Civil Resolution Tribunal

Date Issued: July 11, 2022

File: SC-2021-008077

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Parker v. Hsieh,* 2022 BCCRT 790

B E T W E E N :

CHARLES PARKER

APPLICANT

A N D :

PAUL HSIEH and CINDY HSIEH

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Acting Chair and Vice Chair

INTRODUCTION

1. This dispute is about "running bamboo" planted in around 2010 or 2011 by the respondents, Paul Hsieh and Cindy Hsieh, along their side of the roughly 60-foot property line shared with the applicant, Charles Parker.

2. Mr. Parker says the Hsiehs failed to install a barrier when they planted the bamboo and that the bamboo's roots and rhizomes have become a nuisance on his property. Mr. Parker says he has had to continually cut back the bamboo over the years. He also says he feared the bamboo would ultimately damage structures on his property. In 2021, Mr. Parker installed a barrier on his side of the property to prevent property damage and avoid his having to complete further routine removal of the bamboo. Mr. Parker claims $5,000 for the barrier installation work. Mr. Parker also seeks an order that the Hsiehs remove the bamboo "and/or place a barrier" on their side of the fence line.

3. The Hsiehs say Mr. Parker was and is free to remove any bamboo encroaching on his property. The Hsiehs also say any impact on Mr. Parker's structures is likely to come from his own laurel hedges' roots, and not the bamboo. They further say that a barrier was not the only option and cutting and digging out rhizomes was and will be a reasonable solution. The Hsiehs deny any responsibility for Mr. Parker's installation of the barrier and say they owe him nothing. However, they say they are willing in future to work with Mr. Parker in addressing any bamboo overgrowth.

4. Mr. Parker is self-represented. Mr. Hsieh represents the respondents and their evidence and submissions are identical.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.

In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. CRTA section 42 says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

9. Under the *Limitation Act* (LA), there is a 2-year limitation period in BC to start a claim, running from when the claim was discovered or ought to have been discovered. Mr. Parker admits he sought legal advice about the bamboo problem in September 2019, more than 2 years before he started this CRT dispute. In *K&L Land Partnership v. Canada (Attorney General)*, 2014 BCSC 1701, the BC Supreme Court held that a nuisance continues so long as the activity causing the nuisance is ongoing. While K&L dealt with a previous version of the LA, I find that the same reasoning applies to the current version, and therefore to this dispute. Here, the bamboo nuisance issue was ongoing until Mr. Parker installed the barrier in 2021. So, I find Mr. Parker's claim is not time barred and note the Hsiehs do not argue it is out of time.

10. Next, as noted above Mr. Parker seeks an order that the Hsiehs remove the bamboo "and/or place a barrier on the fence line" on the Hsiehs' side of the fence. He did not pursue this remedy in his submissions. In any event, I decline to grant this remedy. It amounts to injunctive relief, which is an order to do or stop doing something. With limited exceptions under CRTA section 118 that do not apply here, the CRT has no authority to grant injunctive relief in a small claims dispute. Second, Mr. Parker has already built a barrier on his side of the fence and his $5,000 claim is for that construction. If I were to order the Hsiehs to pay the $5,000, that would be the CRT's maximum for small claims matters and so I could not also order the Hsiehs to do more, even if I found I otherwise had jurisdiction to do so.

11. Finally, in their submissions the Hsiehs ask that I provide guidance about how they should proceed in future, should Mr. Parker's barrier fail and if any bamboo crosses the property line. I decline to offer such guidance, though I acknowledge the CRT's mandate that includes recognition of ongoing relationships, such as with neighbours. I say this because I have no jurisdiction to make declaratory orders and in small claims disputes and I generally cannot grant injunctive relief, as noted above. Further, whether any future encroachment amounts to an actionable or compensable nuisance will depend on the extent of the encroachment and the impact it has on Mr. Parker's property. I cannot foresee that and so I decline to speculate. With that, I have set out the law on nuisance below.

ISSUE

12. The issue is whether the Hsiehs' bamboo encroached on Mr. Parker's property to the extent it was a legal nuisance, and if so, whether the Hsiehs are responsible to compensate Mr. Parker for his removal of encroaching bamboo and installation of a preventative barrier.

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, as the applicant Mr. Parker must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read all the submitted evidence and arguments but refer only to what I find relevant to provide context for my decision.

Bamboo – was it a nuisance?

14. The Hsiehs admit they planted running bamboo along their side of the parties' shared property line. While not entirely clear, it appears they planted it in 2010 or 2011. The precise date does not matter. The bamboo's scientific name is Phyllostachys (genus) Aurea (species). The Hsiehs undisputedly did not install any sort of barrier to prevent any encroachment of the bamboo into Mr. Parker's property. Further, the Hsiehs admit that in the summer of 2019 Mr. Parker expressed his concern about the encroaching bamboo. Mr. Parker says the Hsiehs did not respond to his verbal expression of concern in 2019. The Hsiehs deny this and say that at the time, they refused his suggestion of a pesticide and told Mr. Parker he was free to remove any encroaching bamboo.

15. In any event, it is undisputed the Hsiehs never offered to take any steps to remove the bamboo or solve the encroachment problem, before Mr. Parker installed the barrier. It is also undisputed that Mr. Parker never told the Hsiehs about his plan to install the barrier before he installed it in summer 2021.

16. In notes from a District of Saanich (District) file about Mr. Parker's complaint, there is some evidence that the Hsiehs told a District bylaw officer in early 2022 that they would assist with bamboo removal on Mr. Parker's side of the fence. However, at that point Mr. Parker had already done the barrier installation work.

17. The Hsiehs' position in summer 2019 and now is that Mr. Parker is free to remove any bamboo stalk, roots, or rhizomes (the plant's spreading structure) that encroach over his side of the property line. Though now the Hsiehs also say they are willing to assist with future bamboo encroachment in the spirit of good neighbour relations. I

have addressed the Hsiehs' request for guidance above. I make no order about the Hsiehs' future assistance.

18. It is undisputed the law of nuisance applies to this dispute. A nuisance is the substantial (non-trivial) and unreasonable interference with the use and enjoyment of property (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraph 18). Where a respondent does not actively create the nuisance, that respondent 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). Here, as noted above, the Hsiehs were undisputedly told of the bamboo problem in the summer of 2019 and took no steps to remedy the situation before Mr. Parker installed the barrier.

19. When there is actual physical damage, there is a strong indication that the interference is unreasonable (see *Murray v. Langley (Township)*, 2010 BCSC 102, paragraph 33, citing *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The onus is then on the respondent to establish that the use of the land was reasonable (see *Murray*, paragraphs 36 and 37).

20. Here, there was no actual physical damage, although I acknowledge the bamboo roots were somewhat entangled. That said, I find Mr. Parker's decision to install the barrier was largely based on the work involved in annually removing the bamboo stalks that were sprouting and his fear of potential property damage resulting from the spreading bamboo.

21. Most significantly, the Hsiehs deny the bamboo that undisputedly encroaches amounted to a private nuisance. Instead, the Hsiehs say the encroaching bamboo is no different than any other encroaching root or leaf that all neighbours deal with in a community. While they do not use these words, I find the Hsiehs essentially argue the bamboo encroachment is trivial and non-substantial.

22. So, the next question is whether in the absence of physical damage the bamboo encroachment was a substantial and unreasonable interference with Mr. Parker's use and enjoyment of his property. If so, it was a legal nuisance and Mr. Parker is entitled to reasonable damages. I find the bamboo was a nuisance. My reasons follow.

23. Photos submitted by Mr. Parker show the parties' respective properties, with the bamboo growing on the Hsiehs' side and the laurel hedge close to the fence on Mr. Parker's side. Mr. Parker's submitted photos also show the bamboo had increasingly encroached into his property, with stalks "popping up" from the ground further and further into his yard over the years. I accept the amount of bamboo growing inside his laurel hedge increased over the years, and it was increasingly difficult for him to remove. It is undisputed and based on the photos I also accept the bamboo had reached the perimeter, if not under, Mr. Parker's greenhouse in his yard.

24. As noted, the Hsiehs argue Mr. Parker's having to remove their bamboo did not amount to a nuisance. Based on the photos and the large amount of bamboo stalks sprouting up throughout Mr. Parker's well-manicured yard, I accept the interference was substantial and unreasonable. I find it was a compensable nuisance. My further reasons follow.

25. As well as arguing Mr. Parker's laurel hedge is more likely to damage his property than their bamboo, the Hsiehs argue the laurels (or their roots) encroach onto their property. The Hsiehs did not file a counterclaim or argue they have sustained any damage as a result of the laurel. So, I make no findings about the alleged encroachment by Mr. Parker's laurel hedges onto the Hsiehs' property.

26. I also do not accept the Hsiehs' argument that it was Mr. Parker's choice to plant laurel hedges and so it is Mr. Parker's problem to deal with the bamboo growing inside them. Mr. Parker was entitled to plant the laurel hedges on his own property and the Hsiehs are responsible for their encroaching bamboo, to the extent it amounts to a nuisance. I find the bamboo was a nuisance, because of the particular difficulty in removing it from the laurel and because of the extent the bamboo sprouted over Mr. Parker's yard.

27. Given my conclusion above, I do not need to address the parties' arguments and evidence about whether the bamboo or Mr. Parker's own trees' roots endangered Mr. Parker's greenhouse and drainage systems. As noted, Mr. Parker's damages claim is for his barrier construction cost, not for property damage. I also find nothing turns on whether the District of Saanich (District) viewed the Hsiehs' bamboo as a violation of its bylaw addressing encroaching vegetation.

28. Contrary to Mr. Parker's apparent assertion, I find there is no evidence before me to support a conclusion the Hsiehs ought to have known in 2010 or 2011 when they planted the bamboo that they should have installed a barrier. I say this because the bamboo is not listed on the District's "Status List for Priority Invasive Plants in the Capital Region" document. There is also nothing in evidence that shows the Hsiehs knew or ought to have known about the bamboo's potential for significant encroachment.

29. However, the Hsiehs undisputedly knew about their bamboo's encroachment onto Mr. Parker's property after Mr. Parker told them in 2019 about it and his concerns about potential property damage. As noted, they did nothing about it.

30. So, what matters is that the Hsiehs allowed their bamboo to grow unchecked over time, and in particular after 2019. As noted above, how they address future problems is not the issue before me in this decision. I find the Hsiehs liable in nuisance and address the appropriate remedy below.

Remedy – damages claim for barrier construction

31. I find this turns on whether Mr. Parker's construction of the barrier was reasonably necessary to remedy the nuisance. On balance, I find that it was. I say this because the Hsiehs' alternative solution was and is for Mr. Parker to routinely have to remove the bamboo on an ongoing basis. I find his having to do so is an unreasonable solution, given the bamboo's past growth pattern. In other words, while digging up the rhizomes may be a reasonable solution for the Hsiehs to contain their bamboo on

their own property, I find it is not a reasonable solution for Mr. Parker to deal with the Hsiehs' bamboo in his own yard.

32. Mr. Parker says he spent $3,173.68 in materials, between July 2021 and September 2021. He also says he spent $1,680 for 100 labour hours (mostly his son's paid labour) between July and September 2021, plus $163.72 for a new drip line that had to be replaced in April 2022 as a final stage of the project.

33. The difficulty for Mr. Parker is that he submitted no evidence in support of these claimed expenses, such as invoices or quotes, or a statement from his son supporting the labour. Parties are told during the CRT process to submit all relevant evidence, and evidence supporting the amount of the claimed damages is clearly relevant. Further, in the absence of supporting evidence, I find 100 labour hours is likely excessive.

34. However, it is undisputed that in 2021 Mr. Parker took on the project himself of excavating and installing a barrier to prevent further bamboo encroachment. Based on Mr. Parker's submitted photos of the barrier construction and of the removed bamboo, I accept Mr. Parker's work involved to remove the bamboo was significant. I say this given the presence of the laurel hedge, the fence's location adjacent to that hedge, and the presence of boulders on Mr. Parker's side of the fence that he had to break up and remove in order to install the barrier. I also accept Mr. Parker likely had to buy some tools for the project, which is undisputed.

35. So, given the above, on a judgment basis I find the Hsiehs must pay Mr. Parker $2,000 in damages for his having to remedy the nuisance with the barrier construction he completed in 2021.

Interest, fees, and expenses

36. The *Court Order Interest Act* COIA) applies to the CRT. I find Mr. Parker is entitled to pre-judgment COIA interest on the $2,000. Calculated from September 30, 2021 (a date I consider reasonable in the circumstances) to the date of this decision, this interest equals $7.01.

37. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. As Mr. Parker was partially successful, I find he is entitled to reimbursement of $87.50, which is half his paid CRT fees. I dismiss the Hsiehs' $126 expense claim for an expert opinion as the Hsiehs were not successful in this dispute.

ORDERS

38. Within 30 days of this decision, I order the Hsiehs to pay Mr. Parker a total of $2,094.51, broken down as follows:

    a. $2,000 in damages,

    b. $7.01 in pre-judgment interest under the COIA, and

    c. $87.50 in CRT fees.

39. Mr. Parker is entitled to post-judgment interest, as applicable. I dismiss the Hsiehs' expense claim.

40. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Acting Chair and Vice Chair