



# Civil Resolution Tribunal

Date Issued: February 9, 2018

File: SC-2017-003479

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kennedy et al v. City of Castlegar*, 2018 BCCRT 35

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

Neil Kennedy and Cidalia Bohjecho

**APPLICANTS**

**A N D :**

City of Castlegar

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kate Campbell

## **INTRODUCTION**

1. The applicants say the respondent (city) failed to maintain a culvert and drain, resulting in damage to the applicants' land including loss of lawn, topsoil, bedding plants, paving, and pathways.

2. The applicants are self-represented. The city is represented by a lawyer, Scott Morishito.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 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.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. Neither party requested an oral hearing.
5. 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.
6. Under tribunal rule 121, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

7. The issues in this dispute are:
  - a. Is the city liable for damage to the applicants' land?

- b. If so, what is the appropriate remedy?

## **BACKGROUND AND POSITIONS OF THE PARTIES**

8. The applicants' property (Lot 2) is located in Castlegar. Bloomer Creek runs through the rear portion of that property, through a channel that continues downstream onto the adjacent property (Lot 1), where it enters a culvert that runs all the way across that lot.
9. The applicants say the culvert was installed illegally, bypassing provincial regulations and requirements, with the full knowledge of the city's Public Works Superintendent. The applicants also say that in 1998 the city installed a restrictive grate at the opening of the culvert, and have failed to maintain it and keep it free of obstructions.
10. The city says it has no jurisdiction or authority over Bloomer Creek, or over the culvert, as these are areas of provincial jurisdiction. It says it was not involved in installing the culvert, and had no jurisdiction or authority to approve its installation as it was installed in or about a stream and is under provincial jurisdiction.
11. The applicants say their land was damaged due to the blockage of the culvert, which they say is undersized. They say there were annual problems with the culvert during seasonal runoff, the city was aware of this issue for at least 20 years.
12. The city says the damage to the applicants' property was caused by a landslide that occurred along Bloomer Creek on May 26, 2017, which transported debris down Bloomer Creek and through the channel.

The city also says they were not involved in installing the grate at the culvert's entrance, located at the property line between the applicants' property and Lot 1. They say it was installed by someone else, at an unknown time.

13. The city says they are not liable for damage to the applicants' property because the evidence does not establish the required elements of negligence. They deny that the city owed the applicants' a duty of care in relation to the culvert, that the city breached such a duty, and that the breach was the cause of the damage. The city also says a restrictive covenant that was registered on the title to the applicants' property when Lot 1 and Lot 2 were subdivided into separate lots in the late 1970s provides the city with immunity with respect to the applicants' claim.

## **EVIDENCE AND ANALYSIS**

14. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
15. Based on the evidence before me, I find that the city is not liable for damage to the applicants' property due to the restrictive covenant registered on their title.

### *Restrictive Covenant*

16. The city says a restrictive covenant about flooding is registered on the title of the applicants' property (Lot 2), as well as on the title of Lot 1. The city says this covenant was registered against the title of each property, and remains in force.
17. The applicants do not dispute that the covenant is currently registered against their title, but say that a January 31, 1983 memorandum shows that the covenant was registered against their property in error, and should not have been associated with their land.
18. The January 31, 1985 memorandum is a telephone message taken by a city staff member. The staff member's name is blacked out, as the document was obtained by the applicants through a Freedom of Information request. The memorandum says a Mr. Young telephoned about the restrictive covenant on Lot 1, regarding flooding. The memorandum says the restrictive covenant should have been

applied to Lot 1 and not Lot 2. The memorandum states, “Ask for removal from Lot 2 and to remain on Lot 1”.

19. I accept that the January 31, 1983 memorandum establishes that the issue of removing the covenant from Lot 2 was raised in 1983. However, it is unclear from the memorandum whether the city staff member agreed that the covenant should not have been applied to Lot 2, or whether this was merely a request from Mr. Young. In any event, there is no evidence that any action was taken, and the restrictive covenant was not removed. Accordingly, it remains in force.
20. Also, the documentation showing the history of the covenant indicates that it was intended to apply to both Lot 1 and Lot 2. On June 4, 1979, Lot 17, District Lot 7180, Plan 4608 was subdivided to create Lot 1 and Lot 2.
21. An April 4, 1979 letter from the engineer to the city says a field inspection for the proposed subdivision was completed on March 23, 1979, and revealed a potential for minor flood and erosion problems on Lot 17. The engineer wrote that as a condition for the subdivision, he recommended covenants restricting building within a certain distance of Bloomer Creek.
22. The restrictive covenant was registered against the title of Lot 17 on May 4, 1979. When Lot 17 was subdivided in June 1979, the restrictive covenant remained on title of both Lot 1 and Lot 2.
23. The restrictive covenant registered against the titles of Lot 1 and Lot 2 includes the building restriction recommended by the engineer, as well as indemnity clauses regarding flooding. The covenant names the city and the province as the “grantee” and the property owner as the “grantor”. It says the grantee knew the land might be subject to periodic flooding, and in particular that they waive any claims it may have against the grantor arising from flooding.
24. Section 4 of the covenant also states that the grantor will never require or have any claim that the grantee do any work or take any action to protect the land from

erosion or flooding. Section 7 of the covenant states that it shall run with the land and be perpetual, meaning that transfers to subsequent property owners.

25. Since this covenant remains registered on the title to the applicants' property, I find that the city is not liable for the claimed damage.
26. The tribunal's rules provide that the successful party is generally entitled to recovery of their fees and expenses. The applicants were unsuccessful and so I dismiss their claim for reimbursement of tribunal fees. The respondent did not pay any fees and there were no dispute-related expenses claimed by either party.

## **ORDERS**

27. I dismiss the applicants' dispute.

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Kate Campbell, Tribunal Member