



# Civil Resolution Tribunal

Date Issued: June 27, 2019

File: SC-2019-000125

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *PASHELKA v. SUPER-SAVE ENTERPRISES LTD.*, 2019 BCCRT 776

B E T W E E N :

RICHARD PASHELKA

**APPLICANT**

A N D :

SUPER-SAVE ENTERPRISES LTD.

**RESPONDENT**

A N D :

RICHARD PASHELKA

**RESPONDENT BY COUNTERCLAIM**

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## REASONS FOR DECISION

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Tribunal Member:

Eric Regehr

## **INTRODUCTION**

1. The applicant (and respondent by counterclaim), Richard Pashelka, is a former customer of the respondent (and applicant by counterclaim) propane supplier, Super-Save Enterprises Ltd. (Super-Save). Mr. Pashelka claims that Super-Save removed a propane tank from his property when it still contained 567 liters of propane. He claims \$567.00, which he says is the value of the propane.
2. Super-Save says that it has already credited Mr. Pashelka's account \$510.04, which it says is the value of the leftover propane, but that Mr. Pashelka still owes it for the cost of removing the tank and other charges. Super-Save counterclaims for \$1,458.33, which it says is the amount Mr. Pashelka owes it after taking into account the value of the propane.
3. Mr. Pashelka is self-represented. Super-Save is represented by an employee, Marli Griesel.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "he said, she said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the

circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.

6. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are:
  - a. Did the parties agree that Mr. Pashelka would pay to have Super-Save's propane tank removed?
  - b. What is the value of the leftover propane?
  - c. How much, if anything, does Mr. Pashelka owe Super-Save?

## EVIDENCE AND ANALYSIS

9. In a civil claim such as this, each party must prove its claims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
10. Mr. Pashelka has been a customer of Super-Save since 2004, when he bought a cabin. A Super-Save propane tank was already on the property when Mr. Pashelka bought it. It is undisputed that the parties do not have a written contract, but Mr. Pashelka has generally had the tank filled annually and paid an annual rental charge.
11. The parties agree that in the early summer of 2018, a change in propane tank meant that Mr. Pashelka's propane tank could not remain where it was. The parties discussed Mr. Pashelka's options, which included moving the tank or replacing it with multiple smaller tanks, but were unable to come to an agreement. The parties have very different views about who said what during these discussions.
12. Mr. Pashelka says that after these discussions failed, Super-Save decided to pick the propane tank up. Mr. Pashelka says that the parties never discussed anything about who would pay for the costs of picking it up. He says that he assumed that because Super-Save owned the tank and was getting it back, it would bear the cost of removing it. He is adamant that he never agreed to any removal fee.
13. Super-Save says that it told Mr. Pashelka that he would have to pay the costs to remove the tank, and that it would be expensive because the cabin was a significant distance from the Super-Save depot. Super-Save says that Mr. Pashelka agreed to pay to have it removed. Super-Save also says that it is industry standard to charge the customer to remove a tank.
14. On August 23, 2018, Super-Save removed the propane tank from the property. It is undisputed that at the time of the removal, the propane tank contained 567 liters of propane that Mr. Pashelka had already paid for. Mr. Pashelka says that the

employee who picked up the tank said that he would receive a credit for the propane.

15. Mr. Pashelka says that after Super-Save removed the tank, he regularly inquired about the credit but Super-Save never responded.
16. Super-Save did not provide Mr. Pashelka with an invoice until December 20, 2018. Super-Save charged a total of \$1,757.54 for the removal of the tank and provided a credit for 567 liters of propane for a total of \$510.04. Super-Save's records also show that Mr. Pashelka had \$210.83 in outstanding charges from previous invoices. Super-Save's counterclaim is for the removal costs plus the other outstanding charges, less the credit for the propane.
17. As stated above, there is no written contract between the parties. While verbal contracts are enforceable just like written contracts, it is harder to determine what their terms are. The party trying to prove the existence of a verbal contract has the burden to prove what its essential terms were. Applied to this dispute, this means that Super-Save must prove that the parties agreed that Mr. Pashelka would pay the cost to remove the tank. For the reasons that follow, I find that Super-Save has failed to meet its burden of proof.
18. First, and most importantly, Super-Save failed to provide any direct evidence that it reached a verbal agreement with Mr. Pashelka that he would pay the removal costs. Specifically, Super-Save did not provide a statement from the employee who spoke to Mr. Pashelka or any internal notes or records that might indicate what that employee said. Super-Save is a sophisticated party that has been a party to multiple tribunal claims. Notably, in *Super Save Enterprises Ltd. v. Diamond Pre-Cast Concrete Ltd.*, 2018 BCCRT 850, the tribunal determined that Super-Save had failed to prove its allegations in part because it failed to provide direct evidence from the individuals with firsthand knowledge of the matters at issue. In these circumstances, I find that it is appropriate to draw an adverse inference against Super-Save based on its failure to provide evidence from the employee who dealt with Mr. Pashelka or offer any explanation for its failure to do so.

19. In addition, I rely on the lapse in time between the removal of the tank in and charging Mr. Pashelka. Super-Save provided a printout of its internal bookkeeping system, which shows that Super-Save did not register a charge on Mr. Pashelka's account until December 20, 2018. I find that this unexplained passage of time suggests that the parties did not come to an agreement before August 23, 2018, about the cost to remove the propane tank.
20. Super-Save argued that it is industry standard to charge the customer for picking up a propane tank. Super-Save provided no objective evidence of an industry standard on this issue and, even if it had, proof of an industry standard is not proof that it reached an agreement with Mr. Pashelka.
21. Therefore, I dismiss Super-Save's claim for the costs of removing the propane tank from Mr. Pashelka's property.
22. The amount of Super-Save's counterclaim also includes amounts for overdue invoices. Two of the charges, totaling \$17.98, are from 2015, which is well past the 2-year limitation period that applies to debt claims under section 8 of the *Limitation Act*. I find that Super-Save is not entitled to recover these amounts.
23. The remaining charges, dated November 30, 2017, appear to be an annual charge of \$212.85 for renting the propane tank, less a \$20 credit. I find that this charge is consistent with Mr. Pashelka's evidence that the parties had a verbal agreement that included an annual rental charge.
24. I note that Super-Save's submissions do not squarely raise the issue of this past rental charge. That said, I find that Super-Save's evidence made it clear that the outstanding charges were part of its overall claim. In his submissions, Mr. Pashelka denies that he owed Super-Save for any previous charges but does not explain his position further.
25. On balance, I find that Super-Save has proven that Mr. Pashelka owed it \$192.85 in past charges.

26. As for the value of the propane, there is no evidence before me other than the credit note that Super-Save provided, which values the propane at \$0.799 per liter and provides credit for taxes and storage. Mr. Pashelka filed his claim before he knew that Super-Save had issued the credit note, and in this dispute does not provide any support for his position that the propane is worth \$1.00 per liter. He also does not dispute Super-Save's calculation. I find that the value of the propane is \$510.04.
27. Therefore, I find that Mr. Pashelka is entitled to \$510.04 for the propane, less \$192.85 for the past rental charge, for a total of \$317.19.
28. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Mr. Pashelka has been successful in his claim so I find that he is entitled to reimbursement of \$125 in tribunal fees. Super-Save has been partially successful in its counterclaim so I find that it is entitled to reimbursement of half of its tribunal fees of \$125, which totals \$67.50. Setting off these amounts, I award Mr. Pashelka \$67.50 for his tribunal fees.
29. Neither party claimed any dispute-related expenses.

## **ORDERS**

30. Within 14 days of the date of this order, I order Super-Save to pay Mr. Pashelka a total of \$389.31, broken down as follows:
  - a. \$317.19 as reimbursement for the propane,
  - b. \$4.62 in pre-judgment interest under the Court Order Interest Act, and
  - c. \$67.50 in tribunal fees.
31. Mr. Pashelka is entitled to post-judgment interest, as applicable.
32. I dismiss the remaining claims and counterclaims.

33. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
34. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Eric Regehr, Tribunal Member