SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
05-Jun-17

Victoria
REGISTRY

Court File No. VIC-S-S-172167

NO.
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SAHTLAM NEIGHBOURHOOD ASSOCIATION, ISABEL RIMMER, KATHARINE HEATHER MERCER, ALAN ROSS MERCER, JOHN YARNOLD, CATHERINE MacNEILL and JOHN MacNEILL

PLAINTIFFS

AND:

MUNICIPALITY OF NORTH COWICHAN, 1909988 ONTARIO LIMITED and 1946328 ONTARIO LIMITED doing business as VANCOUVER ISLAND MOTORSPORT CIRCUIT

DEFENDANTS

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

1. The Plaintiff, Sahtlam Neighbourhood Association is a Society duly incorporated pursuant to the laws of the Province of British Columbia and has a registered office at 4195 Sahtlam Road, Duncan, British Columbia V9L 6K3.

2. The Plaintiffs, Isabel Rimmer and John Yarnold, reside at and are the registered owners of the lands and premises municipally described as 4195 Sahtlam Road, Duncan, British Columbia V9L 6K3 (the "Rimmer Property").

3. The Plaintiffs, Katharine Heather Mercer and Alan Ross Mercer, reside at and are the registered owners of the lands and premises municipally described as 6231 Mina Drive, Duncan, British Columbia V9L 6K4 (the "Mercer Property").

4. The Plaintiffs, Catherine MacNeill and John MacNeill, reside at and are the registered owners of the land and premises municipally described as 4190 Sahtlam Road, Duncan, British Columbia V9L 6K3 (the "MacNeill Property").

5. The Defendant, the Municipality of North Cowichan is a municipal corporation incorporated under the *Local Government Act* and governed by that Act and the *Community Charter,* S.B.C. 2003, c. 26 and has a business address at 7030 Trans Canada Highway, Duncan, British Columbia V9L 3X4.

6. The Defendant, 1909988 Ontario Limited, is a Company duly incorporated pursuant to the laws of the Province of Ontario and has a registered office at 220 Steeles Avenue West, Thornhill, Ontario, Canada L4J 1A1.

7. The Defendant, 1946328 Ontario Limited is a Company duly incorporated pursuant to the laws of the Province of Ontario and has a registered office at 220 Steeles Avenue West, Thornhill, Ontario, Canada L4J 1A1. 1946328 Ontario Limited is the proprietor of the Sole Proprietorship registered in British Columbia on January 28, 2016 under registration number FM0679683 as Vancouver Island Motorsport Circuit.

8. 1909988 Ontario Limited is the registered owner in fee simple of property situate at 4063 Cowichan Valley Highway, Cowichan, British Columbia and more particularly described as:

   PID: 029-201-675
   Lot A, Section 3, Range 1, Somenos District, Plan EPP35449

   (the "Lands").

9. The Lands are approximately 46 acres in size.

10. The Lands are adjacent to properties owned by the individual Plaintiffs and within the "Sahtlam Community".

11. The Lands are located in the Municipality of North Cowichan and subject to North Cowichan Zoning Bylaw 1997 No. 2950 (the "Zoning Bylaw").

12. The Zoning Bylaw was amended on May 4, 2011 by Zoning Amendment 3374 to zone 9.88 acres of the Lands from I-2 (Industrial – Heavy) to C-8 (Commercial Rural Recreation). The C-8 zoning was created to permit the use of land as a "Race Track" as the Zoning Bylaw and more particularly, the I-2 zone did not permit such use.

13. Pursuant to the Zoning Bylaw, a portion of the Lands are now municipally zoned as C-8 (Commercial Rural Recreation) and the remaining portion is zoned I-2 (Industrial – Heavy).

14. In 2014, the Municipality of North Cowichan sold the Lands to the Defendant, 1909988 Ontario Limited and a part of the sale warranted to the Defendant, 1909988 Ontario Limited that the entirety of the Lands could be used for "driving training" in addition to "vehicle testing".

15. In 2016, the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, or any one of them, began using (or permitted the use of) the Lands (C-8 and I-2 zoned portions) as a motorcar racetrack and/or driving training track.

16. Specifically, the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit make the following, *inter alia,* advertisements with respect to the "racing" use of the Lands:

    (a) "...offer a Tilke GmbH designed road track, driving dynamic area...";

    (b) "Generally speaking, any car that is deemed safe with the appropriate driver will be allowed, including street, vintage and racecars"

    (c) "Both vehicles and drivers will be sorted and allowed to drive in groups based on their lap times. We allow vintage sports cars, racecars, track cars, sports cars and performance cars";

    (d) "All of the major facilities are served exclusively for Vancouver Island Motorsport Circuit members and guests. However, there will be days where the facilities open their door to the public, for example to the Vancouver Island Motor Gathering in August of each year"; and

    (d) "High-octane fuels are available".

17. The Zoning Bylaw does not permit use as motorcar racetrack and/or driving training track on the I-2 zoned portion of the Lands.

18. The Plaintiff, Sahtlam Neighbourhood Association, on behalf of concerned residents, has requested that the Municipality of North Cowichan take enforcement action to stop the unauthorized use of the Lands; however, the Municipality of North Cowichan has refused to or neglected to do so.

19. The Municipality of North Cowichan has taken the position that the use for which the Defendants are putting the Lands is permitted by the Zoning Bylaw.

20. The Municipality of North Cowichan, Bylaw No. 2857 (the "Noise Control Bylaw") specifically prohibits "using an engine or motor vehicle without a muffler or other device which would prevent excessive noise there from, or so out of repair, or equipped in such a way as to disturb the quiet, peace, rest, enjoyment, comfort, or convenience of any person or persons in the neighbourhood or vicinity."

21. Vehicles without mufflers have been permitted to use the Property, specifically operating on the track in contravention of the Noise Control Bylaw.

22. On or about the spring of 2016 to the present time, the Defendants 1909988 Ontario Limited and 1946328 Ontario Limited doing business as

Vancouver Island Motorsport Circuit, have operated or permitted the operation on the Lands of a motorcar racetrack and/or driving training track. In operating the motorcar racetrack and/or driving training track, the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, their servants or agents have allowed races and high speed driving to take place on the Lands, which races and high speed driving wrongfully caused or permitted substantial and unreasonable noise to come into and about the Rimmer Property, the Mercer Property and the MacNeill Property (the "Affected Areas").

23. The excessive noise and vibration from the cars is disturbing and audible in the Affected Areas, including inside the homes located at the Rimmer Property, the Mercer Property and the MacNeill Property.

24. The excessive noise produced from the Property constitutes a nuisance at law for which the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit are liable to the Plaintiffs, Isabel Rimmer, Katharine Heather Mercer, Alan Ross Mercer, John Yarnold, Catherine MacNeill and John MacNeill. Further particulars of the nuisance are as follows:

    (a) Excessive and unreasonable noise or sound including:

        (i) Noise from motor cars, including squealing tires and engine noise from motor vehicles, some of which do not have mufflers installed or have modified muffler systems;

        (ii) Noise from cars during practicing or driver training; and

        (iii) helicopter noises.

    (b) Such other particulars as counsel shall advise prior to the trial of this action (collectively the "Nuisances").

25. By reason of the Nuisances, the Plaintiffs, Isabel Rimmer, Katharine Heather Mercer, Alan Ross Mercer, John Yarnold, Catherine MacNeill and John MacNeill, have suffered annoyance, discomfort and loss of use and enjoyment of property and the Affected Areas have been rendered unfit for ordinary use. The Affected Areas have suffered a reduction in the market value by being undesirable, or less desirable, as residences.

26. The Plaintiffs, Isabel Rimmer, Katharine Heather Mercer, Alan Ross Mercer, John Yarnold, Catherine MacNeill and John MacNeill have suffered loss and damage, particulars of which are as follows:

    (a) interference with and reduction in the quality of rest and sleep;

(b) interference with the performance of daily tasks;

(c) interference with the reasonable and comfortable use of gardens, patios and yards on the Rimmer Property, the Mercer Property and the MacNeill Property;

(d) interference with social and family gatherings;

(e) interference with normal conversation both in and out of the home on the Rimmer Property, the Mercer Property and the MacNeill Property; and

(f) interference with and reduction of peace and privacy normally associated with the Rimmer Property, the Mercer Property and the MacNeill Property.

27. The Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit intend to continue the nuisance and have plans for future expansion of the track, including an off-road track and year-round go-karting.

Part 2: RELIEF SOUGHT

1. A declaration that the use of the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for recreational or "race" driving motor vehicles at high speeds is a contravention of the Land Use Bylaw;

2. An order requiring the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit to cease using the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for driving motor vehicles at high speeds contrary to the Land Use Bylaw;

3. A declaration that using an engine or motor vehicle without a muffler or other noise preventing device on the Lands is a contravention of the Noise Control Bylaw;

4. An order requiring the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motor Sport Circuit, to cease using or permitting the use of the Lands contrary to the Noise Control Bylaw;

5. General Damages against the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit;

6. Special Damages against the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit;

7. A permanent injunction prohibiting the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, or each of them, or their servants, agents or otherwise from operating motorcars anywhere on the Lands where the sound level tested at the boundary of the Lands exceeds a reasonable decibel level as determined by the Court;

8. Costs; and

9. Such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

Not a Permitted Use of the Lands:

1. Pursuant to the Zoning Bylaw 9.88 acres of the Lands are zoned C-8 (Commercial Rural Recreation) and the remainder of the Lands is zoned I-2 (Industrial – Heavy).

2. The operation of a "Race Track" is permitted in the portion of the Lands zoned C-8 (Commercial Rural Recreation). A "Race Track" is defined by the Zoning Bylaw as the "use of land for the purpose of holding motor vehicle, motorcycle, or go-cart races.

3. A "Race Track" is not a permitted use in the I-2 (Industrial – Heavy) zone.

4. The Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, are using or permitted the use of the I-2 (Industrial – Heavy) zoned portion of the Lands for the operation of a "Race Track" and/or motorcar racetrack and/or driving training track contrary to the Zoning Bylaw.

5. The Noise Control Bylaw specifically prohibits "using an engine or motor vehicle without a muffler or other device which would prevent excessive noise therefrom, or so out of repair, or equipped in such a way as to disturb the quiet, rest, enjoyment, comfort, or convenience of any person or persons in the neighbourhood or vicinity." The Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit are using the Lands for the operation of motor vehicles without mufflers or similar noise control devices.

Declaratory Relief

6. The Defendant, the Municipality of North Cowichan, has publicly stated and upheld to the Plaintiffs that the use of the Lands is permitted and the Plaintiffs legal interest in seeking compliance with the Zoning Bylaw is in issue between the parties.

7. Declaratory relief is allowable where there is a cognizable threat to a legal interest.

8. Whether or not the court should order enforcement of a bylaw, a declaration serves a useful purpose, on the basis that the court will assume the government agents will follow the law.

Private Nuisance:

9. The tort of private nuisance is defined as the interference in the use or enjoyment of land by the claimant (*Antrim Trust Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13). The following passages from *Antrim* are relied on:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances... [Emphasis in original.]
>
> [22] What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis.
>
> [25] The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of

> the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.

10. Nuisance may arise in the absence of physical damage, as for example when sound or odor travels from one property to another (*469238 B.C. Ltd. (Lawrence Heights) v. Okanagan Aggregates Ltd. (Motoplex Speedway and Event Park)* 2016 BCSC 721 at para. 132).

11. In this case, excessive and unreasonable noise and vibrations generated from the Lands are being experienced at the Affected Areas and rendering the Affected Areas unfit for their intended purpose. The private nuisance experienced at the Affected Areas is more than trivial.

Injunctive Relief:

12. Injunctive relief is appropriate to address future harm.

13. In *Suzuki v. Munro,* 2009 BCSC 1403, Verhoeven J. set out the factors concerning the granting of an injunction in the case of nuisance by noise as follows:

> [109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 (CanLII) at para. 141.
>
> [110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.
>
> [111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.
>
> [113] Regarding the balance of convenience, the harm to the plaintiffs is compared against the reasonableness of the efforts the defendants have made and could make to eliminate the nuisance caused by their air conditioner.

14. The nuisance is likely to continue and likely at an increased level if an injunction is not granted.

Damages:

15. An injunction can only address harm going forward and cannot be a remedy for past loss. Where the nuisance has gone on for some time, it is common for the court to couple injunctive relief with an award of damages. As with any award of damages, it is for the plaintiff to prove on the balance of probabilities that it has suffered a compensable loss. That the loss may not be amenable to calculation is no bar to the making of an award. Where a damage award cannot be determined by use of a formula or algorithm, the court will do its best to assess it.

16. The Plaintiffs will provide particulars of compensable loss at the trial of this matter, including loss of property value, loss of enjoyment of use of property and loss of amenity.

General:

17. The Plaintiffs will rely on the Supreme Court Civil Rules and such other authorities and statutes as may be relied upon at the trial of this matter.

Plaintiffs' Address for Service:

COX TAYLOR
Barristers and Solicitors
3rd Floor, Burnes House
26 Bastion Square.
Victoria, BC V8W 1H9

Fax number for service: 250-382-4236
Email address for service: leblanc@coxtaylor.ca and leila@coxtaylor.ca

Place of trial: Victoria, British Columbia

Registry Address: **MINISTRY OF ATTORNEY GENERAL**
Court Registry, 2nd Floor
PO Box 9248 Stn Prov Govt
850 Burdett Avenue
Victoria, BC V8W 9J2

Dated: June 5, 2017

LINDSAY R. LeBLANC,
Lawyer for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Form 11 (Rule 4-5 (2))

ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE OUTSIDE BRITISH COLUMBIA

The Plaintiffs, Sahtlam Neighbourhood Association, Isabel Rimmer, Katharine Heather Mercer, Alan Ross Mercer, John Yarnold, Catherine MacNeill and John MacNeill, claim the right to serve this pleading on the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit, outside British Columbia on the grounds that this claim concerns a business carried on in British Columbia.