Civil Resolution Tribunal

Date Issued: August 25, 2020

File: SC-2020-003051

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Chisholm v. Shatzko*, 2020 BCCRT 948

B E T W E E N :

KATHLEEN CHISHOLM

APPLICANTS

A N D :

MARTIN WALTER SHATZKO and VICTORIA DOROTHY READ

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This dispute is about whether smoke from a wood stove and barbeque is a nuisance.

2. The applicant Kathleen Chisholm says the respondents Martin Walter Shatzko and Victoria Dorothy Read have been burning unseasoned wood, garbage and other material, causing smell and reduced air quality at her nearby home.

3. The applicant claims $4,999.99 for medical costs, medical supplies and prescriptions, and the loss of use and enjoyment of her property. She also asks for an order that the respondents stop burning certain material at their property.

4. The respondents deny causing a nuisance. They say they burn only seasoned wood for heating, using a high-efficiency wood-stove. They use their barbeque for cooking. The respondents deny producing any unreasonable smoke. They ask me to dismiss the dispute.

5. The parties are each self-represented.

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). 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 parties to a dispute that will likely continue after the dispute resolution process has ended.

7. The CRT 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 "she said, they 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.

8. 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 *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

9. 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.

10. 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

11. The issue in this dispute is whether the respondents have caused a nuisance to the applicant by burning improper materials and, if so, what remedy is appropriate?

EVIDENCE AND ANALYSIS

12. In this civil claim, the applicant Ms. Chisholm bears the burden of proof on a balance of probabilities. The applicant did not provide submissions despite CRT staff providing her with opportunities to do so. I have reviewed the evidence and submissions provided but refer to them only as I find necessary to explain my decision. For the following reasons, I dismiss the applicant's claims.

13. I find the law of nuisance applies to this dispute. The general principle underlying the law of nuisance is that people are entitled to use and enjoy their land without unreasonable interference. Not every invasion of a person's interest in the use and enjoyment of their property will be a nuisance that attracts compensation. Rather,

the law of nuisance involves a “give and take, live and let live” approach: see *Grant* v*. Warman*, 2009 BCSC 886.

14. To establish nuisance, the applicant must prove she suffered a substantial and unreasonable interference affecting the use or enjoyment of her property: see *St.* Lawrence *Cement Inc. v. Barrette*, 2008 SCC 64.

15. In *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLII 2776 (BCCA), the BC Court of Appeal lays out the factors to consider in deciding whether an interference is unreasonable as follows:

    a. the nature of the act complained of,

    b. the nature of the injuries suffered,

    c. the character of the neighbourhood,

    d. the frequency of the occurrence which causes the interference,

    e. the duration of the alleged nuisance,

    f. the utility of the respondents’ conduct, and

    g. other factors which could be of significance in special circumstances.

16. In this dispute, the act complained of is that the respondents are burning materials on their property causing unreasonable smoke at the applicant’s property.

17. In order to be an unreasonable interference, the nature of the acts complained of must be substantial and beyond simply annoying or bothersome: *Osler Dev. Ltd. et al v. H.M.T.Q et al*, 2001 BCSC 129.

18. However, judging the unreasonableness of the interference is not measured by the subjective standards of an overly sensitive person, but by the standards of the ordinary reasonable person: *Chiang v. Yang*, 1999 BCPC 29. Because the test is objective, the applicant cannot satisfy her burden to prove the smoke is

a nuisance based only on statements of her subjective experience: see *Gichuru v. York*, 2011 BCSC 342.

19. The respondents agree that they create some smoke, by burning seasoned wood through a wood stove used to heat their home. The respondents also agree that they use a barbeque for cooking.

20. I find that to burn proper materials to heat a home, using a functioning wood stove, is reasonable. Likewise, using a barbeque to cook food at a private home is reasonable. Put differently, there is utility to the respondents' conduct in burning materials for heating and cooking.

21. However, the question is whether, as the applicant submits, the respondents create unreasonably heavy smoke, by burning improper items including garbage, grease and untreated wood.

22. The applicant provided statements from three people (EN, PS and JC) who she says live nearby. EN, PS and JC say that they have noticed undue smoke and that it frequently interferes with their enjoyment of their own properties. None of the statements are signed, and none of them specify the authors' addresses. I cannot tell whether these witnesses live close enough to the respondents to provide reliable, direct observation. I therefore place little weight on these statements.

23. The applicant also provided a statement from NS, who attends at the applicant's home to provide therapy. NS refers to observing undue smoke outside the applicant's home but does not specify the source of the smoke. Again, NS' statement is unsigned. Because NS knows the applicant and does not report the source of the smoke, I place little weight on her evidence.

24. In her Dispute Notice, the applicant referred to having evidence in the form of "Air quality readings from reliable equipment used on a daily basis inside and outside" her home, and "videos and pictures of smoke coming from" the respondents' address. That type of independent evidence would be relevant and useful: see *Churcher* v*. Richards*, 2014 BCSC 2093 at paragraph 20, where the court relied on

photographic evidence that the defendant was generating unreasonable smoke. Here, the applicant did not provide any such evidence despite referring to it in her Dispute Notice. I am left without independent evidence that an unreasonable amount or type of smoke has been coming from the respondents' address. As well, there is no direct evidence that the respondents burned anything other than seasoned wood.

25. On January 21, 2020, the Saanich Fire Department (SFD) inspected the wood stove at the respondents' property in response to a complaint from the applicant. The firefighters inspected the wood stove and found it to be "professionally installed". They also looked at the embers of the burned material and the supply of dry fir wood that had yet to be burned. Based on that review, the SFD wrote that it had no concerns about the wood stove or its use at that time. Based on the SFD memorandum, and the lack of contrary evidence, I find that the applicant has not proven that the respondents burned unreasonable materials through their wood stove or barbeque.

26. In a February 2020 email to the applicants, MS, Assistant Fire Chief in SFD's Fire Prevention Division, wrote that firefighters had attended the respondents' property multiples times and "found no issues" with smoke.

27. Based on the SFD's multiple visits to the respondents' property, during which it did not observe unreasonable smoke, I find that the applicant has not proven, on a balance of probabilities, that the respondents produced unreasonable smoke that unreasonably impaired her ability to enjoy her property. I therefore dismiss the applicant's claims.

28. Turning briefly to the applicant's requested remedy, even if I had found nuisance to be proven, I would not have ordered the $4,999.99 sought by the applicant for medical costs, supplies, prescriptions and loss of use of her property. She did not provide evidence in support of these damages.

29. The applicant also asked for an order to stop the respondents from burning specific items. An order requiring someone to do something or stop doing something is known in law as "injunctive relief". Injunctive relief is outside the CRT's small claims jurisdiction, except where expressly permitted by section 118 of the CRTA. I find that there is no CRTA provision which would permit me to grant this injunctive relief.

30. 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. I see no reason in this case not to follow that general rule. The respondents paid no tribunal fees and did not claim dispute-related expenses. I make no order for them. I dismiss the applicant's claim for reimbursement of tribunal fees.

ORDER

31. I dismiss the applicant's claims and this dispute.

Julie K. Gibson, Tribunal Member