



# Civil Resolution Tribunal

Date Issued: April 30, 2021

File: SC-2020-008010

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McPherson v. Rutledge*, 2021 BCCRT 458

B E T W E E N :

DAN MCPHERSON and LESLEY KRAINER

**APPLICANTS**

A N D :

CAROLINE RUTLEDGE and DANIEL CLARK

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Leah Volkers

## INTRODUCTION

1. This dispute is about unauthorized tree removal. The applicants, Dan McPherson and Lesley Krainer, say the respondents' contractors cut down trees on the applicants' property without permission and disturbed the area surrounding a registered eagle's nest, contrary to provincial and district regulations. The applicants claim \$5,000 for remediation costs and legal fees.

2. The respondents, Caroline Rutledge and Daniel Clark, do not dispute that they hired a tree service company (TSC) who mistakenly cut down the applicants' trees and disturbed the area surrounding the eagle's nest. TSC is not a party to this dispute. The respondents say this dispute has already been dealt with by way of a Comox Valley Regional District (CVRD) aquatic and riparian habitat and eagle nest tree development permit (DP). The respondents say they have already paid to remediate the applicants' property in accordance with the DP.
3. The parties are all self-represented.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
6. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

## **ISSUE**

8. Are the respondents personally liable for TSC's trespass on the applicants' property, and if so, what is the appropriate remedy.

## **EVIDENCE AND ANALYSIS**

9. In a civil proceeding like this one, the applicants bear the burden of proof, on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
10. The undisputed facts of this dispute are as follows:
  - a. The parties are neighbours in a rural area,
  - b. The respondents hired TSC to remove trees on their property,
  - c. On October 30, 2018, TSC entered onto the applicants' property and cut down numerous trees without the applicants' permission, disturbing the area surrounding an eagle's nest,
  - d. The applicants complained to CVRD and were advised that a DP was required to remediate the area surrounding the eagle's nest, and they were responsible to carry out the DP's requirements,
  - e. CVRD issued the DP to the applicants on July 11, 2019, and
  - f. The respondents have paid the costs to date of complying with the DP, including new plantings and payment of a \$3,132.81 deposit.

11. The first issue is whether the respondents can be held personally responsible for TSC entering onto the applicants' property and removing the trees. As noted, TSC is not a named party to this dispute.
12. The law of trespass is well summarized in *Lahti v. Chateauvert*, 2019 BCSC 1081, which at paragraph 6 quotes from Fridman, *The Law of Torts in Canada*:

Trespass to land consists of entering upon the land of another without lawful justification ... . To constitute trespass the defendant must in some direct way interfere with land possessed by the plaintiff.

13. Mistake is not a defence to trespass (see *Lahti*, paragraph 8). However, the interference with land must be direct, and, intentional or negligent. As applied to this dispute, the "intentional act" refers to the completion of a voluntary and affirmative act (attendance on the applicants' property), rather than an intention to do something wrongful (trespass).
14. Based on the undisputed evidence before me in this dispute, I accept that TSC trespassed on the applicants' property and cut down 16 trees.
15. I turn then to the respondents' liability for trespass. I note at the outset that while it is undisputed that the respondents have paid the costs to date to remediate the applicants' property, this does not, in and of itself, make them liable for TSC's trespass. The applicants confirmed in their submissions that the respondents have never admitted fault and instead have blamed TSC for "going rogue and taking down too many trees".
16. There is no suggestion that the respondents personally trespassed on the applicants' property. Rather, the applicants say the respondents are responsible for TSC's trespass on the applicants' property. While the applicants initially alleged that the respondents instructed TSC to cut down trees on the applicants' property, in their later submissions the applicants say the respondents mistakenly thought the trees were on their own property, and when the respondents realized this mistake, blamed

TSC. The applicants also alleged that “at the very least”, the respondents failed to properly supervise TSC. The respondents deny all these allegations. Neither party submitted any evidence or a statement from TSC in this dispute. So, I find I am left with an evidentiary tie. As noted above, the applicants bear the burden of proof. I find the applicants have not proven the respondents directed TSC to trespass on the applicants’ property, either intentional or mistakenly. I will address the respondents’ supervision of TSC below.

17. The applicants say the respondents were negligent for failing to properly supervise TSC. The respondents dispute this and say they specifically instructed TSC to only remove the cottonwood trees at the edge of their hayfield and “drop them into our field”. The respondents say TSC was first directed to cut down a number of trees closer to the respondents’ home, and they advised TSC they were leaving the property for a few hours but would return before TSC addressed any cottonwood trees at the edge of the respondents’ hayfield. The respondents say TSC started cutting down the cottonwoods at the edge of their hayfield before the respondents returned and cut down several trees on the applicants’ property “with no consideration for the eagle’s nest or the applicants’ fence”.
18. I find in the circumstances the respondents acted reasonably in their hiring and supervision of TSC. I find that it was reasonable for the respondents to rely on TSC to only remove the trees the respondents had identified and confirmed for removal. I note the applicants have provided no evidence that the respondents should have known TSC would trespass or any argument that it was an underqualified business.
19. I turn to the nature of TSC’s relationship with the respondents, as this is relevant to whether the respondents can be held responsible for TSC’s trespass. The relevant factors to consider in determining whether a person is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. These factors include the level of control the employer has over the worker’s activities, whether the worker provides his own equipment, whether the

worker hires his own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his tasks. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

20. I find TSC and its fallers were independent contractors, rather than employees of the respondents. TSC operated as a tree service company, independent from the respondents. I infer from the parties' submissions that TSC had its own equipment and fallers and were not directly supervised in how they conducted their work. None of this is particularly disputed and this conclusion is consistent with the factors and evidence I have summarized above. I find the fact that the respondents were undisputedly responsible for instructing TSC about which trees to cut down is not sufficient to make TSC the respondent's employee.
21. Why does it matter that TSC was an independent contractor rather than an employee? Generally speaking, an employer can be held vicariously responsible for its employee's conduct, whereas with certain exceptions, a party is not held responsible for the negligence or trespass of an independent contractor the party reasonably hired to do work.
22. In *Lewis (Guardian ad litem of) v. British Columbia*, 1997 CanLII 304 (SCC), [1997] 3 SCR 1145, Madam Justice McLachlin's conclusion was that a court (or CRT, in this dispute) must examine the relationship between the parties and ask whether it possesses elements that make it appropriate to hold a defendant liable for the negligence of its independent contractors. In *Lewis*, which involved highway maintenance, this involved a discussion of whether a duty can be delegated or whether it is non-delegable. Where there is a strict statutory duty to do a particular thing, then a party cannot escape liability by delegating the job to an independent contractor. There is no relevant statutory duty in this dispute.

23. The court's majority in *Lewis* held at paragraph 19:

In some circumstances, the duty to take reasonable care may well be discharged by hiring and, if required, supervising a competent contractor to perform the particular work. The standard of reasonable care is met by exercising reasonable care in the selection and, in some situations, the supervision of an independent contractor qualified to undertake the work. If this is done, then the principal will usually not be held liable for injury caused by the negligence of the independent contractor.

24. In the circumstances here, I find that the task of falling trees on the respondents' property is not a non-delegable duty such that the respondents would be held liable for the negligence of their independent contractor, TSC. There is also no inherent harm or risk in the task, which are other factors discussed at paragraph 51 in *Lewis* that might give rise to a non-delegable duty.

25. The applicants say one of the respondents was on the respondents' property when TSC trespassed. However, given my finding above that the respondents acted reasonably in relying on TSC to only remove specified trees, I find that nothing turns on whether the respondents were on their property when TSC trespassed. In saying this, I note that the parties reside on large rural properties and there is no evidence before me to suggest that even if the respondents were on their property, they would have become aware of TSC's actions in time to prevent the trespass or the resulting damage.

26. So, I find the respondents cannot be held responsible for TSC's negligence or trespass. As TSC is not a party to this dispute, I make no findings or orders about their responsibility for the applicants' claims.

27. Given my conclusion that the respondents cannot be held responsible for TSC's trespass, I find I do not need to address in any detail the applicants' claimed damages. I find the applicants' claims against the respondents must be dismissed.

***Dispute Related Expenses and CRT Fees***

28. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to the recovery of their CRT fees. The respondents did not pay fees or claim any dispute-related expenses, and so I award none. As the applicants were unsuccessful, I dismiss their claim for reimbursement of CRT fees and legal fees.

**ORDER**

29. I dismiss the applicants' claims and this dispute.

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Leah Volkers, Tribunal Member