



Civil Resolution Tribunal

Date Issued: October 21, 2022

File: SC-2022-001064

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *FortisBC Energy Inc. v. City of Surrey*, 2022 BCCRT 1154

BETWEEN:

FORTISBC ENERGY INC.

APPLICANT

AND:

CITY OF SURREY

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about a damaged gas line.

2. The applicant, FortisBC Energy Inc. (Fortis), says employees of the respondent municipality, City of Surrey (Surrey), damaged an underground gas main line while excavating. Fortis claims \$3,691.85 in repair costs.
3. Surrey says the claim should be dismissed because Fortis has not set out any cause of action or legal basis for its claim. Surrey also says its employees were not negligent as they took reasonable care during the excavation.
4. Fortis is represented by an employee. Surrey is represented by in-house legal counsel Wassan Aujla.
5. For the reasons set out below, I dismiss Fortis's claim.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.
8. 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.

9. 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.

ISSUES

10. The issues in this dispute are:
 - a. Did Surrey's employees negligently excavate around the gas line?
 - b. If not, is there any other basis for Fortis's claim?
 - c. How much, if anything, must Surrey pay Fortis for the claimed \$3,691.85 repair costs?

EVIDENCE AND ANALYSIS

11. As the applicant in this civil proceeding, Fortis must prove its claims on a balance of probabilities, meaning more likely than not. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
12. At the outset I will address Surrey's argument that Fortis's claim should be dismissed for failing to disclose a cause of action, meaning a legal basis for its claim, or when and where the incident occurred. The CRT's mandate includes being informal, economical and flexible. While I agree that the Dispute Notice is short on facts and does not make explicit the claim's legal basis, I find this is not fatal to the claim. The Dispute Notice includes Fortis's invoice date and the amount it was seeking to recover. Using that information, Surrey was able to determine when and where the events happened. Surrey's submissions show that it was able to know the claim against it and adequately defend itself. In any event, nothing turns on this because I ultimately dismiss the claim for other reasons.
13. The damage occurred on August 20, 2020. The gas line belongs to Fortis and is a "42mm plastic main". Surrey was excavating under the gas line when a bank gave

way, causing asphalt and material to fall and break the gas line. None of this is disputed.

14. Fortis says it was Surrey's responsibility to secure the bank. Without using these words, Fortis essentially argues that Surrey's employees excavating under the gas line were negligent. Surrey does not dispute that it is vicariously liable for its employees' negligence, so in the rest of this decision I use Surrey to refer to Surrey and its employees.
15. To establish a claim for negligence, Fortis must show that Surrey owed it a duty of care, its conduct did not meet the standard of care, its conduct caused the claimed damages, and the damages were reasonably foreseeable (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
16. Surrey submits that Fortis's claim must fail because it failed to provide sufficient evidence to establish that Surrey breached the standard of care. As I explain below, I agree.
17. Fortis's evidence includes photos of the site and the damaged gas line, and notes from RF, a system damage investigator. RF spoke with Surrey foreman GM and Surrey superintendent of construction BH. According to RF's notes from those conversations, Surrey excavated at the site 3 weeks earlier to replace a storm line and located and exposed the gas line at that time. Surrey returned to repair a broken "sani line," and again located and exposed the gas line. Surrey's excavator operator was digging under the gas line when the slope (bank) above gave way. Asphalt and material fell in, causing the gas line to break. The excavator operator was unable to get their bucket against the slope quickly enough to prevent the damage.
18. RF's notes are consistent with a detailed statement that GM provided as evidence in this dispute. GM is a field supervisor with Surrey's engineering operations department, a position they have held since 2008. GM's evidence about the excavation and gas line damage is as follows.

- Between May and August 2020, GM was part of the Surrey crew working on a drainage upgrade project on 114A Avenue in Surrey.
- On July 14, 2020, Surrey staff submitted a ticket through BC One Call for 114A Avenue.
- On July 20, 2020, BC One Call confirmed the location of the gas line. Surrey staff then identified and marked the gas line.
- In August, GM was tasked with repairing a sanitary service connection along 114A Avenue. To access the connection and complete the repair, the Surrey-owned roadway had to be excavated.
- On August 19, 2020, GM attended the site with other Surrey staff and began the excavation. The previously marked gas line remained marked. It was then carefully exposed by hand excavation. After the gas line was exposed, GM directed Surrey staff to dig down to the sanitary service connection. At the end of the workday, they had not fully exposed the connection. Surrey staff then installed shoring in the trench to support the walls overnight.
- On August 20, 2020, GM attended the excavation site to continue the repair. Surrey staff removed a portion of the shoring from the trench to allow the excavator to remove additional material to expose the sanitary service connection. Without removing this portion of shoring, the excavation work would not be “reasonably possible.” GM ensured that the angle of the bank appeared adequately sloped and safe without any overhang.
- During the excavation work that day, a part of the bank gave way and fell on the exposed gas main.
- GM immediately called Surrey’s “radio room” which dispatched the Surrey fire service and notified Fortis.

- The trench showed no signs of sloughing or cracks at any point during the excavation work before the trench bank gave way. There was no indication that the bank was in a position to fail.
 - If at any point the bank showed signs of stress, in accordance with GM's general practice, they would have stopped the excavation work and directed Surrey staff to scale or slope the bank to make it safe.
19. Fortis does not specifically challenge any of GM's evidence. I find it reliable because of its detail and because it was consistent with what GM reported to Fortis on August 20, 2020. I accept GM's evidence and place significant weight on it.
20. Fortis has been successful in some previous CRT disputes in which the respondent homeowner or contractor was found to have breached the standard of care by failing to call BC One Call before digging, failing to hand-dig to locate the gas line, or both. Hand-digging to expose the gas line is a requirement set out in the materials Fortis gave to Surrey as part of its BC One Call inquiry and in section 39(7) of the *Gas Safety Regulation* (Regulation) under the *Safety Standards Act*. However, Fortis does not dispute that Surrey hand-dug to expose the gas line and followed the other excavation procedures in the Regulation.
21. Instead, Fortis says Surrey is liable simply because if Surrey did not excavate, the gas line would not have been damaged. Fortis does not point to any legal authority for this "strict liability" or automatic fault for damage to gas lines. I find there is no legal basis to hold Surrey strictly liable just because the damage resulted from its excavation work. Instead, as noted above, Fortis must prove each element of negligence, including that Surrey's conduct fell below the standard of care.
22. The question is whether Surrey can reasonably be expected to have done something more to prevent the trench bank from giving way. The Regulation does not include any requirements about banks or slopes when excavating around gas lines. Generally, in negligence claims involving construction or the work done by professional trades, expert evidence is required to prove the standard of care and

that the respondent's conduct fell below that standard. For example, in *Bergen v. Guliker*, 2015 BCCA 283, the Court of Appeal decided that expert evidence was required to determine whether a police officer acted reasonably in a vehicle pursuit. There are exceptions, including when the breach relates to something non-technical and within the experience of an ordinary person, or when the breach is so egregious that it is obvious (see *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196). However, neither of those exceptions apply here. I find bank stability is a technical matter outside the experience of an ordinary person. And given GM's unchallenged evidence that the bank appeared adequately sloped and safe, there is no egregious or obvious breach. Fortis has provided no expert evidence to suggest that a reasonable person in Surrey's position would have done something more or something different to stabilize the bank and prevent the bank from collapsing. So, I find Fortis has not proved that Surrey breached of the standard of care, and therefore has not proved that Surrey was negligent.

23. Fortis does not provide any other reason why Surrey is responsible for the claimed \$3,691.85 invoice, such as a contract. So, I dismiss Fortis's claim.
24. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to recover their CRT fees and reasonable dispute-related expenses. Surrey was successful but did not pay CRT fees or claim expenses. I dismiss Fortis's claim for reimbursement of CRT fees.

ORDER

25. I dismiss Fortis's claims and this dispute.

Micah Carmody, Tribunal Member