



Civil Resolution Tribunal

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File: SC-2023-002124

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Underhill v. Foster*, 2024 BCCRT 330

B E T W E E N :

GRAHAM D UNDERHILL

APPLICANT

A N D :

DANA DESIREE FOSTER and STEPHEN LUDWIG

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. The applicant, Graham D Underhill, says he paid the respondents, Dana Desiree Foster and Stephen Ludwig, \$5,250 for group transportation and lodging at Snowy Mountain Lodge (Lodge). The applicant says the respondents fraudulently misrepresented that they owned and controlled the Lodge, but in fact the Lodge has been closed by the Province of BC (Province) since March 2020. The applicant also

says the respondents failed to provide the agreed-upon transportation to the remote Lodge.

2. The applicant seeks a \$5,000 refund from the respondents. The applicant has abandoned the portion of his claim over \$5,000 to fit within the monetary limit for Civil Resolution Tribunal (CRT) small claims disputes.
3. The respondents say that before the applicant booked the transportation, they told him there was a BC Supreme Court (BCSC) proceeding about their tenure renewal for the Lodge. They also say the applicant breached their booking conditions in various ways, including by adding 4 additional people to the booking without telling the respondents. The respondents also say the applicant behaved abusively, and intended to do unauthorized mountain guiding.
4. The respondents also say this CRT dispute should not be decided until the BCSC proceeding is complete.
5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 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.
7. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. As the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.

8. CRTA section 42 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.

Late Evidence

9. The respondents provided their evidence after the CRT's deadline. The applicant objects to the late evidence, and says the CRT should not admit it because the deadline had passed. However, the applicant had the opportunity to review and respond to the late evidence, so I find there is no prejudice in allowing it. Consistent with the CRT's mandate of flexibility, I have allowed and considered this late evidence.

ISSUES

10. The issues in this dispute are:
 - a. Should the CRT suspend this dispute until the BCSC proceeding is complete?
 - b. Is the applicant entitled to a \$5,000 refund?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant must prove his claims on a balance of probabilities. I have read the parties' submitted evidence and arguments, but refer only to what I find relevant to provide context for my decision.

Should the CRT suspend this dispute until the BCSC proceeding is complete?

12. The respondents say the BCSC proceeding is about the respondents' legal right to use and rent out the Lodge, so the CRT cannot fairly decide this dispute until the BCSC proceeding has ended. Specifically, the respondents argue that the CRT must wait for the BCSC to determine whether the respondents were "in violation of any law" at the time of the applicant's booked trip, from February 19-25, 2023.

13. At the time of the respondents' CRT submissions, the BCSC had issued an interlocutory order, but had not set a trial date.
14. For the reasons explained below, I find I can fairly decide the issue in this dispute based on the evidence currently before me. Specifically, I find that regardless of the outcome of the ongoing BCSC proceeding, the respondents had been served with a Notice to Vacate, Notice of Seizure, and Notices of Trespass related to the Lodge before the applicant booked his trip.
15. Even if the BCSC finds in favour of the respondents and orders the Province to revoke the vacate, seizure and trespass notices, those notices were in place and legally in force at the time of the booking, and at the time of the scheduled trip.
16. As explained in my reasons below, I conclude that regardless of what happens in the BCSC proceeding, the respondents were not legally entitled to rent out or host guests at the Lodge in February 2023, because the Province had forbidden them from doing so. Whether or not the Province was justified in doing that is a matter between the respondents and the Province, and will not change the outcome of this dispute. Put another way, the Province's notices were binding in February 2023, even if the respondents think they were issued wrongfully. The respondents were not entitled to ignore the notices and rent out the Lodge anyway.
17. For these reasons, I deny the respondents' request to suspend this dispute pending the outcome of the BCSC proceeding.

Is the applicant entitled to a \$5,000 refund?

18. The evidence before me shows that in June 2022, the parties corresponded by email about booking the Lodge for a group trip in early 2023. In a June 21, 2022 email, the applicant asked Mr. Ludwig to tentatively book the trip for February 19-25, 2023.
19. The evidence shows the parties corresponded further about the trip, and had a phone conversation. In a June 23, 2023 email, the respondents said the price would be \$1,500 per person, or \$1,300 if they each paid a \$650 deposit by the end of June

2023. In a June 24, 2022 email, the respondents wrote that they could house a maximum of 10 people in the Lodge, including the applicant as guide.

20. Invoices and e-transfer records show that the applicant paid the respondents a \$2,625 deposit on June 27, 2022.
21. On September 1, 2023, the respondents emailed the applicant, asking him to “confirm his trip numbers soon”. The email also included an attached invoice. The applicant replied, stating that 5 people had fully paid, and he was pretty sure there would be a 6th person, plus himself as guide. The respondents replied, confirming the group number and asking the applicant to send another payment.
22. The applicant made a second payment of \$2,625 on September 3, 2022, for a total payment of \$5,250.
23. The parties agree that the applicant and his group arrived at the meeting location for transportation to the Lodge on the agreed-upon date of February 19, 2023. Then, the parties had a disagreement. The respondents did not transport the group to the Lodge, and the trip did not occur. As discussed below, the parties disagree about why this occurred.
24. The applicant says he is entitled to a refund for 2 reasons. First, the respondents did not provide transportation as promised. Second, the respondents did not have a legal right to host groups at the Lodge because the Province had ended the respondents’ tenure over the Lodge in March 2020.
25. The respondents say the applicant is not entitled to a refund because he is not authorized to lead guided trips, and failed to tell them he planned to use the Lodge for a guided trip. They also say the applicant had 8 people in his group, but only paid for 4 people.
26. I agree with the applicant that the respondents were not legally entitled to rent out the Lodge in February 2023.

27. The respondents say the applicant knew about the BCSC proceeding when he paid for the trip, and that they updated him about the proceeding's status in a January 6, 2023 email. However, I find the respondents have provided no evidence to support these assertions. They provided no copies of emails. There is no January 6, 2023 email in evidence, or any other correspondence from the respondents that mentions the BCSC proceeding.
28. The evidence before me shows that on February 17, 2023, 2 days before the trip, someone unrelated to the respondents, with the initials MM, wrote to the applicant about snow conditions, and mentioned that the Lodge had been "officially closed by the province". The applicant replied, "Nothing has been conveyed to me by the owners."
29. Also, one of the applicant's group members, AS, provided a statement dated December 12, 2023. AS says that after the group arrived at the meeting site for transportation to the Lodge on February 19, the applicant asked Ms. Foster if they had a valid permit for the Lodge, or if the Province had closed the Lodge. AS says Ms. Foster refused to answer the question.
30. The respondents provided no evidence to prove their assertion that they told the applicant about the BCSC proceeding, or about the problems with the Lodge's tenure. The respondents were aware of these issues since at least November 2020, when the Province served them with a Notice to Vacate. This was long before the applicant booked or made any payments for the trip.
31. On October 4, 2023, Justice Crerar issued an interlocutory order in the BCSC proceeding. In his reasons, Justice Crerar explained that the Lodge is located on Crown land, and the Province granted the respondents the right to occupy and operate a business on that Crown land pursuant to a licence of occupation dated March 1, 2010. That licence expired on March 1, 2020. Justice Crerar noted the respondents' position that the Province terminated the licence in 2016.

32. Justice Crerar wrote in paragraphs 30-33:

I am satisfied that the licence does govern the termination of the plaintiffs' right to occupy or use these lands. This is so under either party's theory of the status of the licence.

If the licence remains in place, as the Province asserts, then it expired on March 1, 2020. At that point, the plaintiffs were obliged to vacate the lands.

If the licence was terminated in October 2016, as the plaintiffs assert, then the plaintiffs are no longer entitled to occupy or use the land through the March 1, 2010 licence, or any other instrument, as required by the *Land Act*. If indeed the licence was terminated in October 2016, the plaintiffs continued to use the lands under the indulgence of the Crown on the basis of a month-to-month arrangement, all the time subject to the remaining provisions of the licence, by the express terms of articles 5(q) and 6.1(k).

... The land is Crown land. They are not allowed to use or occupy those lands without permission or licence to do so, and, under either theory of the case, they lack a present right to do so. Indeed, if the plaintiffs' theory of the case prevails and the licence was terminated in October 2016, as they assert, then they have been illegally occupying the lands not for three-and-a-half years, but for seven-and-a-half years.

33. Based on this reasoning, Justice Crerar issued an injunction barring the respondents from accessing, occupying, or otherwise taking actions with respect to the Crown land or the structures on that land, including the Lodge building.

34. In his decision, Justice Crerar also noted that since 2020, the Province had repeatedly communicated with the respondents, demanding that the plaintiffs remove themselves from the land and cease occupying or operating their Lodge business on it. These communications include:

- November 18, 2020 – personally served notice to vacate.
- December 16, 2020 – notice of trespass.
- January 29, 2021 – notice of trespass.
- June 3, 2021 – provincial officers posted seizure notices on the structures and placed locks on the exterior doors, with accompanying seizure notice sent to the plaintiffs by registered mail.
- April 14, 2022 – notice of trespass with \$1,000 administrative penalty.

35. I acknowledge that the respondents dispute the Province's position in the BCSC proceeding, and argue there that they have an ongoing right to use and occupy the Lodge. However, I find that in February 2023, when the applicant's trip was supposed to occur, the respondents did not have the Province's permission to use the Lodge, and had been repeatedly ordered not to do so. I place significant weight on Justice Crerar's finding that the Province had issued seizure notices and locked the Lodge doors in June 2021, long before the applicant booked his trip.

36. In their August 2022 Notice of Civil Claim, the applicants asked the BCSC to nullify the Notice to Vacate, Notices of Trespass, and Seizure Notice. However, the BCSC had not nullified the notices at the time of the applicant's trip, and might never do so.

37. For these reasons, I find the respondents were not legally entitled to rent out the Lodge or host guests there in February 2023. So, I find the applicant is entitled to a refund of \$5,000.

38. I also acknowledge the respondents' argument that the applicant brought more people to the transportation meeting site than he had paid for, or disclosed to the respondents. The applicant disputes this. However, I find nothing in this dispute turns on the number of guests, since the respondents were not legally entitled to rent out the Lodge or host any guests.

39. The respondents also argue that the applicant is not a certified guide, and intended to “secretly” make money from the trip as an unauthorized guide. However, I again find nothing turns on this argument, since the respondents were not entitled to rent out the Lodge or host guests in any event. Also, there is nothing in the correspondence before me establishing that guide certification was a requirement of booking.
40. In their submissions, the respondents refer to the terms of their booking policy. However, they did not provide a copy of the policy, and there is nothing in the email correspondence in evidence setting out a booking policy. So, I find the respondents have not proven they disclosed a booking policy to the applicant, or that the applicant agreed to it, so it is not determinative of this dispute.
41. Finally, the respondents made several allegations against the applicant, including about family law matters, criminal law matters, and a cabin that the applicant allegedly uses. I place no weight on these allegations, as they are unsupported by evidence, and unrelated to the issue before me to decide.
42. I find it unnecessary to address the applicant’s argument that the respondents did not provide sufficient transportation, since the respondents were not entitled to use the Lodge regardless.
43. For all these reasons, I find the applicant is entitled to a \$5,000 refund.
44. The *Court Order Interest Act* (COIA) applies to the CRT. I find the applicant is entitled to pre-judgment interest from September 3, 2022 (the date of the final payment). This equals \$307.92.
45. Under CRTA section 49 and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As the applicant was successful in this dispute, I find he is entitled to reimbursement of \$175 in CRT fees.

46. The applicant also requested \$500 for time spent on this dispute. CRT Rule 9.5(5) says the CRT will not order reimbursement for time spent on a dispute except in extraordinary circumstances. The applicant says the circumstances here are extraordinary, due to the respondents' "level of deceit". I do not agree. Although the parties disagreed, and although I have found in favour of the applicant, I find the circumstances of this dispute are not extraordinary. It is typical in a CRT dispute for parties to take opposing positions, and give conflicting evidence. I find this dispute was not unusually complex, and there was no undue delay. For these reasons, I dismiss the applicant's claim for time spent on the dispute.

ORDERS

47. I order that within 30 days of this decision, the respondents must pay the applicant a total of \$5,482.92, broken down as follows:

- a. \$5,000 as a refund of payments,
- b. \$307.92 in pre-judgment interest under the COIA, and
- c. \$175 in CRT fees.

48. The applicant is entitled to post-judgment interest under the COIA, as applicable.

49. I dismiss the applicant's claim for time spent on the dispute.

50. This is a validated decision and order. Under CRTA section 58.1, a validated copy of the CRT's order can be enforced through the BC Provincial Court. Once filed, a CRT order has the same force and effect as an order of the BC Provincial Court.

Kate Campbell, Tribunal Member