brian Donaldson, Deputy Referee

attachment