



Civil Resolution Tribunal

Date Issued: September 6, 2019

File: SC-2019-001590

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Clarke v. Emke et al*, 2019 BCCRT 1057

B E T W E E N :

DAVID CLARKE

APPLICANT

A N D :

KELLY EMKE and SAM EMKE

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. This dispute is about excess water that flooded fields in the spring of 2018. The applicant, David Clarke, says that the water reached his fields because an irrigation ditch failed that belonged to the respondents, Kelly Emke and Sam Emke. Mr. Clarke requests \$4,106.55 to compensate him for restoring his land. Mr. Clarke represents himself.

2. The respondents say that they are not liable for the damage to the applicant's land. They submit that the excess water came from natural drainage during a faster than usual spring melt. Sam Emke represents the respondents.

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 118 of the *Civil Resolution Tribunal Act* (CRTA). 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. In some respects, this dispute amounts to a "he said, they said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
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 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA: a)

order a party to do or stop doing something, b) order a party to pay money, c) order any other terms or conditions the tribunal considers appropriate.

ISSUE

7. The issue in this dispute is whether the respondents are liable for the damage to the applicant's fields and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant must prove his claim. He bears the burden of proof on a balance of probabilities.
9. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
10. On April 29, 2018, the applicant emailed the respondents that more water than expected was entering his fields. He thought that the water was coming from the respondents' reservoir or ditch. Mr. Emke responded that he did not think that the ditch had failed. He said that because of the increased snowpack that year they all needed to expect more water than usual. He indicated that he would do what he could to keep the water flowing in the ditches but pointed out that "Mother Nature" had a "will of her own."
11. Mr. Emke arrived at the property on May 3, 2018 and says he saw that 15 meters away from the dam their ditch had overflowed and water was flowing overland for 10 to 12 meters and then entered the natural stream system. Mr. Emke built up and reinforced the ditch. On May 8, 2018, the applicant emailed the respondents that the water flows were reduced. The respondents point out that the temperature also cooled down at this time.

12. Under section 29(4) of the *Water Sustainability Act* (WSA) a person is liable to owners of land or premises for damage or loss resulting from the construction, maintenance, use, operation or failure of the person's works.
13. Although neither party addressed the law of nuisance, it is also applicable to this dispute. A nuisance is the substantial and unreasonable interference with the use and enjoyment of property (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The respondents can only be found liable in nuisance if they knew or ought to have known about the potential nuisance through the exercise of reasonable care and failed to take reasonable steps to remedy the situation (see *Lee v. Shalom Branch #178*, 2001 BCSC 1760).
14. The applicant provided photos showing water on his fields. There is no dispute that excess water entered the applicant's fields. The crux of this dispute is whether the respondents are responsible for the water entering the applicant's fields. The applicant submits that when the respondent's irrigation ditch failed it altered the natural water course flow and ended up bringing more water to his lands. The applicant submits that this happened because the respondents did not properly maintain their ditches.
15. The applicant provided two pictures which he says shows two overflowing ditches. There is no time stamp on the pictures so I am unable to tell when they were actually taken. There is also no clear indication as to where they were taken. Further, the photos do not clearly show that the ditches are overflowing, some water seems to be escaping but it does not show a breach of the ditches. I place little weight on this evidence. I accept the respondents' evidence that one of their ditches overflowed.
16. The applicant also alleges that the respondents did not follow dam safety regulations to fix a non-functioning low-level outflow and a blocked portal to the natural water course. Further, the applicant says that a culvert collapsed and the respondents did not fix it.

17. The respondents point out that the collapsed culvert diverted water into their irrigation ditch instead of into the natural stream system flowing to the applicant's lands. They argue this means that water was being diverted away from the applicant's fields and this actually benefitted the applicant during the flooding. The respondents say that the applicant is trying to hold them responsible for natural flooding. They deny that their dam or reservoir had anything to do with the level of water.
18. The applicant claims that after the April 2018 event, the respondents installed an outlet from their reservoir going to the natural water course, so their ditches would no longer be flooded with water. He says that this is an admission by the respondents that they were responsible for the water damage. The respondents submit that they are in the process of upgrading their property, but this is not an admission they were responsible for the flooding of 2018.
19. The applicant did not provide sufficient evidence to show how the respondents' dam or reservoir had any impact on the flooding that occurred. Therefore, I find the applicant has not proved on a balance of probabilities that the respondents' dam or reservoir resulted in the excess water reaching the applicant's lands. I also find that the applicant has not established that the collapsed culvert led to more water coming onto his property.
20. The applicant says that this was a normal year and that the excess water was not due to a rapidly thawing snowpack. The respondents submit that the spring of 2018 was very hot and there was a record snowpack causing flooding. The respondents provided data from three automated government weather stations that are closest to their area. The temperature data shows that temperature records were set for three out of the four days provided in April 2018. The snow graphs also show that the snowpack was much larger than normal. The applicant argues that the respondents' weather station data provided does not reflect the actual temperature or snowpack conditions for their area. I have reviewed these records and accept the respondents'

position that temperatures were higher than normal and there was a larger than normal snowpack in the area of the parties' properties.

21. The applicant also says that the extra water flooded his field because there was a blockage in the water that overflowed the respondents' ditch and travelled downstream to his property. He says that the mud and debris from the ditch breach blocked the natural water course where it slows down at the level ground and caused the misdirection of the water onto his property.
22. The respondents say that any water overflowing their ditch quickly flowed into the natural stream system 10 to 12 meters downstream. This overflow went over Crown land and there was no damage. The natural stream then continued on and entered the applicant's property 2 kilometers downstream. The respondents submit that the water that damaged the applicant's field was flowing in this natural stream system. The respondents say that they worked to redirect water away from the natural stream system as an act of good will toward the applicant but that this does not mean they accept liability for the flows in the natural stream system.
23. The respondents also submit that the flow of water was higher than usual but that the water that came from their ditch did not change the course of the natural stream system. Further, they point out that the water flowing onto the applicant's property was coming from various parts of the watershed and not just the stream system their water flowed into when it overflowed their ditch.
24. The respondents provided pictures and video showing that the natural water course close to their property is in a gully with steep banks on both sides. They say that the water overflowing their ditch dropped into that water course but because of the steep banks it would not alter the course of the flow.
25. The respondents provided an email from a representative of the Ministry of Forests, Lands and Natural Resource Operations (FLNR) who they contacted because they were concerned about the applicant's claim that they were responsible for the excess water in his fields. The FLNR representative, B, emailed the respondents on

May 2, 2018 and told them to inspect their ditches and that any excess flows of water were to be managed within the natural stream system.

26. The respondents also provided an email from the Water Section Head of FLNR, W, dated October 29, 2018 stating that normally water from an overflow would have to be directed into the natural stream. W suggested that ideally the respondents' ditch should have been closed and all the "unchannelized" overland flows should have gone into the reservoir and then into the natural stream. The respondents argue that, although the water did not go through the reservoir, the water overflowing their ditch did go into the natural stream. They also point out that they were not charged with an offence under the WSA and say that W did not conclude that they were liable.
27. In considering the law of nuisance, on the evidence before me I find that once the respondents became aware of the ditch overflowing they did their best to divert water away from the applicant's property. However, the water was excessive because of a flooding event. I accept the evidence from the FLNR's emails that the natural stream was where the excess water should go, which was where it went. The respondents were not obligated to keep the excess water on their property. They took reasonable steps to protect the applicant once they learned he was being affected by the excess water, including by building up and reinforcing their ditches, but they did not have an obligation to protect the applicant from the excess water entering the natural stream due to the spring thaw.
28. In considering the WSA, based on all of the evidence, I find that the applicant has failed to prove on a balance of probabilities that the respondents are responsible for the excess water entering his fields. The evidence shows that there was a greater amount of water than usual due to high temperatures and the increased snowpack in the spring of 2018. Some of this water overflowed the respondents' ditch. I find that it then entered the natural stream, again, as it was supposed to do. The applicant has not provided convincing evidence that the water that overflowed the respondents' ditch contained mud and debris or in any way changed the natural

stream's course to cause the excess water entering the applicant's fields. I find it more likely that the excess water was due to the spring thaw. The applicant has not proved that the respondents altered the course of the water stream causing damage to the applicant's fields. Therefore, I dismiss the applicant's claim.

29. Under section 49 of the CRTA, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the applicant was unsuccessful in his claim he is not entitled to have his tribunal fees reimbursed.

ORDER

30. I dismiss the applicant's claim and this dispute.

Kathleen Mell, Tribunal Member