Civil Resolution Tribunal

Date Issued: February 23, 2023

File: SC-2022-005595

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cooper v. John*, 2023 BCCRT 157

B E T W E E N :

BRIAN COOPER and TATIANA NICOARA

APPLICANTS

A N D :

YVONNE JOHN

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. The applicants, Brian Cooper and Tatiana Nicoara, say water and mud floods onto their property when their neighbour, the respondent, Yvonne John, waters her lawn and shrubs. The applicants say their property is always wet and muddy. They say the respondent is negligent and the water flowing onto the applicants' property is a

nuisance. The applicants also say the respondent is bullying them. They collectively claim $5,000 in damages.

2. The respondent denies any wrongdoing. She says she lives on higher ground and "water goes downhill". She says she manages any water going onto the applicants' property as best she can, and has done no damage to their property.

3. The parties are each self-represented.

JURISDICTION AND PROCEDURE

4. 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). Section 2 of the CRTA 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.

5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, 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.

6. Section 42 of the CRTA 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.

7. 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.

Bullying

8. In their application for dispute resolution the applicants refer to "potential bullying". In their submissions, the applicants allege that the respondent bullied one of the applicants, which I find is an allegation of harassment. However, there is no recognized tort of harassment in BC. See *Anderson v. Double M Construction Ltd*., 2021 BCSC 1473. In any event, despite referring to "potential" bullying, I find the applicants do not claim a specific remedy for the alleged bullying, so I make no findings about it.

ISSUE

9. The issue in this dispute is whether the respondent's lawn watering is either negligent or a nuisance, and if yes, what remedies are appropriate.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to what I find relevant to provide context for my decision.

Nuisance

11. A nuisance is an interference with a person's use or enjoyment of land that is both substantial and unreasonable. See *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraph 18.

12. The test for nuisance has two parts. The first part of the test requires that the alleged interference be "substantial" in nature. A substantial interference is an injury to the applicants' property or its use that is "more than a slight annoyance or trifling interference". To be considered a nuisance, the respondent's conduct must substantially alter the nature of the applicants' property itself or interfere "to a significant extent" with the actual use of the property. See *Antrim* at para. 22.

13. It is only when the interference is found to be "substantial", that the court (or the CRT) will then go on to consider whether it is "unreasonable" in all the circumstances. In assessing reasonableness, the court must balance various factors, including the severity and duration of the interference, the character of the neighbourhood, the utility of the respondent's conduct, and the sensitivity of the applicant. See *Antrim* at paragraph 40. The distinction ultimately is between "interferences that constitute the 'give and take' expected of everyone and … interferences that impose a disproportionate burden on individuals". See *Antrim* at paragraph 39.

14. The applicants submitted photos and videos of the side of their backyard that adjoins the respondent's backyard. The respondent's backyard is higher than the applicants' backyard. Both parties have fences on their respective properties, with a small gap between the two fences where the ground (which consists of dirt) slopes down towards the applicants' backyard. The small sloped area of land located between the parties' respective fences is undisputedly the applicants' property. The applicants' backyard appears to consist of dirt/clay and some gravel, with large metal garden containers dug down into the dirt at various locations. There is no visible grass. There is also a small trench running along the side of the applicants' backyard, and down onto a graveled surface beside the applicant's paved driveway at the front of the applicants' home.

15. The applicants say they built the trench as their "rainfall drainage" to "mitigate the rainwater". The applicants do not say that they built the trench to address the water seepage from the respondent's property. However, they say when there is no rain, their "rainfall drainage" trench is filled with water and mud overflowing from the respondent's property when she waters her lawn. There are no photographs or videos from before the trench was built, so based on the submitted evidence I do not know what effect, if any, the respondent's watering had on the applicants' property before the applicants built the trench.

16. The applicants say their property is always wet and muddy between the parties' respective fences. The applicants further say their photographs and videos show

water overflowing onto their property, along the fence line, when the respondent waters her lawn.

17. I find the photographs and videos show some water seepage along the edge of the parties' adjoining property line, and between the fences, as well as some small amounts of water running onto the applicants' side of their fence and into their "rainfall drainage" trench. The photographs do not support the applicants' contention that the trench fills with mud and water when the respondent waters her lawn.

18. I find the evidence does not show that any substantial water, or any mud, overflowed from the respondent's property onto the applicants' property. I also find the evidence does not show any substantial interference with either the applicants' property, or their use of the property. As noted, the applicants have the burden of proving their claims. Based on the evidence, I find the applicants' have not proved that the water seepage that occurs on the parties' shared property line when the respondent waters her lawn is anything more than a slight annoyance or trifling interference.

19. Further, an upslope owner is generally not liable for water naturally flowing from their property unless they take positive steps to change the natural flow of water that interferes with another person's property, or to accumulate and then release natural water. See *MacKay v. Brookside Campsite Inc.*, 2021 BCSC 1304 at paragraphs 132-133.

20. In *Mineault v. Kamloops (City),* 2017 BCSC 316 (CanLII), the plaintiff argued that the defendants "made a non-natural use of their land by installing an irrigation system". The court did not agree and found that most court decisions supported the conclusion that domestic water systems, including lawn irrigation systems, do not constitute a non-natural use of land. Based on *Mineault,* I find the respondent is not strictly liable for water flowing from her property as a result of her watering her lawn and shrubs. I find doing so is not a non-natural use of the land. I also find the evidence does not show that the respondent took any positive steps to change the natural flow of water when she was watering. Rather, the evidence shows only that the applicants themselves changed the natural flow of water by digging a trench to address rainfall

in their own backyard. As noted, the applicants do not say that they built the trench to address any water coming from the respondent's property.

21. Given that I have found no substantial interference with the applicants' property itself, or their use of the property, it is unnecessary to consider whether the interference was unreasonable. I find the applicants' have not proved that the respondent watering her lawn is a nuisance, and I dismiss this aspect of their claims. With that, I turn to the respondent's alleged negligence.

Negligence

22. To establish a claim in negligence, the applicants must show that (1) the respondent owed them a duty of care, (2) the respondent breached the applicable standard of care, and (3) that the breach caused foreseeable loss or damage. The burden to prove negligence is on the applicants, on a balance of probabilities. See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

23. There is no dispute the respondent owed a duty of care to the applicants as the owner of the neighbouring property. I find the applicable standard is to take reasonable steps to avoid causing water damage to neighbouring properties. The respondent acknowledges that on a few occasions, she left the water running in her yard longer than intended. However, the evidence does not show that the respondent's watering ever damaged the applicants' property.

24. As I find the applicants' have not proved the respondent's watering caused any damage, I do not need to consider whether the respondent breached the standard of care. With that, I also find it unnecessary to address the applicants' claimed damages, and I dismiss the applicants' claims.

CRT fees and expenses

25. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As the applicants were unsuccessful, I dismiss their fee

claims. The respondent did not pay any CRT fees and neither party claimed any dispute-related expenses, so I award none.

ORDER

26. I dismiss the applicants' claims and this dispute.

Leah Volkers, Tribunal Member