Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Canaday v. Promontory Lake Estates Homeowners' Association*, 2022 BCCRT 1016

B E T W E E N :

JAMES CANADAY and CAROLE MASSE

APPLICANTS

A N D :

PROMONTORY LAKE ESTATES HOMEOWNERS' ASSOCIATION, NORBERT BLUHM, and RON SNOW also known as JAMES SNOW

RESPONDENTS

A N D :

JAMES CANADAY and CAROLE MASSE

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about who has responsibility for landscaping in a non-strata leasehold residential complex managed by a homeowners' association.

2. The applicants, James Canaday and Carole Masse, own a home on a leasehold lot (Unit 233) in a residential complex. The respondent society, Promontory Lake Estates Homeowners' Association (PLE) manages the complex. The applicants say PLE wants to cut down a large cedar hedge on Unit 233. They ask for an order that PLE not remove the hedge. Mr. Canaday represents the applicants.

3. PLE says the hedge is on common property and so PLE is responsible for maintaining the hedge under its bylaws. It also says the hedge has overgrown the common property road, affecting street maintenance, which the applicants deny. Finally, PLE says its arborist recommended removing the hedge. PLE counterclaims $500 in legal expenses and asks the CRT to allow it to remove the hedge. PLE is represented by a director.

4. The respondents, Norbert Bluhm and Ron Snow (also known as James Snow), are current or former PLE directors. They deny any wrongdoing. Mr. Bluhm and Mr. Snow are self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over certain society claims under section 129 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 says 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.

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 and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under CRTA section 131, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate. Ordering a party to do, or not do, something is known as injunctive relief. Contrary to the respondents' arguments, I find the CRT has authority to grant injunctive relief in society disputes, as section 131 specifically allows the CRT to order a party to refrain from doing something.

PRELIMINARY ISSUES

Evidence

9. In its counterclaim submissions, PLE said it attached a copy of its "sublease, and rules and regulations" but did not submit those documents as evidence. I asked CRT staff to ask PLE for the documents, which it submitted along with a complex map, which I infer is the lease plan referred to as Appendix B in the sublease agreement. The applicants were provided with copies of these documents and given an opportunity to provide submissions on them.

10. Contrary to the applicants' submissions, I do not find the new evidence has "no merit". I find the sublease and PLE's rules and regulations are relevant in determining who is responsible for the hedge. In any event, as PLE relied on the documents in its submissions, I find PLE would be prejudiced if I were to decide the dispute without considering the actual documents PLE intended to submit as evidence. As the

applicants had the opportunity to review and provide further submissions on this new evidence, I find accepting these documents is not procedurally unfair to them.

CRT Negotiation Communications

11. As part of their evidence, the applicants submitted excerpts from communications between the parties and CRT staff during the facilitation stage of this dispute. This included a CRT note warning that communications made during negotiations are confidential and cannot be disclosed during the tribunal decision process.

12. Under section 89 of the CRTA, communications and information provided during the dispute's facilitation stage are confidential and are not admissible as evidence unless all the parties consent. As there is no indication that the parties consented to these communications being submitted as evidence, I have not considered them.

ISSUES

13. The issues in this dispute are:

    a. Are either Mr. Bluhm or Mr. Snow personally liable to the applicants?

    b. Is PLE entitled to remove the hedge at Unit 233?

    c. Is PLE entitled to reimbursement of any of its claimed $500 in legal expenses?

EVIDENCE AND ANALYSIS

14. In a civil claim such as this the applicants have the burden of proving their claims on a balance of probabilities (meaning "more likely than not"). PLE has the same burden to prove its counterclaim. I have read the parties' submissions and weighed the relevant evidence, but only refer to that which is necessary to explain and give context to my decision.

Background

15. According to PLE's constitution, its purpose is to control and manage the common property and facilities within the PLE complex and PLE's maintenance fund, and to liaise with provincial departments and agencies on behalf of the members. In other words, PLE is a homeowners' association acting on behalf of all homeowner members in the 241 lot leasehold complex.

16. PLE submitted a generic copy of the sublease agreement between the "owners" and the original developer, which holds the main lease for the land. The agreement says owners, such as the applicants, sublease the lot (or unit) from the developer. It also says the future homeowners' association (PLE) will take over administration and management of the residential complex from the developer. Given the applicants do not dispute the contents of that agreement, I find it applies to PLE and the applicants.

17. Schedule B to the sublease agreement is a lease plan. Both parties provided copies of the same lease plan with slightly different markings which I find identify various hedges and shrubs throughout the complex. I find all versions of the lease plan are identical in the location and size of the Units and so I find they accurately show the boundaries of the applicants' leasehold lot, which is labelled Unit 233.

18. The sublease and PLE's bylaws require PLE to manage any common property in the complex. The bylaws define "common property" as land or buildings not included in a leasehold lot, with some exceptions, which I will explain in more detail below.

19. Based on photos submitted by PLE and the applicants, I find there is a large mature cedar hedge at the edge of the lawn on Unit 233, which appears to be 6 feet or taller and which overhangs the entire curved gutter and curb portion of the road.

20. It is undisputed that PLE hired Joe Skillen Tree Services to provide an opinion and quote for pruning hedges and trees bordering the roads on the complex. In an August 27, 2021 report, arborist Felicia M-Lipka said Unit 233's hedge was overgrown for the space. She said if the overgrown area was pruned from the hedge, it would leave a

dead spot. The arborist recommended removing the hedge and replacing it with another plant.

21. According to the September 14, 2021 directors' meeting minutes, PLE decided to trim Unit 233's hedge at a 45 degree angle to remove the overgrown portion. However, at a September 20, 2021 meeting, PLE decided to accept the August 2021 arborist's recommendations. I infer that means PLE decided to remove Unit 233's hedge.

22. On September 22 or 23, 2021 Mr. Bluhm and Mr. Snow hand delivered a letter from PLE to the applicants, along with a copy of Ms. M-Lipka's report. Although neither party submitted a copy of the letter as evidence in this dispute, the parties agree it contained a release form for the applicants to sign, which would allow PLE to remove the hedge at Unit 233.

23. It is undisputed that the applicants have not signed the consent form and that PLE has taken no further action to remove or prune the hedge at this time.

Mr. Bluhm and Mr. Snow

24. It is undisputed, and PLE's directors' meeting minutes show, that Mr. Bluhm and Mr. Snow were PLE directors in September 2021. The applicants say they named Mr. Bluhm as a respondent because he ordered the arborist report and made the motion to accept the arborist's recommended hedge removal at the September 20, 2021 directors' meeting. I infer the applicants argue Mr. Bluhm's actions as director were negligent.

25. Section 53 of the *Societies Act* (SA) requires a director to act honestly and in good faith, with a view to the best interests of the society in exercising the care, diligence, and skill of a reasonably prudent person in comparable circumstances. Directors must also act in accordance with the SA and the society's bylaws, and act with a view to the purposes of the society.

26. This provision is similar to section 142 of the *Business Corporations Act* (BCA), which requires directors and officers to act honestly and in good faith, with a view to the best interests of the company in exercising the care, diligence, and skill of a reasonably prudent person in comparable circumstances.

27. In *Jaguar Financial Corporation v. Alternative Earth Resources Inc.,* 2016 BCCA 193, the court considered how to analyse decisions of directors within a shareholder's complaint of unfairly prejudicial conduct. At paragraph 114 the court held that corporate directors owed their duty to the corporation and not to any individual shareholder.

28. BCA section 142 is very similar to SA section 53. So, I find the reasoning from *Jaguar* reasonably applies to claims against society directors by society members. I therefore apply that reasoning in this case. I find the fiduciary duties of society directors set out in SA section 53 are owed to the society and not to individual society members. So, I dismiss the applicants' claims against Mr. Bluhm as a director.

29. The applicants make no specific claims about Mr. Snow's actions as director. To the extent the applicants make such a claim, I dismiss it, for the same reasons as above.

30. In their final reply submissions, the applicants say that Mr. Bluhm and Mr. Snow breached the society's bylaws, and the *Privacy Act* by entering onto Unit 233 property to deliver PLE's letter in September 2021. For the below reasons, I refuse to resolve these claims.

31. First, the applicants did not claim any privacy or bylaw breach in their application for dispute resolution. The applicants only raised the claim after Mr. Bluhm and Mr. Snow already provided their response submissions. I find neither Mr. Bluhm nor Mr. Snow had any notice of this claim against them and so have not had the opportunity to provide submissions or evidence in defence of this claim. So, I find it would be procedurally unfair to decide the applicants' claim of privacy violation or bylaw breach in this dispute.

32. Second, there is no common law tort (civil wrong) for breach of privacy in B.C. (see *Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468). The *Privacy Act* creates a statutory tort of invasion of privacy, with some exceptions. However, those claims must be brought in the BC Supreme Court. So, I find the CRT has no jurisdiction (legal authority) to decide any claim for breach of privacy. Under section 11 of the CRTA, the CRT may refuse to resolve a claim if it is satisfied the claim is outside its jurisdiction.

33. Third, the applicants request no specific remedy from either Mr. Snow or Mr. Bluhm, or any remedy related to the alleged bylaw or privacy breach. Their requested order about the hedge has no connection at all to the directors' actions in delivering a letter, even if the applicants could show a bylaw or privacy breach.

34. For all the above reasons, I refuse to resolve the applicants' claim that Mr. Bluhm and Mr. Snow breached any privacy rights or bylaws by entering onto Unit 233 property.

Is PLE entitled to remove the hedge?

35. PLE says the hedge is located within a 2-foot setback from the road for street lights and poles. It also says the hedge is outside of the common property fence on Unit 233, which was built and is maintained by PLE. PLE argues that the hedge has always been treated as common property and trimmed by PLE's landscaping crews. I take PLE to argue that, for all these reasons, the hedge is common property.

36. PLE filed a set of bylaws with the BC Registrar on October 16, 2018, which I find apply to this dispute.

37. As a side note, I acknowledge the applicants' argument that the 2018 bylaws are not valid because the set of bylaws were filed without a copy of any general meeting special resolution approving the bylaws. So, the applicants argue, the 2018 bylaws were not approved by the membership. However, the applicants did not submit any evidence, such as general meeting minutes, showing that the bylaws were not approved.

38. In any event, Section 17 of the SA only requires bylaw alterations to be approved by a ¾ vote of members at a general meeting. It does not require a set of existing bylaws to be approved before being filed with the B.C. Registrar.

39. Under section 240 of the SA, all pre-existing societies were required to file a complete set of existing bylaws within 6 years of the SA coming into force in 2016. So, I find it likely that PLE filed the 2018 set of bylaws to comply with SA section 240, rather than because of any bylaw alterations. This conclusion is supported by the fact that the applicants' submitted bylaw excerpts they say are from before 2018 are identical to the same bylaws found in the set of bylaws filed in 2018. So, I find the 2018 bylaws are valid and that they are identical to the pre-2018 bylaws the applicants rely on in any event.

40. Turning back to the bylaws themselves, bylaw 4 requires PLE to control, manage and administer common property and to maintain and repair any common property landscaping. Bylaw 1 defines "common property" as the land and buildings in a leasehold plan but not in a leasehold lot (unit), and includes pipes, wires, cables or other facilities for the passage of water, drainage, and utilities.

41. The leasehold plan shows the roadways, lake, and RV parking lot are common property, as they are not marked as a leasehold lot. However, unit 233 is clearly marked as a leasehold lot. Further, no version of the lease plan shows a 2 foot setback from the roadway into Unit 233 in favour of PLE, or as common property. Nor does it show the alleged common property fence PLE refers to. So, based on bylaw 1, and the applicants' photos, I find the hedge is clearly located on Unit 233 and is therefore not common property.

42. Bylaw 3 requires an owner to maintain and repair their building and portion of lease lot not designated as common property. It also requires an owner to obtain the written permission of PLE directors before altering their lease lot exterior or building. This is consistent with PLE rule 9 which requires all owners to keep their lot and home in reasonable repair. Further, rule 24 says that any addition, removal, or modification of trees or shrubs shall be in keeping with the general overall décor of the community

and the PLE may require an owner to remedy any unacceptable changes, at the owner's expense.

43. I find the bylaws and rules together mean that owners, such as the applicants, must take care of their own lease lot and any hedges or shrubs on it, at their own expense. This is consistent with section 14 of the sublease agreement, which says that the sublessee (here, the applicants) are responsible for maintaining, repairing, and replacing "any and all things whatsoever" on the Unit.

44. Although PLE says it has maintained Unit 233's hedge, it provided no supporting evidence such as invoices. I find such an argument is inconsistent with PLE's bylaws and rules which I find require an owner to maintain the landscaping on their own leasehold lot. Further, even if PLE did maintain the hedge, I would find that alone does not make the hedge common property.

45. Finally, I find it unlikely PLE would ask the applicants to consent to the hedge's removal if the hedge was common property that PLE already had control over.

46. For all the above reasons, I find the hedge is not common property and so I find PLE has no authority to remove the hedge as part of its duty to repair and maintain common property.

47. I turn now to PLE's argument that it must remove the hedge because it has overgrown the common property roadway. PLE argues the overgrowth interferes with snow removal and street sweeping, which the applicants deny. Contrary to the applicants' arguments, I accept that street sweeping and snow removal are part of road maintenance and that PLE is required to maintain the roads as they are common property.

48. Although I find the photos show the hedge has overgrown the curb and gutter area of the road, I do not find it obvious that the hedge would prevent snowplows or street sweepers from clearing the roadway. PLE has provided no supporting evidence such as photos of the machines working on the road or statements from machine

operators. So, I find PLE has not proven it must remove the hedge in order to properly maintain and repair the common property roadway.

49. PLE says it is entitled to remove any part of the hedge which overhangs the common property roadway. The law of nuisance is clear that a property owner is entitled to trim the branches of their neighbours' tree to the extent those branches extend over the property line onto the other property (see *Anderson v. Skender,* 1993 CanLII 2772 (BC CA). I find the same principle of nuisance applies here such that PLE is entitled to prune the hedge's branches which extend onto the common property road.

50. I accept the August 27, 2021 arborist report that the hedge is overgrown, and that removing the branches grown over the road will leave an unsightly dead spot. However, I find that does not justify PLE going beyond trimming the overhanging branches to remove the hedge entirely.

51. Overall, I find PLE is not entitled to remove the hedge and order it to refrain from doing so.

PLE's counterclaim for legal expenses

52. PLE counterclaims approximately $500 because it says it had to consult a lawyer in this dispute. Legal fees are generally only recoverable in the context of "costs" or dispute-related expenses, not as damages (see *Voyer v. C.I.B.C.,* 1986 CanLII 1226 (BC SC).

53. Under CRT rule 9.5(3), the CRT will not order reimbursement of legal fees in society disputes except in extraordinary circumstances. I find there is nothing extraordinary about this dispute and so I dismiss PLE's claim for legal fees.

CRT FEES and EXPENSES

54. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find the applicants were successful in their claim against PLE, but not against the individual respondents. So, I order PLE to reimburse the

applicants $225 for paid CRT fees. As PLE was unsuccessful in its counterclaim, it is not entitled to reimbursement of its paid CRT fees.

55. CRT rule 9.5(2) allows the CRT to order reimbursement of reasonable expenses and charges directly related to the conduct of the tribunal process. The applicants claim $433.25 for dispute-related expenses for obtaining an arborist report, BC Registrar searches, registered mail, and ink. The applicants provided no supporting evidence, such as invoices or receipts showing they paid those expenses. Further, I find ink is not a necessary expense for an online tribunal. However, I find it reasonable for the applicants to have paid registered mail fees for serving PLE and for BC Registrar searches. Although the applicants did not break down their expenses, I find they are entitled to reimbursement of $50 for registered mail and registry searches.

56. In any event, I would not have allowed the expense for the arborist report. The arborist's report submitted by the applicants addressed only the health of the hedge rather than whether the hedge was on the subleased lot or common property or whether it overhung the common property road. As the hedge's health was not at issue in this dispute, I find the arborist report not relevant to this dispute.

ORDERS

57. I order PLE to:

    a. Refrain from removing the hedge located on the road side of the applicant's leasehold lot known as Unit 233.

    b. Within 14 days pay the applicants a total of $275, broken down as follows:

        i. $225 as reimbursement for CRT fees, and

        ii. $50 as reimbursement for dispute-related expenses.

58. I refuse to resolve the applicants' claims for invasion of privacy against Mr. Bluhm and Mr. Snow. I dismiss the applicants' remaining claims against Mr. Bluhm and Mr. Snow.

59. I dismiss PLE's counterclaim against the applicants.

60. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Sherelle Goodwin, Tribunal Member