

CANADA / JUDGMENT

Chutter Ranch Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)

2023 BCSC 1730

COURT
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2023 BCSC 1730 Chutter Ranch Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chutter Ranch Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development),

2023 BCSC 1730

Date: 20231004

Docket: S61635

Registry: Kamloops

Between:

Chutter Ranch Ltd. and Hamilton Creek Holdings Ltd.

Appellants

And

Attorney General Ministry of Justice,

His Majesty the King in Right of the Province of British Columbia, and

Minister of Forests, Lands, Natural Resource Operations and Rural Development

Respondents

Before: The Honourable Justice Lamb

On appeal from: An order of the Provincial Court of British Columbia, dated October 13, 2022 (Chutter Ranch Ltd. v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development), Merritt Docket 41604).

Reasons for Judgment

The Appellant appearing on own behalf:

D. Chutter

Counsel for the Respondents:

M.G. Goodwin

C.R. Bargaen

Place and Date of Hearing:

Kamloops, B.C.

May 3-4, 2023

Place and Date of Judgment:

Kamloops, B.C.

October 4, 2023

Introduction

- [1] Chutter Ranch Ltd. and Hamilton Creek Holdings Ltd. (collectively, "Chutter") own private land that is adjacent to Crown range land near Merritt, B.C. known as the Lundbom Commonage.
- [2] Chutter sued His Majesty the King in Right of the Province of British Columbia and the Minister of Forests, Lands, Natural Resource Operations and Rural Development (collectively, the "Province") in Provincial Court pursuant to the Small Claims Act, R.S.B.C. 1996, c. 430. Chutter advanced its claim in negligence and nuisance for the Province's alleged failure to stop the spread of the invasive plant spotted knapweed from Lundbom Commonage onto Chutter's land.
- [3] In essence, Chutter's position at trial and on appeal was that the Province was liable in nuisance and negligence because the Province did not spray herbicide to eradicate spotted knapweed on the Lundbom Commonage pasture adjacent to Chutter's land and the spotted knapweed then spread from Crown land to Chutter's land. Chutter spent approximately \$29,000 to spray herbicide on its own land to eradicate spotted knapweed that allegedly spread from Crown land.

- [4] Following a nine-day trial that took place intermittently over more than two years as a result of COVID-19, Judge Dickey of the Provincial Court of British Columbia issued a 45-page decision on October 13, 2022 dismissing Chutter's action (the "Trial Decision").
- [5] Chutter appeals the dismissal of its claim.
- [6] As he did at trial, David Chutter (principal of both appellants) represented Chutter on appeal. Mr. Chutter is not a lawyer. In the appellant's statement of argument, Chutter raised the following issues on appeal:
- a) The trial judge misstated or misunderstood the evidence;
 - b) The trial judge did not give proper weight to the evidence;
 - c) The trial judge failed to consider all relevant evidence;
 - d) The trial judge made findings of fact that were not supported by the evidence; and
 - e) The trial judge misapplied the law to the facts.
- [7] The Province says that Chutter essentially seeks to reargue its case, which is not the role of this Court on appellate review. The Province says that when a proper standard of review is applied, the trial judge made no reviewable error.
- [8] With respect to the first three alleged errors identified by Chutter, I agree that Chutter is asking the Court to reweigh the evidence. This is not the function of an appellate court. An appeal is not an opportunity for the unsuccessful party to re-argue the issues that were decided by the trial judge: *Berg v. Harbour City Diesel and Offroad Ltd.*, 2012 BCSC 710 at para. 58. At the hearing of this appeal, after outlining the standard of review on appeal, the Court asked Mr. Chutter to focus his oral submissions on reviewable errors.
- [9] Based on the trial judge's findings and the arguments advanced by Chutter in its statement of argument and oral submissions, the issues on appeal may be reframed as follows:
- 1) Did the trial judge err in finding that the Province took reasonable steps to control the spread of spotted knapweed?
 - 2) Did the trial judge err in finding that the Province's interference with Chutter's property was reasonable in light of the overall public benefit of the Province's strategy to control the spread of spotted knapweed?
 - 3) Did the trial judge err in finding that the Province's efforts to control spotted knapweed were core policy decisions that negate any duty of care as opposed to operational implementation of policy decisions?
- [10] Before turning to my analysis of these issues, I will review the nature of an appeal from a decision from the Provincial Court and the standard of review to be applied. I will then outline the findings of the trial judge.

Nature of appeal and standard of review

- [11] Section 5 of the Small Claims Act allows a party to a proceeding to appeal to the Supreme Court an order dismissing a claim made by a Provincial Court judge after trial.
- [12] Section 12 of the Small Claims Act provides that the Supreme Court may review the order under appeal on questions of fact and questions of law. The appeal must not be heard as a new trial unless the Supreme Court orders that the appeal be heard as a new trial. Chutter did not ask that the appeal proceed as a new trial.
- [13] Section 13 of the Small Claims Act allows the Supreme Court to make any order that the Provincial Court could make and to make any other order the Supreme Court considers just, including an order for costs of the appeal. There is no appeal from an order made under s. 13 of the Small Claims Act.
- [14] The standard of review on appeal from an order after trial made pursuant to the Small Claims Act is the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 10:
- a) for findings of fact and the application of the law to those facts, the standard is palpable and overriding error; and
 - b) for matters of law, the standard is correctness.
- [15] A palpable error is one that is plainly seen: *Housen* at para. 6. A trial judge's findings of fact cannot be set aside "if there was some evidence upon which he or she could have relied to reach that conclusion": *Housen* at para. 1 (emphasis added). In other words, the trial judge has not committed a reviewable error simply because Chutter identifies other factual conclusions that the trial judge could have reached based on the evidence at trial.
- [16] Appropriate deference to the trial judge is of particular importance to achieve the fundamental purpose of the Small Claims Act, which is to allow people who file claims in the Provincial Court to have them resolved in a just, speedy, inexpensive and simple manner: Small Claims Act, s. 2(1); *Petrick v. Lakeview Credit Union*, 2002 BCSC 672 at paras. 65-66.
- [17] Whether a party owes another party a duty of care is a question of law: *Simpson v. Baechler*, 2009 BCCA 13 at para. 31, citing *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706.

Trial decision

- [18] Chutter's claim against the Province was confined to the recovery of expenses that Chutter incurred between June 2016 to June 2018 to eradicate spotted knapweed on Chutter's land. Chutter claimed the Province was liable in nuisance or negligence for failing to take measures to stop the spread of spotted knapweed from Pasture Four, a pasture within Lundbom Commonage, to adjacent land owned by Chutter.

- [19] The trial judge heard extensive evidence at trial, including expert evidence about spotted knapweed and ways to manage it, evidence about the Province's policies for controlling invasive plants, and evidence detailing the invasive plant control measures undertaken by the Province on the Lundbom Commonage. In the Trial Decision, the trial judge provided a lengthy and detailed account of the evidence tendered by both parties at trial.

Nuisance

- [20] The trial judge analyzed the claim in nuisance first. Referring to *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 19 [Antrim], the trial judge described the legal test as follows:
- [122] [Chutter], to be successful in their claim for nuisance against [the Province], must prove on a balance of probabilities that [the Province] caused a substantial interference with [Chutter's] use and enjoyment of land, and that such interference was unreasonable in the circumstances.
- [21] Where, as is the case here, the alleged nuisance is a naturally occurring hazard, Chutter was also required to prove that the Province knew or ought to have known about that hazard and that the Province failed to take reasonable steps to mitigate it: Trial Decision at para. 122, citing *Sadowick v. British Columbia*, 2019 BCSC 1249 at paras. 91-92.
- [22] Chutter does not take issue with the trial judge's statement of the law of nuisance as it applies in these circumstances.
- [23] The Province conceded that the interference with Chutter's land arising from the spotted knapweed was more than trivial. As a result, the key question for the trial judge's analysis of the claim of nuisance was whether the interference with Chutter's land was reasonable in all the circumstances. In particular, where (as in this case) the interference "arises from an activity that furthers the public good, the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation": *Antrim* at para. 45.
- [24] The trial judge found that Chutter failed to prove its claim in nuisance on a balance of probabilities. The trial judge found that the Province's "actions were reasonable to mitigate the hazard of spotted knapweed" and the Province had "made all reasonable efforts to reduce the impact of its work on neighbouring properties": Trial Decision at para. 128. The trial judge concluded that it was not unreasonable to expect Chutter to bear the interference without compensation:

- [129] even if there has been some interference and harm to the interests of [Chutter] this harm cannot reasonably be viewed as more than [Chutter's] fair share of the cost associated with [the Province] providing a public benefit. The public benefit of [the Province's] invasive plant management is one that will take some time to complete and to see results. In the meantime, persons such as [Chutter] may have to bear their fair share of the cost of the long term benefit to the public.
- [25] The trial judge found at para. 131 that the steps suggested by Chutter (eradication through spraying of herbicides) to address the issue of spotted knapweed were not reasonable because
- a) Spraying does not provide long term mitigation of the spotted knapweed issue;
 - b) The cost of spraying is excessive;
 - c) Other values must be considered when assessing how to address spotted knapweed; and
 - d) There are potential unintended and negative consequences of herbicide treatment, including removing biocontrols and allowing other invasive plants such as cheatgrass to proliferate.
- [26] The trial judge found that the steps taken by the Province to mitigate the hazard of spotted knapweed were reasonable because they were "comprehensive, thorough, fall within the budgets provided, and provide for a long term approach to the control of spotted knapweed": Trial Decision at para. 132.

Negligence

- [27] The trial judge set out the legal test for a finding of negligence: Chutter needed to prove on a balance of probabilities that the Province owed Chutter a duty of care, that the Province breached that duty of care by failing to meet the reasonable standard of care and that the Province's breach caused the claimant to suffer reasonably foreseeable damages or loss: Trial Decision at para. 135.
- [28] As the duty of care alleged did not fall within an established category, the trial judge was required to determine whether the two stage Anns/Cooper test for finding a novel duty of care (summarized at paras. 17-18 of *Nelson (City) v. Marchi*, 2021 SCC 41) [Nelson] is met in this case. For a duty of care to exist, there must be a "relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff": *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 18. Where the alleged tortfeasor is a government body, the first question is whether the government entered into a special relationship with the claimant sufficient to establish the necessary proximity to give rise to a private law duty of care. The second question is whether the duty of care is negated by policy considerations: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 66.

- [29] The trial judge relied on s. 2 of the Weed Control Act, R.S.B.C. 1996, c. 487, which requires "an occupier" to "control noxious weeds growing or located on land and premises" to find the Province owes a prima facie duty of care to Chutter. The trial judge found that the duty of care did not require the Province "to eradicate spotted knapweed, but simply to control it": Trial Decision at para. 152.
- [30] However, the trial judge found the duty of care owed by the Province to Chutter was negated for policy reasons. In particular, the Province's decision on how to control spotted knapweed in the Lundbom Commonage (including Pasture 4 adjacent to Chutter's land) was based on a core government policy and thus immune from tort liability: Trial Decision at paras. 168-170.
- [31] In the alternative, if a duty of care was owed, the trial judge found that Chutter failed to prove that the Province breached the reasonable standard of care in its approach to controlling spotted knapweed on the Lundbom Commonage. The trial judge found that "control" did not require "eradication". Chutter failed to prove that the Province's long-term approach will not control spotted knapweed: Trial Decision at paras. 171-176.

Analysis of issues on appeal

- [32] As noted above, Chutter's framing of some of the issues on appeal invited the Court to reweigh the evidence rather than to assess whether the trial judge committed a reviewable error. I have reframed the issues on appeal to address the potential reviewable errors raised by Chutter's arguments. I will address some of Chutter's specific arguments in this context.
- 1) Did the trial judge err in finding that the Province took reasonable steps to control the spread of spotted knapweed?
- [33] In order to succeed in a claim in nuisance for a naturally occurring hazard like spotted knapweed, Chutter needed to prove that the Province failed to take reasonable steps to mitigate the hazard. I am satisfied that the trial judge did not make a palpable and overriding error in finding that Chutter had failed to meet its burden of proof. There is evidence to support the trial judge's finding that the Province did take steps to mitigate the hazard, and it was not a palpable and overriding error to conclude that the Province's steps were reasonable.
- [34] There was evidence at trial to support the trial judge's findings that the Province took steps to mitigate spotted knapweed. Provincial employees provided extensive evidence at trial detailing the Province's policies on invasive plant management and how spotted knapweed in particular is managed. This evidence is summarized in paras. 28-112 of the Trial Decision.

- [35] The finding that the Province's steps were "reasonable" is one of mixed fact and law. It is only reversible if the trial judge committed a palpable and overriding error. The trial judge concluded that the Province's steps to control spotted knapweed were reasonable because they were "thorough, fall within the budgets provided, and provide for a long term approach to the control of spotted knapweed": Trial Decision at para. 132. I find the trial judge made no reversible error in reaching this conclusion.
- [36] The trial judge made no palpable and overriding error because there is evidence to support his rationale for finding the Province's management plan was reasonable. Extensive evidence from seven of the Province's employees supports the description of the Province's invasive plant management plan as "thorough". Evidence related specifically to budgetary concerns is referenced at paras. 39, 44, 47 and 69 of the Trial Decision. Evidence related to the long-term nature of the management plan is set out at paras. 55, 87, 90 and 119 of the Trial Decision.
- [37] Additionally, the Province led expert evidence that specifically described the Province's priority system for dealing with invasive plants as "a reasonable approach for weed control on crown land" and opined that there should not be herbicide treatment of spotted knapweed in the containment area (which includes Lundbom Commonage): Trial Decision at para. 114. This expert evidence also supports the trial judge's conclusion that Chutter's proposed approach for dealing with spotted knapweed is not reasonable.
- [38] Chutter argues that the trial judge erred by considering the Province's invasive plant management program for the whole of Lundbom Commonage and in doing so failed to recognize that Chutter's claim related to management of spotted knapweed on Pasture 4 (a small subsection of Lundbom Commonage adjacent to Chutter's land). However, evidence regarding the Province's invasive plant management program demonstrates that the Province does not manage Pasture 4 in isolation. One Provincial employee testified that it is important when determining priorities for invasive plant management to consider the provincial rather than regional scale: Trial Decision at para. 59. The trial judge properly considered the Province's invasive plant management policy for Lundbom Commonage and the rest of British Columbia. Further, there was evidence related to use of biocontrols (a significant component in the Province's strategy to manage spotted knapweed) on Pasture 4 and Lundbom Common as a whole, which is referenced at paras. 66, 72, 85, 91, 94-95 of the Trial Decision.
- [39] Chutter argues that the trial judge erred by considering steps taken by the Province after 2016 when deciding whether the Province took reasonable steps to manage spotted knapweed. However, Chutter's claim includes expenses incurred in 2017 and part of 2018, which means the Province's action after 2016 is relevant to Chutter's claim. In any event, as found by the trial judge, invasive plant management is a long-term project, which means that ongoing efforts are relevant to the trial judge's assessment of whether the Province's management plan is reasonable.

- 2) Did the trial judge err in finding that the Province's interference with Chutter's property was reasonable in light of the overall public benefit of the Province's strategy to control the spread of spotted knapweed?
- [40] The trial judge concluded that the harm to Chutter's property "cannot reasonably be viewed as more than [Chutter's] fair share of the cost associated with the [Province] providing a public benefit": Trial Decision at para. 129. The trial judge made no palpable and overriding error in connection with this finding of mixed law and fact.
- [41] Provincial employees provided evidence of the public benefit arising from the Province's invasive plant management program, including benefits to other stakeholders (including ranchers, non-governmental organizations, timber companies and hydro companies), various users of Crown land (including recreationalists, tenure holders and community groups) and the general public.
- [42] Chutter argues that the Province incurred no cost because it took no mitigation steps on Pasture 4 prior to 2016. Chutter says that it incurred all the costs for spotted knapweed control when it sprayed herbicide on Chutter property from 2016 to 2018. However, the cost of the Province's invasive plant management plan cannot be measured only by mitigation efforts prior to 2016, because Chutter's claim included expenses incurred from 2016 to 2018. Similarly, the cost of the Province's invasive plant management program cannot be measured based on steps taken specifically on Pasture 4 because the Province's plan is managed regionally and province-wide.
- 3) Did the trial judge err in finding that the Province's efforts to control spotted knapweed were core policy decisions that negate any duty of care as opposed to operational implementation of policy decisions?
- [43] Whether or not a defendant owes a duty of care is a question of law which is reviewed on a standard of correctness. There was ample evidence to demonstrate that the Province's invasive plant management program was a core policy decision. On the strength of that finding, I agree with the trial judge's conclusion that the Province owes no private law duty of care to Chutter. As there is no duty of care, there can be no finding of negligence.
- [44] In *Nelson*, the Supreme Court of Canada confirmed that government is immune from negligence for true policy decisions; however, a private law duty of care may arise from the operational implementation of policy decisions: *Nelson* at para. 22. The key question is whether government's alleged tortious conduct arises from policy decisions or implementation of policy decisions. At para. 56 of *Nelson*, the Supreme Court of Canada identified four factors to consider when assessing the nature of a government's decision:
- (1) the level and responsibilities of the decision-maker;
 - (2) the process by which the decision was made;
 - (3) the nature and extent of budgetary considerations; and

- (4) the extent to which the decision was based on objective criteria.
- [45] The trial judge correctly found that all four factors supported a finding that the Province's decision on how to manage invasive plants including spotted knapweed is a policy decision and thus any prima facie duty of care is negated.
- [46] In this case, there was evidence from Provincial employees to support the trial judge's finding that the Province's decisions related to invasive plant management were made "by persons at a high level and with the greatest responsibility": Trial Decision at para. 160.
- [47] Similarly, there was evidence from Provincial employees to establish that "process that was followed in creating the policies for the management of invasive plants, including spotted knapweed, was complex, collaborative, involved numerous values and stakeholders, and required a balancing of interests": Trial Decision at para. 163.
- [48] There was evidence from a number of Provincial employees to support the trial judge's finding that budgetary considerations at the provincial and regional level were considered when determining "which invasive plants could be managed, and what steps could be taken to manage the highest risk invasive plants": Trial Decision at para. 164.
- [49] Finally, there was "objective evidence that the best method of treatment when considering the long term control of spotted knapweed is through the use of biocontrols, and not herbicides": Trial Decision at para. 166. That evidence at trial came from the Province's witnesses, including the expert tendered by the Province. The trial judge clarified that when he referred to "control" of spotted knapweed, he did not mean complete eradication of the invasive plant.
- [50] In summary, the trial judge correctly concluded that the Province's invasive plant management program was a core policy decision. As a result, the Province is immune from liability and owes no private law duty of care arising from decisions made as part of that program. Specifically, the Province owes no duty of care to Chutter for any harm to Chutter arising from the Province's invasive plant management program. Chutter's claim in negligence must fail.
- [51] Chutter argues that the trial judge erred by failing to define "control" of spotted knapweed when discussing duty of care as "eradication" of spotted knapweed. In my view, the trial judge jumped ahead in the negligence analysis when he found the prima facie duty of care does not require the Province "to eradicate spotted knapweed, but simply to control it": Trial Decision at para. 152. The first step in any negligence analysis is to determine "whether there is any duty of care imposed by the law upon the defendant". Only if there is a duty of care does the court "define the measure of its proper performance": Ryan at para. 21, citing *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 at 254, 1951 CanLII 325 (N.S.C.A.). In other words, "[t]he standard of care is the content of the duty owed by the defendant": Simpson at para. 31. The requisite standard of care, i.e., whether "control" of spotted knapweed requires "eradication" or some lesser standard, need only be decided

where the defendant owes a duty of care. In this case, the Province owes no duty of care to Chutter, thus there is no reason to go further in the negligence analysis.

Conclusion

[52] The appeal is dismissed. The Province did not seek costs of the appeal, so no costs shall be awarded.

"Lamb J."

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