



Civil Resolution Tribunal

Date Issued: September 20, 2018

File: SC-2018-002364

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Seivewright v. Neal et al, 2018 BCCRT 542*

B E T W E E N :

David Seivewright

APPLICANT

A N D :

Kevin Neal and Gina Neal

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant, David Seivewright, and the respondents, Kevin and Gina Neal, are neighbours. This is a dispute about the respondents' 5 ornamental cherry trees (Trees), whose branches are overhanging across the property line over into the

applicant's yard. The applicant wants an order that the respondents trim and maintain their trees.

2. The respondents say the applicant is responsible to engage in "self-help" and trim whatever hangs into his yard's "airspace". The applicant is self-represented and the respondents are represented by Kevin Neal.

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.
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 126, 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) whether the respondents' trees are overhanging into the applicant's property, and b) if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
9. It is undisputed that the Trees are located on the respondent's property. It is also undisputed that the Tree's branches have been overhanging onto the applicant's property. It is also undisputed that the Trees are healthy and have not yet caused any damage to the applicant's property.
10. I accept the Trees' branches are overhanging onto the applicant's property. While the respondents argue they overhang only into the applicant's airspace, I find they still overhang onto his property. The branches do not need to be touching the ground of the applicant's property in order for the respondents to be held responsible for maintaining and trimming the branches so they do not cross over the property line. In other words, the applicant owns the air space above his property to the extent he can use it. The Trees' branches are invading his usable airspace and therefore his property.
11. The law of nuisance is clear. It is true that a homeowner, such as the applicant, is entitled to trim the branches of their neighbour's tree 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, there is no obligation on the applicant to do so in order to resolve the problem. As discussed below, the obligation rests with the respondents to maintain their own Trees so that they do not cause a nuisance.

12. The respondents rely on a City of Nanaimo Urban Forestry Coordinator who told them they have no legal obligation to prune back their vegetation that grows over the property line. For the reasons set out below, I disagree.
13. Here, the relevant issue is that a person is entitled to use and enjoy their land without unreasonable interference. This is a general principle of the law of nuisance. When there is actual physical damage, there is a strong indication that the interference is unreasonable (see *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLii 2776 BCCA). As noted above, there is no physical damage from the Trees yet.
14. However, I have reviewed the evidence, including photos, and the parties' submissions. I find that the Trees' overhanging branches are causing a nuisance to the applicant. The fact that there is no city bylaw requiring the respondents to trim the Trees' branches is not determinative. The Trees run about 2/3 to 3/4 of the length of the property line, and are planted very close to the property line, on the respondents' side. The applicant's photos show leaves from the Trees' overhanging branches fall onto his property. The Trees' branches extend significantly over the fence, apparently about 10 feet, and hang low enough that they would hit the applicant in the face if he were to walk along his side of the fence (as shown in a photo in evidence).
15. On balance, I find the applicant has proved that the Trees' overhanging branches are causing a nuisance. I order the respondents to trim them, as soon as is reasonably practicable, so they no longer overhang onto the applicant's property. To the extent the trimming leaves any debris on the applicant's property, it is the respondents' responsibility to remove it.
16. I am not prepared to make a prospective or future order about future maintenance of the Trees and their branches. However, bearing in mind the tribunal's mandate that includes recognition of parties' ongoing relationships, and given the parties' submissions, I find it is appropriate to note that the respondents are responsible to

maintain the Trees, including preventing its branches from overhanging onto their neighbour's property.

17. The applicant was substantially successful in this dispute, and therefore in accordance with the Act and the tribunal's rules, she is entitled to reimbursement of \$125 for tribunal fees paid. There were no dispute-related expenses claimed.

ORDERS

18. I order:

- a. The respondents to trim the Trees' branches as soon as reasonably practicable so that they no longer overhang onto the applicant's property, with the respondents having the obligation to immediately remove any debris that lands on the applicant's property as a result of the trimming, and
- b. The respondents to pay the applicant \$125 in tribunal fees, within 14 days of this decision.

19. The applicant is entitled to post-judgment interest, as applicable.

20. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

21. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed,

a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair