



# Civil Resolution Tribunal

Date Issued: March 5, 2018

File: SC-2017-002222

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Reym v. Fox*, 2018 BCCRT 63

**B E T W E E N :**

Jason Reym

**APPLICANT**

**A N D :**

Joanne Fox

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kamaljit Lehal

## **INTRODUCTION**

1. This dispute is about damage to the applicant's shed after a branch from the respondent's cottonwood tree ("tree") fell on it, and about debris from the tree falling onto the applicant's property. Both parties are self-represented.

## **JURISDICTION AND PROCEDURE**

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
3. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility that cannot be resolved without an oral hearing or other reasons that might require an oral hearing.
4. The tribunal 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. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. Under tribunal rule 121, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

6. The issues in this dispute are:
  - a. To what extent, if any, is the respondent responsible for the damage caused by the tree's branch falling on the applicant's shed?

- b. To what extent, if any, is the respondent responsible for debris falling from her tree onto the applicant's property?
- c. Should an independent arborist assess the tree and provide a report?
- d. Should the respondent be required to prune and top the tree?

## **EVIDENCE**

- 7. The applicant and respondent are neighbours, and their backyards share a property line. The respondent owns the tree that grows near the property line in the respondent's backyard. The tree is not shared by the properties.
- 8. On March 30, 2016, the applicant emailed the respondent to advise, among other things, that:
  - (a) Large amounts of debris and broken branches came onto his property during the past two storm seasons and his new wood shed was damaged in the last storm. Photos of the debris and damage were attached.
  - (b) The tree has large branches that extend over his yard and another neighbour's yard.
  - (c) He raised concerns with the Town of Sidney who sent their arborist ("Town Arborist") to assess the tree. The Town Arborist found the tree "is not in the best of shape, and it looks sick, possibly dying."
  - (d) The applicant is concerned the tree will fall onto his home as he has seen the tree lean considerably towards his and a neighbour's home during storms. He inquired into and obtained quotes to remove the tree.
- 9. The respondent replied by email, the next day, and stated this was the first time she heard of branches falling on the applicant's shed. She stated she has a friend who is an arborist who she would consult to determine the health of the tree and to remove branches that are at risk of falling in future storms. She expressed that she

did not want to cut the tree and that it simply needed a good trim which she would make sure was done immediately.

10. On April 17, 2016 the respondent advised the applicant, by email, that a certified arborist assessed the health of the tree on April 16, 2016. The arborist found the tree and the branches to be healthy. None of the branches needed to be removed. The arborist also advised that trimming the tree would not be in the best interest of the tree and that trimming would not make any difference as to whether a branch may fall in the event of a heavy snow fall. The above was information given by the respondent to the applicant based on what the arborist allegedly said.
11. The applicant asked for a written report, for insurance purposes, and on April 23, 2016 the respondent gave the name and contact number for the arborist, who was from Harbourview Tree Experts. The respondent told the applicant he was free to contact the arborist directly to arrange for a written report or to speak to him further about any concerns regarding the tree.
12. There was no further communication between the applicant and respondent until October 11, 2016 when the applicant emailed the respondent to advise that a large branch from the tree fell on his shed, during a storm, severely damaging the shed to the point that it had to be replaced. There was also debris that had to be cleared. The applicant stated that he spoke to the Town of Sidney again about the tree and was told that cottonwood is very porous wood and very susceptible to damage from storms. He was also told that the size and age of the tree increased the risk of more issues to come during winter storms.
13. The respondent did not reply to this email, however, as part of her evidence in this dispute she provided a September 12, 2017 email from Harbourview Tree Experts, from the arborist who assessed the tree in April 2016. This email stated "For whom it concerns. Approximately two years ago I was requested by Joanne Fox to look at the health of a large Cottonwood at the rear of her property. I completed a visual inspection finding this tree in very good health."

*The Applicant's position:*

14. The applicant states there are "town by-laws" stipulating that an owner is responsible to maintain a tree on their property. However, no bylaws were provided by the applicant. In addition, the applicant states that since the respondent was expressly warned about his concerns with the tree in March 2016 that the incident could have been avoided if the respondent had addressed those concerns before the October 2016 storm that led to the damage.
15. The applicant seeks the following:
  - (a) \$864 to reimburse the cost of the shed destroyed by the fallen branch.
  - (b) \$250.00 to reimburse the cost of removal of debris and the destroyed shed.
  - (c) An order that a professional arborist assess the tree and provide a written report.
  - (d) An order that the respondent prune and top the tree.
  - (e) An order that the respondent reimburse the tribunal fees of \$125.00.
16. The applicant had initially sought \$1,300 for the shed's replacement but reduced his claim to \$864.00 after I sought clarification as to its cost. The applicant referred to an "average replacement based upon Lowes, Home Depot and Walmart." The applicant provided an invoice of \$264.25 for removal of cottonwood branches and one damaged garden shed.

*The Respondent's Position*

17. The respondent cites the decision in *Anderson v. Skender, 1993 CanLII 2772 (BCCA)* for the proposition that the applicant, as owner of land, is entitled to cut branches or roots of a neighbor's tree which extend over the property line. The respondent maintains that the applicant's failure to do so resulted in the branch, which extended into his property, falling on his shed. As such the respondent

submits that she is not liable for any damages. However, in response the applicant states the branch that fell on his shed did not extend over his property, it was a branch overhanging the property beside him. The respondent provided no response to this statement.

18. Alternatively, the respondent states the applicant provided no evidence as to the amount of damages, and specifically no evidence to support the value of the shed.

## **ANALYSIS AND FINDINGS**

19. In a civil claim such as this the law of nuisance applies. The general principle is that people are entitled to use and enjoy their land without unreasonable interference. When there is actual physical damage, there is a strong indication that the interference is not reasonable and that a claim for damages should succeed (*Royal Ann Hotel Co. v. Ashcroft, 1979 CanLII 2776 BCCA*). However, in the area of nuisance from trees case law indicates that an award for damages may not always follow just because there is actual damage. An award of damages will depend upon whether the nuisance was known or ought to have been known and whether reasonable steps were taken to remedy the nuisance (*Hayes v. Davis 1991 CanLII 5716 BCCA* and *Lee v. Shalom Branch #178 Building Society, CanLII 2001 BCSC 1760*).
20. The applicant provided photographs from a storm in March 2016 and the October 2016 storm showing damage to his shed and debris on his property. I find that the damage and debris came from the respondent's tree. I find that the tree's falling branches and debris unreasonably interfered with the applicant's use and enjoyment of his land. I turn then to the question of what damages, if any, should be ordered?
21. I agree with the respondent that *Anderson v. Skender* supports the proposition that as a land owner the applicant can cut branches extending over his property. However, I accept the applicant's evidence that the branch that fell on his shed did not extend over his property permitting him to cut it. The respondent does not

reside on her property, it is tenanted, and therefore, the applicant is in a better position to say where the branch came from. Even if the branch did overhang the applicant's property, I find that the right to cut a branch protruding over a property is not a legal obligation that relieves the respondent of her responsibility to address a potential hazard from the nuisance created by the tree.

22. *Hayes v. Davis* involves a claim in nuisance for damages after two trees fell onto the neighbour's property injuring one of the occupants. The court found that the owner of the tree had been warned about five to six months before the incident about a cluster of trees bending quite significantly as if they were going to snap, including the two that fell. The owner of the trees took no active steps to address the concerns with the trees and, in fact, stated he did not have money to remove the trees. The majority for the court of appeal agreed with the trial judge that the owner knew or ought to have known that the trees posed a hazard and as such was liable for damages as the owner took no steps to abate or prevent the known and foreseeable risk.
23. In contrast, in *Lee v. Shalom* the court dismissed the plaintiff's claim for damage caused by the roots of a tree because the court found that the defendant had taken active steps to remove the nuisance, by not only cutting down the tree but building a retaining wall.
24. In the present case the applicant made the tree's owner, the respondent, aware of issues with tree branches falling onto the applicant's shed and damaging it. The respondent was made aware of the tree leaning in storms and the concerns of the Town Arborist that the tree looked like it was dying. Therefore, I find the respondent knew or ought to have known that the tree or its branches posed a hazard to the applicant's shed or property.
25. The respondent took steps to address the applicant's concerns about the tree by contacting an arborist, her friend, to assess and provide an opinion about the tree in April 2016. There is no written report from the assessment except for an email exchange between the respondent and her arborist in September 2017. In this

exchange the respondent asked her arborist for an email confirming that she had asked him to assess whether her tree was dying. The arborist responded that he completed a visual inspection about two years ago and found the tree to be in very good health. There is no evidence before me that this opinion addressed the tree's vulnerability to lean or have branches break during a storm.

26. This opinion of the respondent's arborist is in direct contrast to that of the Town Arborist, who also did not provide a written report. I prefer the opinion of the Town Arborist as it is independent. Despite this I find the respondent's steps to only have her arborist conduct a visual inspection of the tree to determine the health of the tree were not reasonable steps. Given the prior history of storms resulting in branches and debris coming onto the applicant's property and the prior damage to the shed I find that the respondent should have taken more active steps such as prune the tree and cut any compromising tree branches.
27. I therefore find that the respondent is responsible for damage to the shed. I award the sum of \$864.00 based on the applicant's evidence on average costs, which I find reasonable. Likewise, with respect to the debris I find that the respondent is responsible for the applicant's expenses in removing the debris and damaged shed. I order the amount of \$250.00 as claimed by the applicant, as again I find that sum reasonable.
28. With respect to the applicant's claim for an order that a professional arborist assess the tree and provide a written report, given the most recent opinion from the Town of Sidney which raises concerns with the porous nature of the tree and size and age of the tree and vulnerability in future wind storms I do not find the need for a formal assessment and report. However, I do find that the respondent must deal with the tree to stop the nuisance. Therefore, I order that the respondent take steps as soon as practicable and in any event within 45 days of the order to arrange at her expense for the tree to be cut or pruned in such a manner that its branches and debris cannot enter the applicant's property.



## ORDERS

29. I order that:

- (a) The respondent immediately pays the applicant the sum of \$864.00 for damage to the shed.
- (b) The respondent immediately reimburses the applicant \$250.00 for cleanup of the shed and debris.
- (c) The claim for an order for a professional arborist is dismissed.
- (d) The respondent take steps as soon as practicable and in any event within 45 days of the order to arrange at her expense for the tree to be cut or pruned in such a manner that its branches and debris cannot enter the applicant's property.

30. Under section 49 of the Act, the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I therefore order the respondent to also immediately reimburse the applicant for tribunal fees of \$125.00. There were no dispute-related expenses claimed.

31. Under the *Court Order Interest Act* (COIA), the applicant is entitled to \$9.22 pre-judgment interest on the \$864.00 and \$2.67 pre-judgment interest on the \$250.00. The applicant is further entitled to post-judgment interest under the COIA, as applicable.

32. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunals' final decision.

33. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or if, no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Kamaljit K Lehal, Tribunal Member