



Civil Resolution Tribunal

Date Issued: June 11, 2024

File: SC-2023-003756

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Morissette v. City of Courtenay*, 2024 BCCRT 528

BETWEEN:

BRIAN ROBERT MORISSETTE

APPLICANT

AND:

COURTENAY, THE CORPORATION OF THE CITY OF

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This dispute is about damage caused by a fallen tree owned by the Corporation of the City of Courtenay. Brian Robert Morissette says that, despite his complaints, the City failed to remove the tree before it fell on his property, damaging his motorhome. Mr. Morissette seeks \$3,120.26 for out-of-pocket expenses related to the motorhome damage. Mr. Morissette represents himself.

2. The City says it is not legally responsible for the damage caused by the fallen tree because it reasonably acted in accordance with a policy in place for the removal of trees. The City is represented by Dana Romanik, a lawyer for its insurer.

JURISDICTION AND PROCEDURE

3. 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.
4. Section 39 of the CRTA says that 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.
5. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.
6. 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

7. The issue is to what extent, if any, the City must reimburse Mr. Morissette for expenses related to property damage caused by the City's tree.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant Mr. Morissette must prove his claims on a balance of probabilities (meaning “more likely than not”). While I have read all of the parties’ submitted evidence and arguments, I have only addressed those necessary to explain my decision.
9. The background facts are not disputed. Mr. Morissette owns property that backs onto a “Buffer Park” owned by the City. On January 12, 2021, a City tree (a Trembling Aspen) fell from the Buffer Park onto Mr. Morissette’s property, landing on his parked motorhome.
10. Mr. Morissette complained about trees in the buffer park previously. In 2018, he complained about 3 dead poplar trees, and the City sent its Urban Forestry and Natural Areas Supervisor and ISA Certified Arborist, Shane Tillapaugh, to review the trees. Mr. Tillapaugh determined the area needed a risk assessment, which was completed by Peter Jungwirth, ISA Certified Arborist, Certified Tree Risk Assessor, and Certified Faller, in late October to mid November 2018. In his 2018 report, Mr. Jungwirth gave the tree located near Mr. Morissette’s motorhome a “low” risk rating, but noted the tree would “possibly” fail in 2 years, and “probably” fail in 5 years.
11. Mr. Jungwirth completed another assessment in November 2020. In his 2020 report, Mr. Jungwirth again noted the Trembling Aspen as “low” risk. He stated the tree would “probably” fail within 2 years and recommended mitigation in “1 yr or better less”. Although the City argues this meant mitigation was recommended in 1 year or more, I disagree. On a plain reading of Mr. Jungwirth’s recommendation, I find he recommended the tree be mitigated in 1 year, but it would be better if done in less than 1 year.
12. In any event, in March 2021, less than 1 year later, some dead trees were removed further to the 2020 report, and it appears the Trembling Aspen was topped, though it is unclear from the documentation before me.

13. On October 19, 2021, Mr. Morissette wrote to the City advising it that a tree had fallen and there were a couple others that he was concerned about in the Buffer Park behind his home. On October 29, 2021, Mr. Tillapaugh reviewed the trees and found 4 dead, rotten Trembling Aspen. Mr. Tillapaugh's notes stated he would have a contractor remove the trees in the "next few months", and that he spoke to Mr. Morissette on site.
14. Unfortunately, on January 12, 2022, one of the dead Trembling Aspens fell onto Mr. Morissette's property, landing on his motorhome. The City says the tree was slated to be removed but fell before the work was done.
15. Mr. Morissette's insurer paid for the repairs to his motorhome, but he claims \$3,120.26 for his related out-of-pocket expenses, including the insurance deductible he paid, fuel costs taking the motorhome in to be repair, and the value of his and his partner's time in dealing with the City and the repairs. Mr. Morissette's claims actually total \$3,328.25, but nothing turns on this difference. Mr. Morissette says the City was negligent by not dealing with the tree in a timely manner.
16. The City denies it was negligent and relies on a legal principle called the "policy defence". The policy defence essentially says that governments, including local governments, cannot be held responsible in negligence for "core policy decisions" because they do not owe a duty of care to citizens for policy decisions. The reason this principle exists is that governments must make difficult policy choices, and it is not the court's (or the CRT's) job to judge those choices. Instead, voters judge government policy choices through elections. However, governments can be held responsible in negligence for operational decisions, which involve implementing those policies. Operational decisions are generally made based on administrative direction, professional opinion, technical standards, or general standards of reasonableness (see: *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420).
17. So, were the City's actions in this case a policy or operational decision? The City's general policy for trees in a buffer park is reactive. That means the City does not

actively inspect the trees in those areas, but rather performs risk assessments on demand, in response to public inquiries or storm damage. Trees are then removed (or not) based on the assessed risk level and available resources. To the extent Mr. Morissette argues these policies are unreasonable, I find they are *bona fide* (made in good faith) policy decisions, and the City is immune from a negligence claim about those policies. However, I find the City's inspection and rating of the trees are operational decisions, as it is the City's implementation of those policies. I further find that because Mr. Morissette notified the City about the dead or dying trees, the City owed Mr. Morissette a duty of care.

18. The next question is whether the City breached the standard of care. Claims of professional negligence generally require expert evidence to prove a breach of the standard of care. I find that expert evidence is necessary in this case because the subject matter is technical and outside the knowledge and experience of an ordinary person (see: *Bergen v. Guliker*, 2015 BCCA 283). That is because the degree to which a tree is likely to be a hazard and what action is needed to address it is not something within ordinary knowledge. Mr. Morissette argues any "ordinary, reasonable and prudent person" would have immediately removed the tree, as he says it posed a "severe risk of killing someone". However, Mr. Morissette did not provide any evidence from an arborist that says the City's risk rating for the tree was improper or unreasonable. I find Mr. Morissette has not proved the City's tree risk assessment fell below the required standard of care.
19. Similarly, I find Mr. Morissette has not proved the City's choice to slate the tree for removal "in the next few months" was negligent. I find the City's choice to wait was consistent with its tree risk management policy and the tree's specific risk rating. In summary, I find Mr. Morissette has not proven that the City breached the standard of care. Therefore, I find the City was not negligent.
20. Although Mr. Morissette did not argue it, I also considered whether the City is liable in nuisance. The law of nuisance protects a person's right to use and enjoy their land without unreasonable interference. To prove a nuisance when a tree falls onto

someone's property, the person must prove that the tree's owner knew or should have known the tree was a hazard or at risk of falling. Once the tree's owner is aware of a problem, they must take reasonable steps to address it (see: *Hayes v. Davis*, 1991 CanLII 5716 (BCCA)).

21. Here, the City was undisputedly aware of the tree's potential nuisance. However, I find that the City took reasonable steps to remedy the nuisance by inspecting and rating the trees, and removing or mitigating trees based on its tree risk management policy. I find the City is not liable for nuisance.
22. As I have found the City is not responsible in either negligence or nuisance, I dismiss Mr. Morissette's claim for damages.
23. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. As Mr. Morissette was unsuccessful, I dismiss his claim for reimbursement of tribunal fees and dispute-related expenses.

ORDER

24. Mr. Morissette's claims are dismissed.

Andrea Ritchie, Vice Chair