



# Civil Resolution Tribunal

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File: SC-2023-004104

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gibson v. City of Vancouver*, 2024 BCCRT 594

B E T W E E N :

STEPHEN EDWARD GIBSON

**APPLICANT**

A N D :

VANCOUVER, CITY OF

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Micah Carmody

## INTRODUCTION

1. This dispute is about a tree limb that fell onence. The applicant, Stephen Edward Gibson, owns a residential property in Vancouver. The respondent, City of Vancouver (city), owns the boulevard in front of Mr. Gibson's property. On that boulevard was a

cherry or plum tree that I will call the tree. On November 30, 2022, a limb fell from the tree and damaged Mr. Gibson's aluminum fence. Mr. Gibson claims \$3,899.18 for fence repairs and clean-up costs. Mr. Gibson is a lawyer and represents himself.

2. The city says it is not liable for the fence damage because it followed its street tree maintenance policy and the tree had no outward indicators of decay. An employee represents the city.
3. As I explain below, I find the city was negligent and I order it to pay most of Mr. Gibson's claimed damages.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has authority over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. Given that mandate, the CRT conducts most hearings in writing. However, it has discretion to decide the format of the hearing, including by telephone or videoconference.
5. In this dispute, Mr. Gibson questions the credibility of some of the city's witnesses, and the city questions Mr. Gibson's arborist's reports and conclusions. Mr. Gibson specifically requested an oral hearing, while the city did not. While credibility issues can, in some cases, be resolved by an oral hearing, the advantages of an oral hearing and cross-examination must be weighed against the CRT's mandate for efficiency. This includes a consideration of what questions turn on credibility, the importance of those questions, and the extent to which cross-examination may assist in answering those questions (see *Downing v. Strata Plan VR2356*, 2023 BCCA 100, at paragraph 47). Here, a central issue is whether the city inspected the tree after Mr. Gibson's arborist warned it about potential decay and asked it to remove the tree. Another issue is the competing professional arborists' opinions about the tree. However, the parties are sophisticated and have squarely addressed these issues in their written

submissions and evidence. Further, the amount of money at stake is relatively small and has already nearly been eclipsed by the cost of the city's expert report. Ordering the parties' witnesses and experts to attend cross-examination would cause disproportionate additional costs. For these reasons, I decided that the benefit of an oral hearing does not outweigh the efficiency of a hearing by written submissions. I decided this dispute on the written material before me.

6. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money, return personal property, or do things required by an agreement about personal property or services. The order may include any terms or conditions the CRT considers appropriate.

### ***Late evidence***

7. In a preliminary decision, a CRT member partially granted Mr. Gibson's request for additional time to file reply submissions and obtain a rebuttal expert report. Mr. Gibson filed a rebuttal expert report from his arborist, Richard Lange, as well as Mr. Lange's resume.
8. The city says I should not consider Mr. Lange's rebuttal evidence. It says because the CRTA and the CRT's rules do not address the admissibility of rebuttal reports, I should follow the principles setgi out by the courts in *C.N. Railway v. R.*, 2002 BCSC 1669 and *Sterrit v. McLeod*, 2000 BCCA 318. In brief, those decisions say that a plaintiff or applicant may only provide expert rebuttal evidence to address a new issue raised by the defendant or respondent and may not address issues they have already raised.
9. 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 court. This means the CRT is not bound by the principles set out above. However, I find it appropriate to apply them here. I agree that Mr. Lange's rebuttal evidence does not identify or critique any assumptions or methods in the city's expert report. Instead, Mr. Lange largely seeks to reinforce his previous reports

and conclusions. I find it would be prejudicial to the city to accept Mr. Lange's rebuttal report at this late stage in the proceeding. I therefore do not admit into evidence Mr. Lange's March 13, 2023 report. I admit his resume, as I find it was an oversight not to include it, the city does not object to its inclusion, and its inclusion does not prejudice the city.

### ***Document request***

10. Mr. Gibson says the city should produce all the complaints, inspections, work orders, removal notices, and reports relating to neighbouring trees of the same species. At least some of those trees the city previously removed. Mr. Gibson says these documents would demonstrate why the city removed the trees and any health issues. I decided it was not necessary to order the city to provide these documents given my conclusion that the city was negligent.

## **EVIDENCE AND ANALYSIS**

11. As the applicant in this civil proceeding, Mr. Gibson must prove his claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

### ***Background***

12. As noted above, the tree existed on the city-owned boulevard between the road and the sidewalk in front of Mr. Gibson's property. It sloped toward and extended over the sidewalk. Mr. Gibson bought the property in 2016 to redevelop it. By August 2019 that development was nearing completion.

13. On August 16, 2019, and again on March 6, 2020, Mr. Gibson's builder phoned the city to request that the tree be replaced. On March 18, 2020, Mr. Gibson's builder sent the city an August 14, 2019 report by certified arborist Richard Lange. The report assessed the tree as "medium risk" and recommended the tree be removed for a

combination of reasons, including age, form, possible decay, and recent damage. I discuss the report in more detail below.

14. On March 20, 2020, a city certified arborist, Reginald Eddy, replied to Mr. Gibson's builder. He said that based on Mr. Lange's report, the city would not remove the tree. Mr. Eddy provided a written statement for the city, and I return to his evidence below.
15. On November 30, 2022, during a period of snowfall, a large limb fell from the tree and damaged Mr. Gibson's aluminum picket fence. On December 5, 2022, Mr. Gibson's tenant advised the city by email about the damage and sent photos.
16. On December 9, 2022, Mr. Lange attended to view the tree and limb. He found signs of extensive decay at the failure point and "fungal fruiting bodies" (mushrooms) at the tree's base. The next day, the city took down the remaining portion of tree. City employee JC observed that the limb had internal decay but no "visible outwardly signs of decay or defects."

### ***The law***

17. Both parties rely on *Lord v. City of Vancouver*, 2015 BCPC 160, for its statement of the relevant questions where a municipally-owned tree damages private property. I will consider those questions in a different order, following the approach the CRT took in *Acosta v. The Corporation of the District of North Vancouver*, 2020 BCCRT 678 and *Camarda v. City of Abbotsford*, 2024 BCCRT 284. I find the questions I must answer are:
  - a. Is the city entitled to rely on the "policy defence" or was it an operational decision?
  - b. If it was an operational decision, was there anything to warn the city of any danger with the tree?
  - c. Was the city's response a breach of the standard of care? In other words, did the city act unreasonably given any warnings it was or should have been aware of?

18. The CRT decisions cited above also considered the law of nuisance, for which the policy defence does not apply. However, given my conclusion that the city was negligent, it is not necessary to also consider nuisance.

### ***Policy defence***

19. The city relies on the “policy defence”. The policy defence provides that governments, including local governments, cannot be held responsible in negligence for “core policy decisions” because they do not owe citizens a duty of care for such decisions (see *Nelson (City) v. Marchi*, 2021 SCC 41). However, governments may owe citizens a duty of care in the operational implementation of policy.

20. In *Nelson*, the Supreme Court of Canada set out four factors to consider when deciding whether a decision was a core policy decision:

- a. The decision-maker’s level and responsibilities.
- b. The decision-making process.
- c. The nature and extent of any budgetary considerations.
- d. The extent to which the decision was based on objective criteria.

21. It is undisputed that the city manages approximately 150,000 trees. The city has a street tree bylaw that says all boulevard trees are the city’s property, under the care and control of the Board of Parks and Recreation. The bylaw also prevents citizens like Mr. Gibson from doing anything to trees.

22. The city’s Tree Inspection Policy has been in place since at least 1993. It says that trees are pruned on a seven-year cycle. As the pruning work is carried out, all trees are visually inspected annually for hazards and prioritized for corrective action. Tree service requests from citizens are “inspected by a tree inspector.” Any corrective work is prioritized and carried out as required.

23. I find the decision in question here is the city’s decision to leave the tree as it was after receiving Mr. Gibson’s service requests and Mr. Lange’s report. I find it was Mr.

Eddy who made the initial decision to leave the tree as it was. As noted, Mr. Eddy is a professional arborist. There is no evidence that he was in a high-level executive or managerial role. On Mr. Eddy's evidence, his decision involved reviewing Mr. Lange's report and exercising his discretion after applying objective criteria to determine the tree's level of risk. I find this was an operational decision, and the city cannot rely on the policy defence. I further find that given Mr. Gibson made a service request supported by an arborist's report, the city owed him a duty of care.

### ***Warnings of danger and the city's decision***

24. Mr. Gibson's argument is that he warned the city about the tree's safety and viability through his service requests and Mr. Lange's August 2019 report. The city argues that for Mr. Gibson to succeed, he must prove on a balance of probabilities that there were "external indicators of internal decay" that would have been visible to the city arborist when the tree was last inspected. The city relies on *Insurance Corp. of British Columbia v. Vancouver (City of)*, 1997 CanLII 2436 (BCSC). Similarly, in the decision Mr. Gibson relies on, *Hayes v. Davis*, 1991 CanLII 5716 (BCCA), the question was whether the defendant was or should have been aware that the tree was a hazard. So, I find the question is whether the city was aware, or should have been aware, based on external indicators on the tree or something in Mr. Lange's report, that the tree had internal decay and was at increased risk of losing a limb.
25. I begin with Mr. Lange's report, which Mr. Gibson provided to the city on March 18, 2020. Mr. Lange is an arborist certified by the International Society of Arboriculture (ISA) since 2008. He is also an ISA board-certified master arborist since 2016, among other ISA certifications. In his August 2019 report, Mr. Lange recommended that the tree be removed. He said that the tree's poor form and condition were not contributing to the aesthetics of Mr. Gibson's new home. Mr. Lange said the tree was "past mature" and its useful life expectancy was near-end. He said that "sounding" indicated hollowness and internal decay at the base of the trunk on one side where there was an open crack and wounding that extended up two meters. Mr. Lange documented previous limb failures on the tree that he attributed to vehicle impact or snow load. He

also noted that a nearby stump of a tree of the same type, which the city removed from the boulevard, showed evidence of internal decay. Mr. Lange noted that trees of the same species and age had been removed from the boulevard because of poor form, health and proximity to traffic. He assessed the tree at an 8 on a scale from 3 to 12, which corresponded to a medium risk rating.

26. As noted above, two days after Mr. Gibson provided Mr. Lange's report, Mr. Eddy confirmed that the city would not remove the tree. Mr. Eddy is an ISA-certified arborist since 2019. In a written statement prepared for this proceeding, Mr. Eddy said that on March 20, 2020, he visited the boulevard in front of Mr. Gibson's home to inspect the tree. Mr. Eddy said he conducted an ISA Tree Risk Assessment Qualification (TRAQ) level 2 inspection and assessed the tree as low risk.
27. Much of Mr. Eddy's evidence is critical of Mr. Lange's report. In particular, Mr. Eddy said Mr. Lange did not follow the ISA TRAQ method and so his risk rating was "not clear and had little meaning" to Mr. Eddy.
28. As Mr. Gibson points out, the city has not provided any of Mr. Eddy's notes, reports, or photographs from his March 20, 2020 inspection. Mr. Gibson asked for these things in his opening submissions. If a party fails to produce evidence to support their position without explanation, an adverse inference may be drawn. This means the CRT can assume that the evidence does not exist. I find it appropriate to draw an adverse inference here because the city does not explain why there is no contemporaneous documentation of Mr. Eddy's March 20, 2020 inspection or the "low risk" assessment.
29. Mr. Eddy's statement is not entirely supported by his March 20, 2020 email, sent at 11:02 am to Mr. Gibson's builder. In that email, Mr. Eddy noted that many staff were isolating or working from home and said that the city would not remove the tree at that time based on the conditions stated in Mr. Lange's report. It is odd that he would omit mentioning an in-person inspection if he had done one earlier that morning. He also did not mention that he concluded that the tree was low risk. I find Mr. Eddy's recollection of what he did in response to a tree removal request he received nearly



four years earlier is unreliable. I do not mean to imply that Mr. Eddy has been dishonest in his written statement. However, the evidence of an honest witness may still be unreliable.

30. The city relies on a written statement from Troy Hudson, superintendent of the Urban Forestry Department. Mr. Hudson explained that the city uses a database called Vantree to document street tree information. Mr. Hudson referred to the Vantree entries and then said that Mr. Eddy carried out an inspection on March 20, 2020 and determined that the tree did not require pruning or removal. Mr. Hudson did not explain how the Vantree entries indicate that Mr. Eddy inspected the tree, and I find they do not. Nor did Mr. Hudson explain how he otherwise came to know that Mr. Eddy inspected the tree. I give this part of Mr. Hudson's evidence little weight.
31. In all, I find the city has not established on a balance of probabilities that Mr. Eddy inspected the tree in response to Mr. Lange's report. I find instead that he reviewed the report and concluded that no action was warranted.
32. On July 17, 2020, Mr. Lange prepared a report about the overall impact of Mr. Gibson's property development on the surrounding trees. I infer that the city required this report as part of the development process. This follow-up report noted that city crews recently removed two similar trees from the boulevard and installed a new municipal sidewalk that impacted the tree. Specifically, two large roots had to be cut for the sidewalk. Mr. Lange said the impact was "major" and again recommended removing the tree.
33. On December 15, 2020, and December 16, 2021, the city carried out its annual inspections of the street where the tree is located. There are no notes from those inspections about the tree. There is no evidence that the city identified the tree as a tree of concern or paid it particular attention during the annual inspections.

### ***Dr. Dunster's report***

34. I turn now to the city's independent expert evidence. Dr. Julian Dunster is an ISA-certified arborist since 1992. He is the lead author of the TRAQ manual and previously

designed its predecessor, the Tree Risk Assessment Course and Exam (TRACE). Dr. Dunster is undisputedly qualified to give expert opinion evidence about the tree's health, stability, and risk of failure. I have disregarded parts of Dr. Dunster's report where he strayed outside the scope of the opinion requested and his area of expertise, such as stating his opinion that the main reason Mr. Gibson requested removal of the tree was aesthetics.

35. Dr. Dunster did not inspect the tree at any time, but examined Mr. Lange's reports, photos, and date-stamped images of the tree from Google street view.
36. Dr. Dunster confirmed that the tree showed evidence of decay inside the tree after it failed. However, he said there were no "external indicators suggesting that this particular limb had a high likelihood of failure within a short time frame." In particular, the fungal fruiting body near the base of the tree was not visible when the city did its most recent inspection in 2021. I accept that conclusion, which was supported by the time-stamped Google street view images.
37. Dr. Dunster said the root cutting that happened when the city installed a new sidewalk has no bearing on limb failure. I accept that unchallenged statement. Dr. Dunster said there was nothing in the evidence he reviewed that indicated the tree or any part of it was a "high risk or showed any alarming signs indicating major problems." He said city staff who inspected the tree would not have had a compelling reason to see the limb that failed as an obvious concern, and would not have had a compelling reason to prune that limb or remove the entire tree. However, Dr. Dunster was given a set of factual assumptions, one of which was that Mr. Eddy inspected the tree on March 20, 2020. That fact is not proven here, and that undermines Dr. Dunster's conclusions to a degree.
38. I accept Dr. Dunster's conclusion that there were no visible signs of decay as of December 2021. What Dr. Dunster did not address is Mr. Lange's observation that "sounding" indicated hollowness and internal decay expected to extend two meters up the tree. I find that observation was consistent with the internal decay Mr. Lange found at the failure point when the limb failed. Dr. Dunster was not asked whether a

report that sounding indicated decay should have caused the city to perform an inspection, and what methods the city could have reasonably employed to determine the decay's extent.

## ***Conclusion***

39. The city says Mr. Gibson has not led any evidence to suggest that its discretion was exercised carelessly or unreasonably. I cannot agree with this statement. The city was advised in Mr. Lange's reports that a) the tree had evidence of internal decay to two meters, b) the tree had previously experienced limb failure, c) the tree was aging and near the end of its useful life, and d) other trees of the same species on the street that had been removed showed evidence of internal decay. This knowledge obligated the city to at least conduct an in-person inspection of the tree and reach its own conclusions about the extent of internal decay and the appropriate course of action. The city did not do that. By failing to do that, the city did not follow its Tree Inspection Policy, which said that all citizen service requests would lead to an inspection.
40. Dr. Dunster said there was nothing in Mr. Lange's reports "that specifically calls out that one limb as a problem." However, the Tree Inspection Policy does not require citizens to successfully identify which limb will fail first. The limb that failed was the limb that extended over the sidewalk and toward Mr. Gibson's property. The internal decay extended up the trunk to that limb.
41. It does not matter that Mr. Eddy found Mr. Lange's report was "unclear" and had "little meaning." Dr. Dunster confirmed that Mr. Lange used TRACE, which was replaced by TRAQ and was not to be used after December 2017. However, there is no evidence that the underlying approach in a TRACE assessment was inherently flawed or that its conclusions must be rejected. I find that a reasonable arborist in Mr. Eddy's position would have sought more information. He could have asked Mr. Lange to complete a TRAQ assessment, or he could have asked a supervisor or more senior arborist for their interpretation of Mr. Lange's report that he did not understand. I find that in light of this lack of clarity, the failure to inspect the tree or flag it for a thorough

inspection beyond the annual general street-wide inspections was an obvious breach of the standard of care.

42. With that, I turn to Mr. Gibson's damages.

### ***Damages***

43. Mr. Gibson claims \$2,362.50 for replacing the damaged section of his fence. He supported the claim with an invoice, and the city did not challenge it. I allow \$2,362.50 for the fence damage.

44. An invoice confirms that Mr. Gibson spent \$1,208.55 to have wood from the tree removed one month after the city cut down the tree. He says the city did not clean up "the property" and left portions of the tree "in the front of" his home. However, the photo attached to the invoice shows only tree remnants on the city-owned boulevard. The city did not address Mr. Gibson's suggestion that it failed to remove the debris in a timely manner. I do not agree that paying someone to remove the debris from the boulevard after only a month was reasonable. That said, I accept that Mr. Gibson likely had to remove at least some of the debris in order to have his fence repaired, because photos show the limb resting on the fence. On balance, I order the city to reimburse Mr. Gibson \$604.28 for half the clean-up cost.

45. In total, Mr. Gibson's damages are \$2,966.78.

### ***Interest, CRT fees and expenses***

46. The *Court Order Interest Act* applies to the CRT. Mr. Gibson is entitled to pre-judgment interest on the \$2,966.78 from February 1, 2023 to the date of this decision. This equals \$203.10.

47. Under CRTA section 49 and the CRT rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses, including expert report expenses. Mr. Gibson was generally successful, so I find he is entitled to reimbursement of \$200 in paid CRT fees.

48. Mr. Gibson indicated that he wished to claim dispute-related expenses for an expert report. He provided an invoice from Mr. Lange for an inspection and correspondence in December 2022. Although this expense was incurred before the CRT proceeding began, I find it was sufficiently related to this dispute to be considered a dispute-related expense. In particular, Mr. Gibson would have had no reason to obtain an inspection after the branch fell unless he was anticipating a claim against the city. I find the \$328.13 claimed is reasonable, and I allow it.
49. Mr. Gibson did not specifically claim any reimbursement for Mr. Lange's rebuttal report. As I did not admit the rebuttal as evidence in any event, I do not order any reimbursement.
50. As the city was unsuccessful, I dismiss its claim for \$3,546.37 for its expert report.

## **ORDERS**

51. Within 21 days of the date of this order, I order the city to pay Mr. Gibson a total of \$3,698.01, broken down as follows:
  - a. \$2,966.78 in damages,
  - b. \$203.10 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$528.13, for \$200.00 in CRT fees and \$328.13 in dispute-related expenses.
52. Mr. Gibson is entitled to post-judgment interest, as applicable.
53. This is a validated decision and order. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as a court order.

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Micah Carmody, Tribunal Member

