



# Civil Resolution Tribunal

Date Issued: July 11, 2018

File: SC-2017-004747

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zaluski v. McCracken*, 2018 BCCRT 319

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

Lorraine Zaluski

**APPLICANT**

**A N D :**

Helen McCracken

**RESPONDENT**

**A N D :**

Lorraine Zaluski

**RESPONDENT BY COUNTERCLAIM**

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## **REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. This is a dispute about damage caused by branches from a large red cedar tree (Tree). The Tree is located in the respondent Helen McCracken's back yard, at the parties' fence and property line.
2. The applicant, Lorraine Zaluski, says the Tree's branches were overhanging onto her property and caused damage. She claims \$630, the amount she paid a professional to remove the Tree's branch on her property. For ease of reference in this decision, I will refer to Ms. Zaluski as the applicant and to Ms. McCracken as the respondent.
3. The respondent says the Tree was healthy and counterclaims for damages to her own yard by the Tree's branches, which she says the applicant is responsible for due to trimming the applicant did to the Tree in 2009. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

4. 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.
5. 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 or other reasons that might require an oral hearing.
6. 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.

7. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are a) whether the respondent's Tree caused damage to the applicant's property and if so, whether the applicant is entitled to her claimed compensation, and b) whether the applicant damaged the Tree in 2009 that in turn led to the Tree's branch falling onto the respondent's plants in 2017, for which she claims \$5,000 in damages.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. That means that Ms. Zaluski must prove her claim, and Ms. McCracken must prove her own claim.
10. It is undisputed that the Tree is located on the respondent's property. It is also undisputed that the Tree's branches have been overhanging onto the applicant's property, with the applicant having trimmed them on at least one occasion in 2009. It is undisputed that on July 11, 2017, a large branch from the Tree fell onto both the applicant's and the respondent's properties. The respondent refused the applicant's request to remove the portion of the Tree's branch that fell onto the applicant's property. In this dispute, the applicant seeks reimbursement of the \$630 she paid to have her yard cleaned up. As discussed further below, the respondent relies upon a July 11, 2017 arborist report as to why the branch fell, pointing to Tree trimming the applicant's spouse did in 2009.

11. Based on the evidence before me, I accept the Tree was significantly overhanging over the applicant's property and likely has done so for several years. I do not need to determine the extent with precision.
12. As for the respondent's July 2017 arborist report, it says the cause of the large branch falling was "due to poor branch attachment resulting from previous poor pruning practices resulting in stress growth". I accept that the applicant's poor pruning in 2009 materially contributed to the Tree branch's falling in July 2017. However, the evidence is clear that in 2009 the applicant and her husband had asked the respondent to prune the overhanging Tree given occasions of prior damage, and that the respondent failed to do so. I find the applicant is not liable for pruning the Tree's overhanging branches in 2009. The respondent remained responsible for the Tree, and continued to be responsible for it through July 2017.
13. In particular, the law of nuisance is clear. Contrary to the respondent's submission, a homeowner is entitled to trim the branches of their neighbour's tree to the extent those branches extend over the property line onto the homeowner's property (see *Anderson v. Skender*, 1993 Canlii 2772 (BCCA) at paragraph 15). In other words, the applicant was entitled to trim the Tree's branches that extended over onto their property. This latter point is relevant for the respondent's counterclaim, and while the respondent says the applicant trespassed onto her property to cut the Tree in 2009, I find the respondent has not proven that allegation.
14. Even if I am incorrect about the applicant's legal ability to prune the Tree as they did, the applicant has a valid limitation defence about the 2009 pruning. In 2010, the respondent had received an arborist consultation report that noted the Tree was overhanging onto the applicant's property and that the applicant had in 2009 hired someone to cut branches of the west side of the Tree and that the manner of pruning was not the best method. The report noted that the respondent may want to consider legal action. Yet, the respondent did nothing legally about the matter. There is no evidence before me that the respondent did anything to maintain the Tree before or after the July 2017 fallen branch.

15. The respondent's current dispute against the applicant is for the damage to her yard by the fallen Tree branch in July 2017, which the respondent says was caused by the applicant's pruning in 2009. I find that any claim for the 2009 pruning is subject to a 2 year limitation period under the *Limitation Act*. I find the respondent's claim arising from the applicant's 2009 pruning of the Tree is long out of time. As such, the applicant bears no responsibility for the respondent's own Tree branch falling onto her own yard. Given my conclusions above, I dismiss the respondent's counterclaim, which I also note was entirely unsubstantiated in terms of the \$5,000 claim for damages. In reply submission to her counterclaim, the respondent says her counterclaim is against the applicant "wanting payment for her hiring a tree company to remove debris from her yard and payment for the CRT fee". Thus, to the extent the respondent's counterclaim is in fact just a claim for damages for having to defend herself against the applicant's claim, I dismiss that counterclaim also. I have found below the applicant is entitled to damages.
16. I return then to the applicant's claim for \$630, which she spent to clean up her yard after the Tree's large branch fell on her property in July 2017.
17. The relevant issue in this dispute is that a person is entitled to use and enjoy their land without unreasonable interference. This is a general principle of the law of nuisance. When there is actual physical damage, there is a strong indication that the interference is not reasonable (see *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLii 2776 BCCA).
18. Given the evidence before me, including a letter from the applicant to the respondent in 2009, I accept that the applicant had raised her concerns about the Tree and find that the respondent was aware of the potential for damage. It is essentially undisputed that the respondent did nothing to properly maintain the Tree and prevent its branches from overhanging onto the applicant's property. As such, the applicant is entitled to an award for damages because the respondent failed to take reasonable steps to remedy the nuisance (see *Lee v. Shalom Branch #178 Building Society*, CanLii 2001 BCSC 1760). I have above dismissed the

respondent's claim against the applicant for the 2009 pruning and for the same reasons set out above that 2009 pruning has no bearing on the applicant's entitlement to recover reasonable damages for her cost to clean up her yard.

19. The Tree's branch was large and based on the evidence before me I accept that the applicant reasonably paid a professional \$630 to deal with the Tree's broken branch in her yard. I order the respondent to pay the applicant that amount, with pre-judgment interest under the *Court Order Interest Act* (COIA) on that amount, from July 26, 2017.
20. Bearing in mind the tribunal's mandate that includes recognition of parties' ongoing relationships, and given the applicant's submissions about ongoing responsibility for the Tree, I find it is appropriate to note that the respondent is responsible to maintain the Tree, including preventing its branches from overhanging onto her neighbour's property.
21. The applicant was substantially successful in this dispute, and therefore in accordance with the Act and the tribunal's rules, she is entitled to reimbursement of \$125 for tribunal fees paid. There were no dispute-related expenses claimed.

## **ORDERS**

22. I order that within 14 days of this decision, the respondent pay the applicant a total of \$760.90, comprised of:
  - a. \$630 for reimbursement of the applicant's yard clean up relating to the respondent's fallen tree branch,
  - b. \$5.90 in pre-judgment interest under the COIA, and
  - c. \$125 in tribunal fees.
23. The applicant is entitled to post-judgment interest, as applicable.

24. 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 tribunal's final decision.
  
25. 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 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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Shelley Lopez, Vice Chair