Civil Resolution Tribunal

Date Issued: November 14, 2023

File: SC-2022-008190 and
SC-2023-000866

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lindsay v. Harris*, 2023 BCCRT 979

B E T W E E N :

JOEL LINDSAY and LINDSAY LINDSAY

APPLICANTS

A N D :

STEPHEN KENTON HARRIS and DENISE LOUISE HARRIS

RESPONDENTS

A N D :

JOEL LINDSAY and LINDSAY LINDSAY

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Megan Stewart

INTRODUCTION

1. These disputes are about pine trees and a pine hedge. This decision involves 2 linked disputes that I find are a primary claim and counterclaim with the same parties and related issues, so I have issued a single decision for both disputes.

2. The applicants and counterclaim respondents, Joel Lindsay and Lindsay Lindsay, and the respondents, Stephen Kenton Harris and Denise Louise Harris, are neighbours. Without meaning any disrespect, I will refer to each party individually by their first name in the rest of this decision, as none of the parties specified their preferred titles.

3. In SC-2022-008190, the Lindsays say the Harrises trespassed on their property by removing parts of their mature Mugo pine trees without consent. The Lindsays say the Harrises severely damaged 1 tree and caused another 2 to die. They claim $5,000 for the value of the trees.

4. In SC-2023-000866, Stephen says the Lindsays breached a building scheme and caused a nuisance by allowing the dead trees to block his lake view, which interfered with the use and enjoyment of his property. He initially claimed $5,000 for the alleged building scheme breach and nuisance, but reduced this amount to $3,500 in submissions. Stephen also says the Lindsays' removal of the trees interfered with his privacy, and was a nuisance and a trespass, so he built a fence to provide a screen. He claims $378.56 for half of the fence's cost and half of the cost to replant 1 tree, and $500 in punitive damages. Finally, Stephen says Lindsay threw debris and trimmings into his yard, for which he claims $500 in trespass damages. In total, Stephen claims $4,878.56. Denise is not an applicant in the counterclaim.

5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. 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.

7. 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.

8. 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.

9. 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.

Preliminary issue – Limitation Act

10. The Harrises say the Lindsays are out of time to bring their claim because they submitted their application for dispute resolution over 2 years after Stephen last trimmed the trees for which the Lindsays seek compensation. The burden of proving a limitation defence is on the party asserting it.

11. The basic limitation period under section 6 of the *Limitation Act* (LA), which applies to the CRT, is 2 years from the date a claim was discovered. Under LA section 8, a claim is discovered by a party when they knew, or reasonably should have known, they had a claim against another party, and that a court or tribunal proceeding was an appropriate remedy. If the limitation period expires, the right to bring the claim ends, even if the claim would have otherwise been successful.

12. Here, I find the Lindsays did not discover their trespass claim until "late October 2020" at the earliest, when they say they found out Stephen had most recently trimmed the trees. The Lindsays filed their application for dispute resolution on October 30, 2022. Though Stephen says he trimmed the third tree over the 2020 Thanksgiving weekend, I find there is no conclusive evidence the Lindsays knew or should have known Stephen allegedly trespassed before October 30, 2020. So, I find the Lindsays are not out of time to bring their claim.

ISSUES

13. The issues in this dispute are:

    a. Are the Lindsays entitled to $5,000 for the dead or damaged trees?

    b. Is Stephen entitled to $4,878.56 for breach of a building scheme, nuisance, and trespass?

EVIDENCE AND ANALYSIS

14. In a civil proceeding like this one, the Lindsays must prove their claims on a balance of probabilities (meaning more likely than not). Stephen must prove his counterclaims to the same standard. I have read all the parties' submissions and evidence but refer only to the evidence and argument I find relevant to explain my decision. I have considered the submissions and evidence submitted by the parties collectively in both disputes in coming to my decision.

Background

15. The parties have been neighbours for at least a decade. Part of their front yards are separated by a pine hedge and pine trees. In some places, it appears the trees are growing out of the hedge. Around 2013, the Harrises asked if they could trim the Lindsays' side of the hedge, and Lindsay agreed. In November 2020, after the pruning at issue in this dispute, the Lindsays asked the Harrises not to cut back the trees again, except as they crossed the property line. The Harrises took the view that the

trees were jointly owned, and further relied on a tree-height restriction in the building scheme governing the housing estate in which both properties are located, to justify trimming the trees. In the spring of 2022, the Lindsays had 3 of the trees removed. Except for the question of whether the consent the Lindsays gave around 2013 was ongoing, which I address below, none of this is disputed.

Damage to pine trees – the Lindsays' primary claim

16. The Lindsays say Stephen's actions in over-pruning the trees in October 2020 caused the 2 front-most trees to die, and severely damaged a third tree, necessitating the removal of all 3 trees in March 2022. The Lindsays say Stephen trespassed onto their property when he cut the trees on their side of the property line. I note that the Lindsays do not support their claim against Denise with any evidence or suggestion she personally cut the trees, authorized their cutting, or trespassed on their property. So, I dismiss the Lindsays' claim against Denise.

17. Trespass to land occurs when someone enters the land of another without lawful justification and directly interferes with that land (see *Lahti v. Chateauvert*, 2019 BCSC 1081). The parties dispute whether the trees were border trees on the Lindsays' property (trees whose trunks and visible roots are close to the property line but do not cross it) or boundary trees (trees whose trunks and visible roots grow across the property line). I find the answer to this question does not matter for the purpose of determining whether Stephen trespassed when he trimmed those parts of the trees and hedge that were undisputedly on the Lindsays' property. This is because while the law of trespass is clear that a homeowner may trim their neighbour's tree as a "self-help" remedy to the extent it overhangs their own property, they may not trim either border or boundary trees on their neighbour's property absent consent (see *Anderson v. Skender*, 1993 CanLII 2772 (BC CA). However, I find whether the trees were border or boundary trees relevant to the subject of damages, and I return to this below.

18. I find whether Stephen trespassed on the Lindsays' property turns on the question of consent. As noted above, Stephen says he obtained Lindsay's permission to trim the

hedge on the Lindsays' side of the property line around 2013. He says that consent remained valid until the Lindsays rescinded it in November 2020. The Lindsays disagree, and say the consent was for a one-time shaping of the hedge.

19. I find the Harrises essentially argue they had implied consent to trim the hedge on the Lindsays' property whenever they liked, based on the 2013 consent. In the context of trespass, implied consent is often described as trespass with leave and license (see *Demenuk v. Dhadwal*, 2013 BCSC 2111). The person asserting leave and license bears the burden of proving it (see *Manak v. Hanelt,* 2022 BCSC 1446). To do so, a person must demonstrate the consent was express by way of an agreement, implied by conduct, or a combination of these.

20. Here, I find the Harrises have not proven they had leave and license to cut the hedge on the Lindsays' property at their pleasure, based on the 2013 consent to trim and shape it. The 2013 consent was undisputedly verbal, and there is no evidence the Lindsays granted it indefinitely. I find the fact that Stephen trimmed the hedge in the years after 2013 without complaint from the Lindsays is not enough to prove implied consent. The court in *Manak* found that silence may not necessarily be construed as consent, and I find that here, the reason for the Lindsays' silence on the matter is not clear. In any case, I find the 2013 consent did not explicitly extend to the trees growing out of or adjacent to the hedge. For all these reasons, I find Stephen did not have leave and license in 2020 when he cut the trees on the Lindsays' side of the property line. I find in so doing, Stephen trespassed on the Lindsays' property.

21. I turn to the question of damages. Absent extenuating circumstances, there are 3 types of damages are available for trespass (see *Manak*):

    c. Nominal damages if the Lindsays have not proven any actual loss,

    d. Actual damages suffered by the Lindsays, or

    e. A sum that should reasonably be paid for the use of the land.

Here, I find Stephen's trespass involved altering the trees on the Lindsays' side of the property line. So, I find it appropriate to award the Lindsays their actual proven damages.

22. The Lindsays say the result of Stephen's trespass was that 3 trees died or were severely damaged, and had to be removed in March 2022. They rely on a July 15, 2021 letter from Jeff Judson of Cody Tree Service, who inspected the trees and wrote "topping cuts on the mugo pine trees were not back to branch collar or secondary lateral branches, thus have caused excessive die back" (reproduced as written). They went on to write that the trees' "canopy reduction performed by the neighbour was too excessive and has killed the trees." The letter indicates Jeff Judson is a certified arborist and is ISA Tree Risk Assessment Qualified. I accept Jeff Judson is qualified under the CRT's rules to provide an opinion on the cause of death and damage to the disputed trees. While it is undisputed that Stephen trimmed the trees, I place no weight on their comment that the canopy reduction was "performed by the neighbour", as I find they did not observe that themself but were likely given that information by the Lindsays.

23. For their part, the Harrises say the trees ultimately died from lack of water. They submitted a February 22, 2022 report from Jason Gabel, Certified Landscape Horticulturist. I also accept Jason Gabel is qualified under the CRT's rules to provide an opinion on the cause of the trees' death and damage. In their report, they said while the pruning was a contributing factor to the trees' death, it was "not likely the ultimate cause. The final cause of death was lack of irrigation in the Spring and early Summer [of 2021]" as exacerbated by a heat wave in June and July.

24. I prefer Jeff Judson's opinion to that of Jason Gabel because Jeff Judson is a tree specialist and provided their opinion closer to the time Stephen cut the trees in October 2020. Also, Jeff Judson provided a conclusive cause of the trees' death and damage in July 2021. Jason Gabel's later report suggested that in July 2021, the trees may still have been alive but dying, but I note they did not see the trees at that time. Jason Gabel acknowledged the role the pruning played in causing the trees'

death, and further, points to the Harrises' own actions in pruning their cedar hedge in October 2020 as a potential factor in the trees' death. On balance, I accept 2 of the trees were likely dead and 1 was severely damaged due to pruning at the time of Jeff Judson's letter. So, I find the Lindsays are entitled to compensation for the dead and damaged trees, to the extent the trees belonged to them.

25. The Lindsays did not submit survey evidence delineating the boundary with the Harrises' property along the hedge. Pictures submitted by the parties show a string line hung by Stephen to establish the property line, but I find they do not assist for the following reasons. First, the Lindsays dispute Stephen's methodology in hanging the string line. Second, the Harrises say that where the pictures appear to show the trees on the Lindsays' property, the Lindsays must have moved the stakes Stephen planted in the ground. Third, the trees each appeared to have several stems growing out of the ground that reached in different directions including towards the Harrises' property, rather than a single trunk. I find this makes it difficult to establish whether the trees were solely on the Lindsays' property or whether they straddled the 2 properties. The Lindsays provided an email from previous owners of their property who said the trees were planted on their land, but I find this insufficient to establish the trees' ownership.

26. In the absence of a professional survey establishing the property line along the hedge and an expert opinion confirming the multi-stemmed trees were only on the Lindsays' property, I find it unproven that the trees were not shared trees that straddled both properties. The law is that a shared tree is held by the owners of the adjoining properties as tenants in common (see *Anderson* and *Demenuk*). So, I find the Lindsays are entitled to half the trees' replacement cost. The Lindsays submitted estimates to replace the trees that total $2,970 before tax, which I calculate to be $3,326.40 after tax. I find the Lindsays are entitled to $1,663.20 for the trees' replacement cost. I order Stephen to pay the Lindsays this amount, subject to any award I make for his counterclaim.

Alleged breach of building scheme, nuisance and trespass – Stephen's counterclaim

27. In his counterclaim, Stephen says the Lindsays breached the building scheme tree-height restriction, and caused a nuisance by leaving the dead trees growing out of the hedge to block the Harrises' view for about 13 months. Stephen claims $3,500 in damages. The Lindsays do not dispute the applicability of the building scheme, but say they did not breach it. They also say the dead trees were not a nuisance.

28. A statutory building scheme is a form of restrictive covenant that a seller of 2 or more parcels of land may impose under section 220 of the *Land Title Act.* The community of interest established by a statutory building scheme requires "reciprocity of obligation", meaning each lot owner bears the burden of the restrictions that run with their land while also benefitting from other owners' restrictions that run with their land (see *Hemani v. British Pacific Properties Ltd.*, 1992 CanLII 575 (BC SC), affirmed 1993 CanLII 2300 (BC CA)). So, a statutory building scheme's terms can be enforced by property owners against one another within the building scheme area. Here, the relevant part of the building scheme says homeowners cannot maintain a hedge greater than 1.22 metres "beyond the front Building Line of the Principal Building" or greater than 1.83 metres on the rest of the lot. The building scheme does not include a definition of "front Building Line" or otherwise explain how it is determined.

29. Stephen says the Lindsays allowed trees in the hedge beyond the front building line of their house to grow well over the 1.22 metre limit, and even taller than the 1.83 metre limit for the rest of the lot. Stephen says the Lindsays' front building line extends east from the west corner of their garage straight across it to the hedge, so the disputed trees were in front of the Lindsays' front building line. In contrast, the Lindsays say the front building line extends north at an angle that runs parallel with the curved street, so their trees were behind their front building line. Neither party provided expert evidence about how a front building line is measured, which I find is necessary as it is outside an ordinary person's knowledge and experience. In addition, while Stephen submitted photos of the hedge and trees, I find they do not clearly show the trees were over 1.83 metres as alleged. I note the photo Stephen

relies on to prove the trees were 76 inches (1.93 metres) tall only shows the tops of the trees next to part of a measuring tape, not the entire measurement. For these reasons, I find it unproven that the Lindsays' breached the building scheme. I dismiss Stephen's claim for damages on this basis.

30. Stephen also says the Lindsays' failure to remove the dead trees was a nuisance as the trees were unattractive and blocked his view, which interfered with the use and enjoyment of his property. 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).

31. In *Tessaro v. Langlois*, 2018 BCCRT 296, a non-binding but persuasive decision, a tribunal member found there is no legal remedy for "visual nuisance" or loss of view. She relied on *Zhang v. Davies*, 2017 BCSC 1180, where the court said, "loss of a view – even a beautiful view – cannot be characterized as interference with the use of land that would be intolerable to an ordinary person, so as to create an actionable nuisance." In *Christensen v. District of Highlands,* 2000 BCSC 196, the court concluded that failure to preserve a property's aesthetic appearance does not create an actionable nuisance. Based on these decisions, I dismiss Stephen's claim in nuisance for the loss of his view due to the unattractive dead trees.

32. Next, Stephen seeks amounts for the Lindsays' removal of the severely damaged tree in March 2022. He claims $43.75 for half the cost of replacing that tree. I have already found the Lindsays are entitled to half the cost of replacing all 3 disputed trees based on Stephen's proven trespass. Further, I find as Stephen's trespass killed or severely damaged the shared trees, he is not entitled to compensation to replace the damaged tree the Lindsays subsequently had removed (see *British Columbia v. Zastowny*, 2008 SCC 4 (CanLII) at paragraph 20).

33. Stephen also seeks half the cost of a fence he built to regain privacy he says he lost when the Lindsays removed the damaged tree. In *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468, the court found there is no common law cause of action for breach of privacy. A claim for breach of privacy under the *Privacy Act* must

be brought in the BC Supreme Court. So, to the extent Stephen claims relief for a breach of privacy, I refuse to resolve that claim under CRTA section 11.

34. Next, Stephen claims $500 in punitive damages for the Lindsays' removal of the damaged tree. The purpose of punitive damages is to punish extreme conduct worthy of condemnation. Punitive damages are awarded in exceptional circumstances to punish "malicious, oppressive and high-handed" behaviour that offends a court or tribunal's "sense of decency" (see *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 (CanLII) at paragraph 36). I find there is no evidence of such behaviour in the removal of the tree. I dismiss this part of Stephen's claim.

35. Finally, Stephen says Lindsay trespassed on his property and caused a nuisance when she threw plant trimmings and debris into the Harrises' front yard on January 22, 2021.

36. Security camera footage in evidence confirms Lindsay threw some plant debris onto the Harrises' property, and Lindsay admits she threw trimmings into the Harrises' yard. However, she says she was returning yard waste Stephen had cut on his property that he neglected to tidy up and that had blown onto the Lindsays' land. Even if that is the case, I find Lindsay trespassed on the Harrises' land. I dismiss this part of Stephen's claim against Joel. I find it is appropriate to award nominal damages for this trespass, as Stephen has not proven actual loss, and there is no evidence a sum should reasonably be paid for Lindsay's use of the Harrises' property. The purpose of nominal damages is to recognize the infringement of a legal right (see *Skrypnyk v. Crispin*, 2010 BCSC 140), though the court in *Skrypnyk* appears to suggest all circumstances can be considered when deciding the amount of nominal damages. Given Lindsay's admission and the security camera footage, I award nominal damages of $50. I order Lindsay to pay Stephen this amount for trespass. I do not find Lindsay's trespass rose to the level of warranting punitive damages, so I order none. Further, I find there is no evidence Lindsay's actions resulted in a substantial and unreasonable interference with Stephen's use and enjoyment of his property, and so amounted to a nuisance. I dismiss this part of Stephen's claim.

CRT FEES, EXPENSES, AND INTERESTS

37. The *Court Order Interest Act* (COIA) applies to the CRT. I find the Lindsays are entitled to pre-judgment interest on the $1,663.20 damages award from October 30, 2020, the "late October 2020" date by which I find the cause of action arose, to the date of this decision. This equals $94.34. I find Stephen is entitled to pre-judgment interest on the $50 damages award from January 22, 2021 to the date of this decision. This equals $2.78.

38. 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. Each party was partially successful in their claims, so I find that on balance, they should each bear the cost of their paid CRT fees. Neither party claims dispute-related expenses, so I order none.

ORDERS

39. In dispute SC-2022-008190, within 30 days of the date of this order, I order Stephen to pay the Lindsays a total of $1,757.54, broken down as follows:

    a. $1,663.20 in trespass damages, and

    b. $94.34 in pre-judgment interest under the COIA.

40. I dismiss the Lindsays' claims against Denise.

41. In dispute SC-2023-000866, within 30 days of the date of this order, I order Lindsay to pay Stephen a total of $52.78, broken down as follows:

    c. $50 in trespass damages, and

    d. $2.78 in pre-judgment interest under the COIA.

42. I refuse to resolve Stephen's claim for breach of privacy under CRTA section 11.

43. I dismiss Stephen's remaining claims.

44. The Lindsays and Stephen are each entitled to post-judgment interest, as applicable.

45. 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.

Megan Stewart, Tribunal Member