



Civil Resolution Tribunal

Date Issued: April 12, 2022

File: SC-2021-007720

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Point v. The Corporation of the District of North Cowichan*, 2022 BCCRT
424

B E T W E E N :

JUSTIN POINT

APPLICANT

A N D :

THE CORPORATION OF THE DISTRICT OF NORTH COWICHAN

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about alleged property damage during a flood.
2. The applicant, Justin Point, says trees, soil and fertilizer on his property washed away during a flood on Canada Avenue, the road beside his property. Mr. Point says the

respondent, The Corporation of the District of North Cowichan (North Cowichan), is responsible for his property damage because of its faulty construction and engineering of Canada Avenue. Mr. Point claims \$807.05 for lost trees, soil and fertilizer.

3. North Cowichan denies it caused any flooding or damage. It says the flooding is a naturally occurring event outside of its control, and it has undertaken flood mitigation measures. North Cowichan says Mr. Point's property is located within an identified flood plain, and says it is not liable for Mr. Point's claimed damage.
4. Mr. Point is self-represented. North Cowichan is represented by an employee.

JURISDICTION AND PROCEDURE

5. 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.
6. 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.
7. 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.

8. 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

9. The issue in this dispute is whether North Cowichan is responsible for Mr. Point's property damage, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, as the applicant Mr. Point must prove his claim on a balance of probabilities (meaning "more likely than not"). I have reviewed the parties' evidence and submissions but refer only to what I find is necessary to provide context for my decision.
11. Neither party expressly confirmed whether Mr. Point provided North Cowichan with written notice of his claim within 2 months of the alleged damage, as required by section 736 of the *Local Government Act*. However, I find I do not need to determine whether Mr. Point did so, because I find he has not proved his claim against North Cowichan in any event.
12. It is undisputed that flooding occurred on Canada Avenue. Mr. Point says Canada Avenue floods regularly and says it has happened numerous times since he has lived there. North Cowichan agrees that Canada Avenue floods regularly.
13. It is also undisputed that North Cowichan is responsible for Canada Avenue, and completed flood mitigation measures in the area in recent years. However, the specific details of what flood mitigation measures were completed, and where, were not provided in evidence.
14. The limited evidence about when the flood at issue in this dispute occurred is also unclear. Mr. Point submitted undated photographs in evidence that I find show a flooded road. The flooding is extensive, and water extends beyond the road and up

onto what I infer is Mr. Point's property and driveway. In the Dispute Notice, Mr. Point says he became aware of his claim in February 2020. In his submissions, Mr. Point says a flood occurred "about a year and a half ago". He says after the flood, he planted trees, and "then the road flooded again" and washed away his trees. Given this, I infer that the flood at issue in this dispute happened in February 2020, or at some point shortly thereafter.

Is North Cowichan responsible for Mr. Point's property damage?

15. I find Mr. Point is alleging North Cowichan was negligent, though I note the private law of nuisance may also apply. A nuisance occurs when a person unreasonably interferes with the use or enjoyment of another person's property. Where a respondent does not actively create the nuisance, they can only be found liable in nuisance if they knew or ought to have known about the potential nuisance through the exercise of reasonable care and failed to take reasonable steps to remedy the situation (see *Theberge v. Zittlau*, 2000 BCPC 225).
16. In order for North Cowichan to be found negligent, Mr. Point must prove the North Cowichan owed him a duty of care, that North Cowichan breached the standard of care, and Mr. Point sustained damage that was caused by North Cowichan's breach (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
17. I note that public authorities, including municipalities like North Cowichan, do not owe a duty of care for properly exercised policy decisions. North Cowichan did not say the engineering and construction of Canada Avenue or its flood mitigation measures were policy decisions. Decisions involving the implementation of policies are called operational decisions, and these decisions can attract liability in negligence if they are not performed with reasonable care. In this case, given the lack of documentary evidence and submissions, I find it is not possible to determine whether the allegedly faulty road engineering and construction at issue in this dispute is a policy decision or an operational decision. However, even if it is an operational decision that could give rise to a duty of care and attract liability in negligence, I find Mr. Point has not

proved that North Cowichan breached the required standard of care in how it engineered and constructed Canada Avenue in any event.

18. Mr. Point says North Cowichan incorrectly engineered the road at Canada Avenue and this resulted in the loss of his trees and other items during the flood. He says this continues to be a problem. Mr. Point says that North Cowichan's head engineer told him that the road was "faulty in its design/architecture and that is why it floods". Mr. Point says the head engineer admitted liability to him and assured him that North Cowichan would redesign the flood zone in front of his property, and do it correctly to avoid further flooding. He says North Cowichan is responsible for the maintenance of the road and it has never "remedied the problem". I find it is unclear whether Mr. Point is referring to the original engineering and construction of Canada Avenue, or some aspect of the flood mitigation measures completed by North Cowichan. However, in either case, I find Mr. Point has not proved that North Cowichan's engineering and construction was faulty, or that it caused his alleged property damage. My further reasons follow.

19. I find Mr. Point's evidence about whether North Cowichan's engineering and construction is faulty is based on the head engineer's hearsay evidence. While the CRT has discretion to admit evidence that would not be admissible in court proceedings, including hearsay evidence, I decline to do so here. I find whether North Cowichan's engineering and construction was faulty, and whether it caused or contributed to Mr. Point's claimed damage is a matter beyond ordinary knowledge and requires expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283). The head engineer's hearsay evidence is opinion evidence. However, Mr. Point does not identify the head engineer he allegedly spoke to, so I do not have evidence before me about their identity, experience or qualifications. Further, North Cowichan is represented in this dispute by an employee, CR, who says they are North Cowichan's Director of Engineering. CR denies making any such statement to Mr. Point. North Cowichan also denies that its Director of Operations made any such statement to Mr. Point. Given all the above, I find I cannot assess the reliability or credibility of the head engineer's alleged conversations with Mr. Point, and I place no weight on them.

Mr. Point did not provide any other expert evidence to support his claim that North Cowichan's engineering and construction was faulty, or that it caused or contributed to his property damage during the flood. Mr. Point also did not provide any evidence or submissions about how North Cowichan should have engineered and constructed Canada Avenue to reduce the flooding impacts to his property.

20. As noted, Mr. Point bears the burden of proving his claim. Overall, I find the evidence before me does not show that North Cowichan's engineering and construction was faulty, or that it caused Mr. Point's property damage during the flood. I also find the evidence does not show that North Cowichan was aware of the flooding and failed to take reasonable steps to remedy the situation. I find Mr. Point has not proved that North Cowichan is responsible for his alleged property damage under either the law of negligence or nuisance. I dismiss Mr. Point's claim.

21. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. As Mr. Point was unsuccessful, I dismiss his fee claim. North Cowichan did not pay any CRT fees or claim any dispute-related expenses, so I award none.

ORDER

22. I dismiss Mr. Point's claim and this dispute.

Leah Volkens, Tribunal Member