



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Leong v. Powell*, 2024 BCCRT 1212

B E T W E E N :

WILLIAM LEONG

APPLICANT

A N D :

SOPHIA POWELL and DANIKA POWELL

RESPONDENTS

A N D :

WILLIAM LEONG

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Peter Mennie

INTRODUCTION

1. The applicant and respondent by counterclaim, William Leong, and the respondents, Sophia Powell and Danika Powell, are neighbours. Mr. Leong says that the Powells damaged plants on his property. He claims \$3,000 for loss of enjoyment of his property, loss of privacy, and costs to replace the plants.
2. The Powells say that Danika Powell only trimmed a few bamboo branches that crossed the property line. In her counterclaim, Sophia Powell says Mr. Leong's bamboo spread onto her property and caused damage. She also says Mr. Leong damaged her fence by using a soaker hose and attaching a tree to her fence. She claims \$3,000 for damage to her property.
3. All the parties are self-represented. The claim and counterclaim involve the same parties and issues, so I have issued one decision for both disputes.
4. For the reasons below, I allow Mr. Leong's claim in part and dismiss Sophia Powell's counterclaim.

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)*. 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.
6. Section 39 of the CRTA says the CRT has discretion to decide the hearing's format. Neither party requested an oral hearing, however, in some respects both parties call into question the other's credibility. In *Downing v. Strata Plan VR2356*, 2023 BCCA 100, the BC Court of Appeal recognized that oral hearings are not necessarily required where credibility is in issue. It depends on the advantages of an oral

hearing and cross-examination balanced against the CRT's mandate to resolve disputes in an accessible, speedy, economical, informal, and flexible manner. In this case, both parties provided their respective submissions and included photos and videos to support their claims. The amounts at issue are small and an oral hearing would delay resolution of this dispute. So, I find that the advantages of an oral hearing do not outweigh the benefits of resolving this dispute through written submissions. I have decided this dispute on the documentary evidence and written submissions before me.

7. 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 court.
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.

Preliminary Issues – Evidence and Legal Representation

9. In her submissions, Danika Powell provided links to websites. CRT staff instruct parties not to provide website links as evidence because website content can change over time. There is no way for a CRT member to know whether they are viewing the same content that the parties viewed. I did not review or rely on these website links in coming to my decision.
10. Next, Sophia Powell suggests that Mr. Leong broke CRT Rules by using a lawyer to write his submissions. I note this allegation was raised in Sophia Powell's reply submission in her counterclaim, so Mr. Leong did not have a chance to respond. In any event, CRT Rule 1.16(3) allows parties to use helpers, including lawyers. A party does not need CRT permission to use a helper for their submissions. So, I find there is nothing to support Sophia Powell's allegation that Mr. Leong broke the CRT Rules.

ISSUES

11. The issues in this dispute are:

- a. Did the Powells damage Mr. Leong's plants and, if so, is he entitled to damages?
- b. Did Mr. Leong damage Sophia Powell's property and, if so, is she entitled to damages?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, Mr. Leong must prove his claims on a balance of probabilities, meaning more likely than not. Sophia Powell must prove her counterclaim to the same standard. I have read all the parties' submissions and evidence. It is obvious that the parties have a poor relationship and both parties provided character evidence which is not relevant to this dispute. In my decision below, I refer only to the evidence and argument that I find relevant to decide the issues raised in the claim and counterclaim.

Did the Powells damage Mr. Leong's plants and, if so, is he entitled to damages?

13. As noted above, the parties are neighbours. A fence divides the two properties.

14. Mr. Leong says that, on August 7, 2023, Danika Powell used a pole pruner to reach over the fence and cut his bamboo plants and hydrangea. Mr. Leong admits that he lost his temper which led to an altercation where he tied the pole pruner to a tree. He says Danika Powell damaged his boxwood shrub when she entered his property to retrieve the pole pruner.

15. Mr. Leong provided photos which show several bamboo stalks that were cut just above the fence's height and cut bamboo stems which he says were thrown into his

yard. He also provided a photo of his boxwood shrub with a bent branch and a photo of his hydrangea which shows a small cut stem.

16. The Powells agree that Danika Powell cut Mr. Leong's bamboo. Sophia Powell admits that she threw bamboo stems into Mr. Leong's yard. However, the Powells say that Danika Powell only cut a few bamboo branches which crossed the property line and some of these branches were already dead. Danika Powell says the bamboo leaned onto their side of the property line, however, after cutting the bamboo it leaned back onto Mr. Leong's property. She says this is why Mr. Leong's photos appear to show that the bamboo was cut on his side of the property line. The Powells say it was Mr. Leong who damaged the hydrangea and boxwood shrub during the parties' altercation.
17. Having reviewed the photos and the parties' respective accounts, I find it most likely that Danika Powell cut the tops off Mr. Leong's healthy bamboo on his side of the property line. Mr. Leong provided photos before this incident which show his bamboo growing straight up on his side of the property with no curve or bend in the stalk. The bamboo cuttings Sophia Powell threw across the fence also appear to have been healthy and growing straight. I note, as well, that when Danika Powell emailed a horticulturalist for expert evidence (discussed below), she asked if bamboo could be killed if you cut "approximately 5 feet from the top". So, I find that Danika Powell "topped" Mr. Leong's bamboo approximately five feet from the top.
18. Neither party said how many bamboo plants were cut. The parties' photos are taken from multiple angles making this difficult to determine. Based on the limited evidence before me, I find that Danika Powell cut four of Mr. Leong's bamboo plants.
19. The Powells say, and Mr. Leong does not deny, that his hydrangea and boxwood have recovered. I find that the cause of the damage to Mr. Leong's hydrangea and boxwood is unproven and, in any event, was not significant.

20. 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). I find that Danika Powell committed trespass when she used the pole pruner to cross the property line and cut Mr. Leong's bamboo.
21. The parties disagree about whether Danika Powell killed the bamboo. Mr. Leong provided an email from a professional gardener who says that bamboo can be killed if it is cut to ground level. He also provided an email from a researcher with a degree in agriculture science who says that bamboo can die if it loses a large percentage of its leaves. The Powells provided an email from a horticulturalist who says you can cut five feet off the top of bamboo and it will not die, however future growth will be from new shoots from the base.
22. I accept that the gardener, researcher, and horticulturalist are all qualified to give expert evidence about bamboo. Mr. Leong's experts say that bamboo will not die unless it is cut to ground level or loses a significant number of its leaves. The photos show that the bamboo was not cut below the fence level and the stalks still had some leaves. As well, Mr. Leong provided no evidence that he bought new bamboo plants which suggests that the bamboo did not die. So, I find the bamboo did not die, however, as noted by the horticulturalist, the bamboo's future growth will be from new shoots from the base.
23. To summarize, I find that Danika Powell used a pole pruner to cross the parties' property line and cut approximately five feet off the top of four of Mr. Leong's bamboo plants. I find that this did not kill Mr. Leong's bamboo, however it did result in a loss of privacy because the bamboo would no longer grow upward.
24. I turn to damages. In *Kates v. Hall*, 1991 CanLII 1127 (BCCA), the British Columbia Court of Appeal considered damages for tree cutting. The court found that the appropriate award included a payment for reasonable remedial work plus an amount to compensate for loss of use and enjoyment of property.

25. Mr. Leong says that his bamboo provided shade, privacy, and was visually pleasing. He says it is less pleasant to be in his backyard now. He provided no evidence to show he paid for any remedial work. He claims \$3,000 in damages.
26. Mr. Leong's evidence includes a news article about *0973210 B.C. Ltd. v Khatkar*, 2023 BCSC 1529, a case where the defendant cut a neighbour's cedar trees and hedges. The court awarded \$109,915. However, the defendant in that case trespassed multiple times and permanently damaged over 74 of the plaintiff's cedar trees. The facts in this dispute are far less serious.
27. Mr. Leong relies on *Kates* where the defendant cut down 13 of the plaintiff's trees and the court awarded \$1,000 per tree. He also relies on *Kiessling v. Varga*, 2002 BCSC 90, where the defendant removed branches from some of the plaintiff's trees without permission, resulting in a loss of privacy. The court awarded \$2,000.
28. Past CRT decisions offer some guidance. In *Heidarian v. Shay*, 2022 BCCRT 1282, a tribunal member awarded \$300 for the partial loss of a magnolia tree. In *Whitehouse v. Larix Landscape Ltd.*, 2019 BCCRT 1296, a tribunal member awarded \$3,000 where the respondent removed branches from a tree which resulted in a loss of privacy.
29. I find that the damage done in this case is more serious than in *Heidarian* where there was no loss of privacy. However, I find it does not rise to the level of *Kates*, which involved multiple trees, or *Kiessling* and *Whitehouse* which involved trees, which are more difficult to replant than bamboo, and resulted in a more significant loss of privacy. Considering all the circumstances, on a judgment basis, I find that \$1,000 is a fair amount of damages to compensate Mr. Leong for the loss of his bamboo.
30. Mr. Leong named Sophia Powell and Danika Powell as the respondents. A principal is jointly and severally liable with their agent for any liability in tort committed by the agent while acting within the scope of their authority (see *Keddie v. Horne*, 1999 BCCA 541). The Powells agree that Danika Powell cut Mr. Leong's bamboo at

Sophia Powell's direction. So, I find that Danika Powell was acting as Sophia Powell's agent when she trespassed on his property. This means that both respondents are liable for the \$1,000 damages award.

Did Mr. Leong damage Sophia Powell's property and, if so, is she entitled to damages?

31. Sophia Powell says that the bamboo's roots and rhizomes spread onto her property and caused damage. She also says that Mr. Leong damaged her fence by using a soaker hose and attaching his tree to her fence with a wire and screw. I deal with each of these allegations below.
32. I start with the bamboo. Sophia Powell provided photos which show two bamboo shoots growing near the fence on her side of the property line. She also provided an invoice dated November 7, 2023, where she paid \$400 for "bamboo removal". A photo from the same day shows two rhizomes being dug up. She says Mr. Leong's bamboo damaged her fence and threatens the integrity of her sidewalk and home's foundation.
33. I find that Sophia Powell is making a claim in nuisance. A nuisance is a substantial (non-trivial) and unreasonable interference with the use and enjoyment of property (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13). 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).
34. I find that the bamboo was not an unreasonable interference with Sophia Powell's property. The photographs Sophia Powell provided only show two small bamboo shoots growing next to her fence. These photos also show many other weeds in her backyard. Though Sophia Powell says removing the bamboo rhizomes is difficult and requires excavation, there is no evidence before me to suggest that the bamboo removal was any more difficult than routine yard maintenance.

35. As noted above, a person is only liable in nuisance if they failed to take reasonable steps to prevent or remedy the nuisance. I find that Mr. Leong took reasonable steps to prevent the bamboo from crossing the property line. Mr. Leong provided photos showing that he planted his bamboo with barriers. Sophia Powell's response submissions in SC-2023-008009 say that Mr. Leong moved some of his bamboo into pots which would stop the bamboo from spreading. She provided no evidence that any bamboo returned after the bamboo removal in November 2023. So, I find that Mr. Leong acted reasonably both to prevent the bamboo from crossing the property line and to prevent future issues in 2024 and going forward.
36. Finally, I find that Sophia Powell has not proven that the bamboo damaged her fence, sidewalk, or home. Again, the photos in evidence only show two small bamboo shoots growing near the fence. There is no evidence that the bamboo caused any physical damage to Sophia Powell's sidewalk or foundation. As I discuss below, any damage to the fence was more likely caused by age and weather.
37. To summarize, I find that Sophia Powell has not proven that Mr. Leong's bamboo was a non-trivial nuisance, that Mr. Leong failed to exercise reasonable care to prevent or remedy the nuisance, or that she suffered any damage. So, I dismiss her claims related to Mr. Leong's bamboo crossing the property line.
38. I turn to the fence. Sophia Powell says that Mr. Leong used a screw and wire to secure his tree to her fence. She says this damaged one of the fence panels.
39. Mr. Leong provided videos from a contractor discussing the state of Sophia Powell's fence. However, the contractor did not state their qualifications as required by CRT Rule 8.3(2), so I do not accept this as expert evidence and have not considered it in my decision.
40. I find that Mr. Leong did commit a nuisance when he used a screw and wire to secure his tree to Sophia Powell's fence. The photos show that the wire pulled on a

fence panel which came loose. I find that this was a substantial (non-trivial) interference with Sophia Powell's use and enjoyment of her property.

41. However, I find that Sophia Powell has not proven that she suffered any damages because of the nuisance. Mr. Leong provided a photo showing that the damaged fence panel had been repaired and that the screw and wire were removed. So, I dismiss Sophia Powell's claims related to Mr. Leong attaching his tree to her fence.
42. Finally, I turn to Sophia Powell's claim that Mr. Leong used a soaker hose which caused water damage to her fence. Mr. Leong denies this and says he used a drip irrigation system. I find nothing turns on this and that Sophia Powell's claim is essentially that Mr. Leong's watering system damaged her fence.
43. I acknowledge Mr. Leong's argument that he has not used his drip irrigation system since 2021, so this claim is barred by the *Limitation Act*. However, section 22 of the *Limitation Act* allows a party to bring a counterclaim if it is connected or related to the original claim, even if the applicable limitation period for the counterclaim has expired. I am satisfied that Sophia Powell's claim about fence damage is related to Mr. Leong's claim about bamboo, so the initial limitation period does not apply.
44. Given that the fence is exposed to the rain, I find that Mr. Leong's watering system getting Sophia Powell's fence wet was trivial. I note, as well, that Mr. Leong provided photos showing that Sophia Powell's fence is deteriorating generally and not just on his side of the property. So, I find that any rot or damage to the fence was caused by exposure to the elements and the passage of time rather than Mr. Leong's actions. I dismiss Sophia Powell's claims related to Mr. Leong's watering system.

INTEREST, FEES, AND EXPENSES

45. The *Court Order Interest Act* applies to the CRT. However, there is no evidence that Mr. Leong paid to replace the bamboo, so I order no interest.

46. 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. Mr. Leong successfully proved that Danika Powell trespassed on his property, so I find it is appropriate to order the Powells to reimburse him \$125 for his paid CRT fees. Sophia Powell was not successful, so I do not order any reimbursement of her CRT fees. Neither party claimed any dispute-related expenses.

ORDERS

47. Within 30 days of the date of this decision, I order the Powells, jointly and severally, to pay Mr. Leong a total of \$1,125 broken down as follows:

- a. \$1,000 as damages,
- b. \$125 in CRT fees.

48. Mr. Leong is entitled to post-judgment interest, as applicable.

49. I dismiss Sophia Powell's counterclaim.

50. This is a validated decision and order. 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.

Peter Mennie, Tribunal Member