



Civil Resolution Tribunal

Date Issued: February 6, 2019

File: SC-2018-003423

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cran v. City of Port Coquitlam*, 2019 BCCRT 146

B E T W E E N :

Helen Cran

APPLICANT

A N D :

City of Port Coquitlam

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. The applicant, Helen Cran, says that trees on municipal property damaged her fence. She seeks compensation for the repair of her fence and an order that the stumps be removed. The respondent, City of Port Coquitlam, denies that it is responsible for the alleged damages or for the stump removal. The respondent also says that the applicant did not bring her claim in time.

2. The applicant is self-represented. The respondent is represented by an employee of its insurer, Samantha Boyce.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.
4. 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.
5. 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.
6. Under tribunal rule 126, 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

7. The issues in this dispute are:
 - a. whether the applicant is out of time to bring her claim;
 - b. whether the respondent must pay \$1,552.43 for the repair of the applicant's fence; and
 - c. whether the respondent must pay \$1,984.50 for the stump removal.

EVIDENCE AND ANALYSIS

8. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities. Both parties provided submissions and evidence in support of their respective positions. While I have considered all of this information, I will refer only to that which is necessary to provide context to my decision.
9. In July of 2017, the applicant contacted the respondent to request the removal of trees from the laneway behind her home. She advised the respondent that the trees were damaging her fence. The respondent arranged for what was described as a "small leaning cottonwood" tree to be removed from the laneway on July 11, 2017. Several other trees remained, along with the stump from the cut tree.
10. The applicant made a claim for damages to her fence in July of 2017. An investigation by the respondent's insurer determined that the trees behind the applicant's fence were naturally seeded and not planted by the respondent. The insurer denied the applicant's claim as it found no negligence on the part of the respondent, and that the respondent had no opportunity to prevent the damage to the applicant's fence.
11. The applicant contacted the respondent again in January of 2018 and asked that the remainder of the trees be removed. On February 27, 2018, several cottonwood trees were removed from the laneway. As before, the stumps were not removed.

12. In May of 2018, the applicant requested that the respondent remove the stumps from the laneway. The respondent advised that it does not provide stump removal services for naturally occurring trees.
13. The applicant seeks an order that the respondent either remove the stumps and repair her fence, or to cover the costs of this work. The applicant says that her fence has already been damaged and if the stumps are not removed, they will grow more trees and continue to damage her property. The applicant claims \$1,552.43 for the repair of her fence and \$1,984.50 for the stump removal. She provided quotes from contractors to support these claims.

Limitation Period

14. The respondent submits that the applicant was or ought to have been aware of the alleged issues with the trees and damage to her fence when she purchased her home in the autumn of 2016. Its position is that the claim is statute-barred as the applicant did not bring it within the 2-month limitation period set out in section 736 of the *Local Government Act*.
15. The applicant's evidence is that the damage to her fence was not apparent when she purchased her home in the autumn of 2016. According to the applicant, she had a "professional survey the property to any defects or red flags" prior to the purchase, and none were found. She says she was not aware of the damage to her fence until July of 2017, when she made the request that the city remove the trees. I accept this evidence and note that it is consistent with the fact that the applicant made a claim to the respondent for her fence damage in that same month.
16. The evidence before me does not show the status of the trees in question when the applicant purchased her property. Without this information, I am unable to conclude that the applicant ought to have been aware of potential problems with the trees and her fence such that she should have alerted the respondent by December of 2017. Based on the available evidence, I am not satisfied that the applicant's claim is time-barred.

Responsibility for Fence Damage & Stump Removal

17. The issue of the respondent's possible responsibility for the damage to the applicant's fence and removal of the stumps is dependent upon the location of the trees. There is no dispute that the trees were located behind the applicant's home, in the vicinity of a municipal laneway. At issue is whether the trees were located on private and/or municipal property.
18. The applicant says that representatives of the respondent told her that the trees were located on municipal property. Based on a January 4, 2018 Request for Service Detail document, it is apparent that the respondent initially believed that the trees were located entirely on municipal property, and attended to the removal of the trees on that basis.
19. However, the respondent says this information was inaccurate and resulted from one of its employees guessing as to the location of the property line. According to the respondent, after the applicant requested the removal of the stumps, it performed a formal survey that showed that 2 of the trees are shared between the parties and the third is located solely on the applicant's property. Although the applicant describes the survey as "contrived", she did not provide evidence to challenge its accuracy. Nothing in this decision determines land ownership. That said, in the absence of contrary evidence as to the placement of the trees relative to the property line, for the purposes of this decision that addresses responsibility for tree maintenance, I accept the respondent's evidence regarding the location of the trees.
20. Based on the photographs provided by the applicant, the tree that seems to be causing the problems in terms of the roots going under the fence line and the stump pushing on the fence panel appears to be the tree that is identified as Tree 1 on the survey document. Tree 1 and Tree 3 both span the property line. Tree 2 appears to be touching the fence, but the survey shows that it is entirely on the applicant's own property. I find that damage from Tree 3 is not apparent in the images provided.

21. As Tree 2 is on her own property, the applicant is responsible for the costs of any damages associated with it. The next consideration is the responsibility for Tree 1 and Tree 3.
22. The respondent says that the trees that are shared between the applicant's property and municipal land are straddle trees. The Court has described a "straddle tree" as being one whose trunk straddles the common boundary between adjoining properties at ground level (as discussed in *Demenuk v. Dhadwal*, 2013 BCSC 2111).
23. There is little treatment of the concept of a straddle tree in British Columbia jurisprudence. The Court in *Demenuk* took guidance from *Koenig v. Goebel*, 1998 CanLII 13635 (SK QB), which held that the ownership of a straddle tree lies with the planting party (or parties, in the event of an agreement), but ownership in common will not be implied if this cannot be determined. An owner may cut back branches or roots that extend onto his or her land even if this jeopardizes the tree's ability to survive. An owner may abate the nuisance of an encroaching tree by cutting roots or branches, but is not entitled to trespass on the other owner's land to address the encroachment.
24. In this case, the trees were naturally seeded. In addition to there not being an owner who planted the trees, I cannot determine on which property the initial seeding occurred. Wherever the seed took root, it is apparent that growth has resulted in portions of 2 trees being present on property of both the applicant and the respondent. I find that Tree 1 and Tree 3 are straddle trees.
25. As noted by the respondent, the Courts have yet to consider whether one owner may compel another owner to remove a straddle tree or stump. However, I accept that the owners of affected properties may take steps to address encroachment of straddle trees onto their properties, so long as there is no trespass involved (see also *Anderson v. Skender*, 84 BCLR (2) 135 (CA)). There is no indication in the case law that the costs of these actions may be charged back to the owner of a straddle tree, if one can be established.

26. Although I make no finding about ownership in common, I find that both owners bear responsibility for the portion of a self-seeded straddle tree that impacts their property. If an owner fails to take steps to address encroachment that results from the growth of a straddle tree, he or she must bear their own costs for any resulting property damage. Thus, the respondent is not responsible for tree-related costs or damages on the applicant's property, and vice versa.
27. Here, the respondent chose to bear the costs of tree removal before the survey was completed and the location of the trees determined. I do not find that this means that the respondent must also pay for, or effect, the stump removal. Further, I am not satisfied that the need for stump removal has been established by the evidence. Although she provided photographs that she says show new growth from the stumps, the applicant has not provided evidence from an arborist or other expert to establish that the remaining stumps will damage her fence or other of her property in the future.
28. Turning to the issue of fence repair, I have determined that the respondent is not responsible for these costs. Although the applicant characterises the quote submitted in evidence as being for "fence repair", it would appear that she intends to replace her entire fence. It is not clear to me why the repair of a portion of the fence at the rear of the property would require any new fencing, let alone 33 panels of new fencing as indicated in the quote. Even if I had found liability with the respondent, I would not have made an order for the \$1,552.43 requested by the applicant.
29. I dismiss the applicant's claims.
30. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the applicant was not successful, I decline to make an order for reimbursement of her fees or expenses. As the respondent did not make a claim for fees or expenses, I make no order in this regard.

ORDER

31. I dismiss the applicant's claims and this dispute.

Lynn Scrivener, Tribunal Member