



Civil Resolution Tribunal

Date Issued: May 17, 2021

File: SC-2020-007548

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super-Save Enterprises Ltd. v. Walton*, 2021 BCCRT 531

B E T W E E N :

SUPER-SAVE ENTERPRISES LTD.

APPLICANT

A N D :

WILLIAM WALTON

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Richard McAndrew

INTRODUCTION

1. This dispute is about propane delivery services. The applicant, Super-Save Enterprises Ltd. (Super-Save) delivered propane to the respondent, William Walton. Super-Save claims Mr. Walton breached their contract by attempting to improperly

end the contract. Super-Save claims \$40 in debt and \$4,961.96 in liquidated damages, but has reduced its total claim to \$5,000, the maximum small claims limit for the Civil Resolution Tribunal (CRT).

2. Mr. Walton says that he does not owe Super-Save a debt for unpaid propane delivery fees or liquidated damages. Mr. Walton says Super-Save breached the contract by failing to refill his propane tank.
3. Super Save is represented by an employee. Mr. Walton is self-represented.

JURISDICTION AND PROCEDURE

4. These are the CRT's formal written reasons. 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, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.
6. 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 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.

7. 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.

ISSUES

8. The issues in this dispute are:
 - a. Did Mr. Walton have a right to cancel the contract under the *Business Practices And Consumer Protection Act* (BPCPA)?
 - b. Did Super-Save fundamentally breach the contract by failing to deliver propane?
 - c. Did Mr. Walton breach the contract by attempting to improperly end it?
 - d. Does Mr. Walton owe Super-Save a \$40 debt for unpaid propane delivery fees?
 - e. Does Mr. Walton owe Super-Save liquidated damages? If so, how much?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicant, Super Save, must prove its claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
10. The parties signed a renewable 5-year agreement on May 10, 2018, with an effective date of April 11, 2018. The contract says that Super-Save will exclusively deliver propane to Mr. Walton and provide an 80-gallon propane tank.
11. It is undisputed that Super-Save periodically delivered propane to Mr. Walton until its final delivery on March 4, 2020.

BPCPA

12. The BPCPA applies to consumer transactions, which it defines as a supply of goods or services by a supplier for a consumer for purposes that are primarily personal, family, or household. I note the parties did not contemplate the BPCPA in their submissions. However, it is undisputed that the propane was delivered to Mr. Walton's home for his personal use and that Super-Save supplies propane in the course of its business. Further, the evidence discussed below shows that Mr. Walton attempted to cancel the contract on April 24, 2020 and the application of the BPCPA is mandatory. So I determined it was unnecessary for the parties to provide further submissions about the applicability of the BPCPA in these circumstances and I find the BPCPA applies to the parties' contract.
13. The BPCPA defines a future performance contract as a contract where the supply, or payment in full of the total price payable, is not made at the time the contract is made or partly executed. Here, I find the parties made their contract on May 10, 2018 for the delivery of propane for 5 years. So, I find the parties' contract was a future performance contract.
14. BPCPA section 23(5) says that a consumer may cancel a future performance contract within 1 year of receiving a copy of the contract if the contract does not contain the information required under sections 23(2) and 19. I find that Mr. Walton had a copy of the contract when he signed it on May 10, 2018, and that he demanded the contract's cancellation on April 24, 2020. So, I find that Mr. Walton did not cancel the contract within one year as required and he is not entitled to cancel the contract under the BPCPA.

Did Super-Save breach the contract by failing to deliver propane?

15. Mr. Walton says that Super-Save was required to keep his tank topped up, and breached the contract by failing to refill his propane tank before it became empty. If Super-Save fundamentally breached the contract, Mr. Walton could end the contract

without further obligations to Super-Save (see, *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA)).

16. The contract does not say Super-Save will prevent Mr. Walton from running out of propane or provide a fixed delivery schedule. Rather, the contract says that the frequency of propane deliveries will be determined by “degree day.” I infer that this means that Super-Save will adjust its deliveries based on the weather. I find that this is consistent with Super-Save’s submission that it calculates delivery dates based on Mr. Walton’s past usage. The contract also says that Mr. Walton can request propane. Based on the above, I find that the contract requires Super-Save to deliver propane based on its estimation of Mr. Walton’s needs and upon Mr. Walton’s request.
17. So, did Super-Save breach the contract by failing to deliver propane, and if so, was this a fundamental breach of the contract?
18. Mr. Walton says he called Super-Save shortly after March 4, 2020 complaining about its accounting records. Mr. Walton also says that he was very sick at that time and he used propane faster than normal to maintain a constant temperature. As a result, Mr. Walton says he ran out of propane earlier than usual on an unspecified date. Mr. Walton’s spouse, LW, provided a statement saying that they ran out of propane during approximately the third week of March. Mr. Walton says he called Super-Save on an unspecified date requesting a refill but Super-Save said that he was not due for another propane delivery for several weeks. Mr. Walton says that he assumed that Super-Save stopped delivering propane because of his billing complaints. He also says he called Super-Save on April 24, 2020 and notified it that his tank was empty.
19. Super-Save denies this and says that Mr. Walton did not complain about running out of propane until after Super-Save informed him that he would be responsible for liquidated damages. Super-Save provided telephone call logs of its conversations with Mr. Walton, which I find are business records prepared in the ordinary course of business. The call logs show that Mr. Walton left a message for Super-Save on April 22, 2020 complaining about its accounting practices and that Mr. Walton requested cancellation when Super-Save called him back on April 24, 2020. It is undisputed that

Mr. Walton told Super-Save that he had disconnected Super-Save's propane tank, hired another propane delivery service and asked Super-Save to remove its propane tank during this telephone call. The call logs do not say that Mr. Walton complained about running out of propane at this time. Super-Save emailed Mr. Walton on April 24, 2020 saying he would be responsible for liquidated damages for ending the contract early.

20. On April 26, 2020, Mr. Walton emailed Super-Save saying that Super-Save breached the contract by failing to refill his propane tank. Mr. Walton provided a photograph showing that his propane tank was empty. Super-Save emailed Mr. Walton back on April 27, 2020 saying that, based on his propane tank's capacity and his previous usage, his propane tank should not have needed a refill for several more weeks. The email also noted that Mr. Walton only complained about Super-Save's accounting practices, not propane delivery, during his previous telephone call.
21. I find that Mr. Walton asked to cancel the contract on April 24, 2020 as Super-Save submits, since it is undisputed that Mr. Walton had already disconnected Super-Save's propane tank and hired another propane delivery service by that date. Further, on balance, I find it more likely than not that Mr. Walton did not notify Super-Save that his propane tank ran out until April 26, 2020. I reach this conclusion because I find that Super-Save's version of events is more likely to be accurate than Mr. Walton's because Super-Save's submissions are more consistent with the parties' emails and Super-Save's call logs. Super-Save's April 24, 2020 email and letter do not address propane delivery complaints but its April 27, 2020 email discusses its propane delivery in detail. I find that this was likely because Mr. Walton did not complain about propane deliveries until April 26, 2020. On balance, I find it more likely that Mr. Walton told Super-Save that he was ending the contract on April 24, 2020 because of billing complaints rather than a delivery failure.
22. Without notifying Super-Save that he ran out of propane before April 26, 2020, I am not satisfied that Super-Save was aware that Mr. Walton needed a propane delivery. I find that Super-Save did not breach the contract by relying on its calculations based

on Mr. Walton's past usage. So, I find that Mr. Walton was not relieved of his contractual obligations.

Did Mr. Walton breach the contract by attempting to improperly end the contract?

23. As stated above, I find that Mr. Walton asked to cancel the contract on April 24, 2020. However, to cancel the contract, clause 11 says that Mr. Walton must provide written cancellation by registered mail no more than 120 days and not less than 90 days before the contract's end (known as a cancellation window, which here would have been in 2023). Since it is undisputed that Mr. Walton did not do so, he could not have properly cancelled the contract under its terms. So, I find that Mr. Walton breached the contract by improperly attempting to end the contract.

24. Super-Save removed its propane tank from Mr. Walton's property on May 27, 2020.

25. On July 9, 2020, Super-Save wrote Mr. Walton that, due to his breach, it was terminating the contract. I find that the contract ended at that time.

Does Mr. Walton owe Super-Save a \$40 debt for unpaid propane delivery fees?

26. I find that under the contract Mr. Walton is liable for Super-Save's propane services up until July 9, 2020, the date Super Save terminated the contract due to Mr. Walton's breach.

27. Mr. Walton says, and Super-Save does not dispute, that he paid the entire outstanding balance of \$829.53 owing for propane services as of April 27, 2020. Mr. Walton also emailed Super-Save on April 27, 2020 saying he was cancelling his automatic monthly payment.

28. Super-Save provided 2 invoices, both dated June 16, 2020, charging a total of \$40 for declined payments. I infer that these charges relate to costs incurred from attempting to process Mr. Walton's cancelled automatic payments twice in June 2020. However, Super-Save does not explain why it attempted to process these payments

after Mr. Walton notified it that these automatic payments were cancelled. Further, Super-Save did not explain why Mr. Walton still owed a payment for services under the contract when the contract fees were based on the volume of propane delivered and it is undisputed that Super-Save did not provide any propane after March 4, 2020.

29. For the above reasons, I find that Super-Save has failed to prove that Mr. Walton owes a debt for unpaid propane delivery fees and I dismiss this claim.

Does Mr. Walton owe Super-Save liquidated damages?

30. Super-Save also claims liquidated damages of \$4,961.96 in its June 24, 2020 invoice. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. I acknowledge that this clause is onerous. However, in *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.*, 2014 BCSC 690, the British Columbia Supreme Court held that a similar contract was enforceable under similar circumstances, and this decision is binding on me.

31. Clause 11 of the contract says that if a customer attempts to end the contract early, Super-Save may accept such a repudiation and terminate the agreement. Super-Save is then entitled to the amounts owing at the time, plus an amount of liquidated damages determined by a formula.

32. I have already determined Mr. Walton breached the parties' contract by attempting to improperly end the contract and I find Super-Save accepted this repudiation by sending Mr. Walton a termination letter on July 9, 2020.

33. How should the liquidated damages be calculated? Clause 11 says to take the monthly average of all charges (including taxes) invoiced to Mr. Walton and multiply that average by the number of months remaining in the parties' agreement. Clause 2 of the contract says it commenced on April 11, 2018 and had a term of 5 years.

34. Super-Save provided a June 24, 2020 invoice for the liquidated damages. It shows that Mr. Walton used a monthly average of 114.773 litres of propane consumed at a current cost of .859 cents per litre, which equals a monthly charge of \$98.59. Super-

Save multiplied this by the claimed remaining duration of 38 months and added GST. This equals \$4,961.96.

35. I was unable to confirm the average monthly usage or price as I do not have Super-Save's previous invoices. Mr. Walton provided Super-Save transaction reports showing the following charges:
 - a. On September 26, 2019 an invoice for \$342.69 was issued.
 - b. On November 12, 2019 an invoice for \$237.01 was issued.
 - c. On December 19, 2019 an invoice for \$323.13 was issued.
 - d. On January 28, 2020 an invoice for \$358.34 was issued.
 - e. On March 3, 2020 an invoice for \$341.72 was issued.
36. Based on the undisputed transaction reports, Super-Save charged Mr. Walton \$1,602.89 from September 2019 to April 2020 for propane delivery services. This averages to \$200.36 per month. Further, it is undisputed that Mr. Walton initially paid Super-Save a \$150 equal monthly payment and this equal monthly payment later increased to \$200. Based on the above, I find that the \$98.59 monthly amount used by Super-Save to calculate liquidated damages in the June 24, 2020 invoice appears reasonable.
37. I find that the contract term had 33 months remaining until its expiration on April 10, 2023. At the monthly amount of \$98.59 calculated above, I find that Mr. Walton owes Super-Save liquidated damages of \$3,253.47 plus \$162.67 GST, as stated in clause 11. This totals \$3,416.14.
38. Although the parties' contract allowed for contractual interest, Super-Save did not make an interest claim. In *Super Save Disposal Inc. v. Pretty*, 2020 BCCRT 1368, the applicant did not claim for contractual interest, though as is the case here, the parties' contract allowed for it. In *Pretty*, a CRT Vice Chair noted that the *Court Order Interest Act* (COIA) does not apply where there is an agreement about interest. So,

the Vice Chair did not order any interest for the unpaid monthly services. However, the Vice Chair found that the parties' agreement about interest did not apply to liquidated damages so the applicant was awarded pre-judgment interest under the COIA for the liquidated damages.

39. Although the decision in *Pretty* is non-binding, I agree with the Vice Chair's reasoning and find it applicable to this dispute. I find the parties' agreement about interest only applied to monthly charges, not liquidated damages. So, I find Super-Save is entitled to pre-judgment interest under the COIA on the \$3,416.14, from July 9, 2020 to the date of this decision. This equals \$13.15.
40. Under section 49 of the CRTA and the CRT's rules, as Super Save was generally successful in this dispute, I find it is entitled to reimbursement of \$175 in paid CRT fees. No dispute-related expenses were claimed.

ORDERS

41. Within 30 days of the date of this order, I order Mr. Walton to pay Super-Save a total of \$3,604.29, broken down as follows:
 - a. \$3,416.14 in liquidated damages,
 - b. \$13.15 in pre-judgment COIA interest, and
 - c. \$175 in CRT fees.
42. Super-Save is entitled to post-judgment interest, as applicable.
43. Under section 48 of the CRTA, the CRT 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 CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to

be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

44. 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. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Richard McAndrew, Tribunal Member