



# Civil Resolution Tribunal

Date Issued: May 14, 2024

File: SC-2023-004394

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Drinkwater v. The Corporation of the City of Victoria*, 2024 BCCRT 454

B E T W E E N :

DAVID DRINKWATER and ADELE SUZANNE MALO

**APPLICANTS**

A N D :

THE CORPORATION OF THE CITY OF VICTORIA

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Megan Stewart

## INTRODUCTION

1. This dispute is about vehicle damage.
2. David Drinkwater and Suzanne Malo say the Corporation of the City of Victoria is responsible for damage caused to Ms. Malo's vehicle when she drove over a pothole. They claim \$1,400 for vehicle repairs. Mr. Drinkwater represents the applicants.

3. The City denies the applicants' claims. Among other things, the City points to its road failure and pothole repair procedure, which it says shields it from liability in negligence. So, it asks that I dismiss the dispute. The City is represented by its insurer's legal counsel, Brian Lee.

## **JURISDICTION AND PROCEDURE**

4. These are the Civil Resolution Tribunal's (CRT) formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 states 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.
5. CRTA section 39 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 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. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court.

## **ISSUES**

7. The issues in this dispute are:
  - a. Does Mr. Drinkwater have standing to bring this dispute?
  - b. Was the City negligent in maintaining its road, and if so, what is the appropriate remedy?

## **EVIDENCE AND ANALYSIS**

8. As the applicants in this civil proceeding, Mr. Drinkwater and Ms. Malo must prove their claims on a balance of probabilities, meaning more likely than not. I have read all the parties' submissions and evidence, but refer only to information I find necessary to explain my decision.
9. The applicants say around 7pm on December 26, 2022, they were driving in Victoria when the vehicle hit a pothole in the road near the junction of Fort Street and Yates Street. They say the vehicle belongs to Ms. Malo and she was driving it, while Mr. Drinkwater was a passenger. Mr. Drinkwater and Ms. Malo say the incident caused damage to Ms. Malo's vehicle, which is the \$1,400 they claim in this dispute. The City denies the incident as described occurred at all, but also raises other defences I address below as necessary.

### ***Standing***

10. The City says since Mr. Drinkwater does not own the vehicle, he does not have standing to bring this claim. To have standing, a party must have a "legally recognized interest in the claims made" (see *Extra Gift Exchange Inc., et al v. Ernest & Twins Ventures (PP) Ltd., et al*, 2007 BCSC 426, at paragraph 51). Mr. Drinkwater does not dispute the vehicle belongs to Ms. Malo, his wife, and insurance documentation in evidence confirms she is the only owner. Since Mr. Drinkwater does not have a property interest in the vehicle he claims damages for, I find he does not have standing to bring this claim against the City. I dismiss Mr. Drinkwater's claims.

### ***Negligence***

11. Ms. Malo says that as the owner of the road where the pothole was located, the City is responsible for any damage it causes to road users. She also says the City cannot argue it did not have notice of the pothole until after the December 26, 2022 incident because the City has known for a long time that its streets are below an acceptable level, and has not taken sufficient action to remedy the situation. While Ms. Malo does not specifically use this term, I find she alleges the City was negligent.

12. To prove negligence, Ms. Malo must show a) the City owed her a duty of care, b) the City breached the applicable standard of care, c) she sustained a foreseeable loss, and d) her loss was the result of the City's breach (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 3).
13. First, the question of whether the City owed Ms. Malo a duty of care.
14. The City relies primarily on what is known as the "policy defence". This defence essentially says that governments, including local governments like the City, do not owe public users of its property a duty of care if the government's actions were based on a policy decision. This is because governments must make difficult policy decisions that involve balancing competing social, political, and economic considerations, and it is not for the court or the CRT to judge those choices. There is an exception to this defence if the policy decision is made in bad faith, or is so irrational or unreasonable that it is not a proper exercise of the government's discretion (see *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 and *Nelson (City) v. Marchi*, 2021 SCC 41, at paragraph 67). Also, governments can be liable for operational decisions, such as how a policy is implemented.
15. The City submitted a statement from its supervisor of roads and bridges. In the statement, the supervisor explained that the City's road failures and pothole repairs procedure involves two main ways of identifying damaged roads. The first is through reports by the City's six to eight maintenance crews who regularly inspect roadways during their everyday travel to and from job sites. The second is through complaints made by members of the public. The procedure indicates the repair response time varies from immediately to one or two days, depending on the hazardous condition and location. It explains the City has one maintenance service truck driver whose job it is to inspect, repair, or make safe minor road failures like potholes, while referring those beyond their capability to their supervisor for assessment and scheduling. Further, the procedure says information about pothole repairs is filed in a database

to help crews target areas of previous concern, and to help prioritize roads for future maintenance programs, within the City's budget.

16. I find the City's road failures and potholes repair procedure describes the City's policy approach to repairing damaged roads. I find it does this by setting out its decision to have a reactive and primarily complaints-driven system. The method a local government chooses to maintain its roads is a policy matter, not an operational decision (see *Barrett v. North Vancouver (District)*, [1980] 2 SCR 418). In addition, I find the policy appears reasonable and made in good faith, given the City's budgetary and resource constraints.
17. Ms. Malo says the City was or should have been aware of the generally poor state of its roads due to media coverage of this topic, and taken additional steps to address this. I disagree. I find that being generally aware of the roads' state did not meet the policy requirement for maintaining or repairing any particular City roads.
18. The evidence clearly shows Mr. Drinkwater did not report the pothole that allegedly damaged Ms. Malo's vehicle on December 26, 2022 until he submitted a claim on January 10, 2023, on Ms. Malo's behalf. The City says there were no reports of the pothole in question until 4:56pm on December 27, 2022, when a member of the public complained about it. A City request for service document in evidence shows the City dispatched a crew to fill the pothole with cold mix on December 28<sup>th</sup>, and milled and paved the pothole on January 4<sup>th</sup>. This is supported by a picture Mr. Drinkwater submitted showing a filled hole with an orange circle spray painted around it. Based on the request for service document, I find Mr. Drinkwater's undated picture likely pre-dated the milling and paving on January 4<sup>th</sup>. So, I find the City followed its own policy in responding to the pothole once it was reported.
19. Based on all of the above, I find the City did not owe Ms. Malo a duty of care, and so was not liable in negligence for the pothole. I dismiss Ms. Malo's claims. Given this, I find I do not have to address the City's other defences.

20. 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. As the applicants were unsuccessful, I dismiss their claim for CRT fees and for \$50 for photocopying and mailing, which I find unproven in any case. The City did not pay any fees, and did not claim dispute-related expenses.

## **ORDER**

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

---

Megan Stewart, Tribunal Member