



# Civil Resolution Tribunal

Date Issued: April 23, 2019

File: SC-2018-006827

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gilbert-Hrimech v. Vmedia Inc.*, 2019 BCCRT 484

**B E T W E E N :**

Sami Gilbert-Hrimech

**APPLICANT**

**A N D :**

Vmedia Inc.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell

### INTRODUCTION

1. The applicant, Sami Gilbert-Hrimech, says the respondent, Vmedia Inc., indicated on its website that it offered cable internet service in Nelson, British Columbia. The applicant says they subscribed to the service and the respondent charged their

credit card, but then the respondent cancelled the service and said it did not offer the service in Nelson.

2. The applicant says they then subscribed a second time, and the same thing occurred. They say the respondent either wrongfully cancelled their service, or else deliberately made a fraudulent representation on its website about services offered, contrary to section 5(1) of the *Business Practices and Consumer Protection Act* (BPCPA). The applicant seeks \$1,000 in damages for fraud, \$2,000 in damages for lost income, and \$2,000 in punitive damages.
3. The respondent denies liability. It says it offers internet service by using the networks of other “underlying” internet providers, under agreement. It says that the underlying provider in the applicant’s area was Shaw, which initially confirmed that the respondent could install the connection, but later Shaw sent an email stating that the applicant’s address was not serviceable. The respondent says its website includes a footnote stating that internet availability shown by postal code was not always 100% accurate, and that selected plans had to be confirmed for the specific address by the network provider. The respondent also says it refunded all payments to the respondent.
4. The applicant is self-represented. The respondent is represented by an employee.

## **JURISDICTION AND PROCEDURE**

5. 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* (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.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.
7. 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.
8. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

9. The issue in this dispute is whether the respondent made a fraudulent misrepresentation about services offered, and if so, what remedies are appropriate.

## **EVIDENCE AND ANALYSIS**

10. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. Typically, in civil claims such as this, the applicant bears the burden of proof, on a balance of probabilities. However, the applicant alleges that the respondent engaged in a deceptive act or practice, contrary to section 5(1) of the BPCPA. Section 5(2) of the BPCPA states that when a deceptive act or practice is alleged,

the burden of proof that there was no deception is on the supplier (in this case, the respondent). I have applied this reverse onus, and for the reasons set out below, I find the respondent has proved it did not commit any deceptive act or practice, and did not commit fraudulent misrepresentation, as alleged by the applicant. I therefore find the applicant is not entitled to any damages, and dismiss the applicant's claims.

12. On November 25, 2017, the applicant subscribed to the respondent's "cable 25" internet service, at an address in Nelson, BC. The applicant's credit card was billed \$104.54, which included service fees and various charges for a modem. The respondent emailed to confirm the order, and later emailed to confirm an installation date on December 7. The respondent shipped the modem to the applicant.
13. On December 5, 2017, the respondent emailed the applicant stating that they were unable to process the order because "the network provider does not provide service in your area".
14. The applicant agrees they received a full refund of all charges, but says this did not occur for 40 days.
15. The applicant says they then subscribed to and received internet service from Shaw, which shows that Shaw does offer service at the address, contrary to the respondent's email. The applicant says that after that, in February 2018, they signed up with the respondent again for internet service, using the name "Imas Treblig" (Sami Gilbert spelled backwards). The applicant did not explain the reason for the false name.
16. The applicant says the same steps were repeated. The respondent confirmed the order, charged their credit card, shipped a modem, and confirmed an installation date, but later emailed and said they could not process the order, because the address could not be validated.
17. The applicant says the respondent provided evasive and contradictory explanations for the subscription cancellation, which shows deliberate fraud rather than a simple

mistake. The applicant says the respondent's actions were deceptive acts, contrary to the BPCPA.

18. The applicant is not entitled to any refund, as all monies paid were already refunded. The tribunal does not have authority to award damages under the BPCPA: see *Donaldson v. Jasjit Rai (Doing Business As Joi Works Consulting)*, 2019 BCCRT 134 at para. 8, which is not binding on me but I agree with it. However, the tribunal does have authority to interpret and apply the BPCPA: *Mah et al v. Wah Fai Plumbing & Heating Inc.*, 2018 BCCRT 466. In applying the provisions of the BPCPA to the facts of this case, I find there was no breach.
19. Section 5(1) of the BPCPA says a supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction. I find the internet service subscriptions in this dispute were consumer transactions, as defined in the BPCPA, as I accept that the internet service was primarily for personal or household use.
20. Section 4(3)(a)(v) of the BPCPA says that a representation by a supplier that goods or services are available is a deceptive act or practice, if they are not available as presented. The applicant says the respondent breached this section by falsely representing that its internet service was available in Nelson, when it was.
21. I find the respondent did not make that representation, and did not breach section 4(3)(a)(v). Based on the provided evidence, the respondent's website does not specifically mention Nelson, or say that its internet service is available in Nelson. Rather, its website allows for a search of available locations by postal code. The following statement appears on the bottom of the webpage showing the various internet plans:

Internet plan availability is not always 100% accurate by postal code. All selected plans need to be confirmed for the specific address by the network provider. Should there be an issue with your selected plan, we will contact you.

22. In this case, the network provider was Shaw. The evidence shows that on November 25, 2017, Shaw emailed the respondent and said they had determined that “this customer’s address is still active”, and the migration request was booked. However, on December 7, 2017, Shaw emailed the respondent again and said that unfortunately, Nelson was part of the Kelowna POI (point of interconnect, part of the cable network). The email said the Kelowna POI was not part of the respondent’s third party internet access (TPIA) service application, so Shaw was unable to process the order and had cancelled the account.
23. The respondent says that when it enters into a relationship with an incumbent provider, such as Shaw, the respondent selects the POIs it would like to access. It says each POI corresponds with a particular geographic service area. The respondent says it does not currently have access to the Kelowna POI, which services Central Alberta. The respondent also says that unlike some other providers, Shaw provides a list of cities that are generally serviceable, but offers no opportunity for the respondent to confirm service at a specific address before processing an order.
24. I find this explanation credible, and I accept it. Based on this explanation, and the specific wording of the respondent’s website, I find there was no deceptive act or practice. While the respondent’s communications with the applicant could have been more specific about the reasons service was unavailable, I find its statements were not deceptive because there is no evidence that it falsely guaranteed service at the applicant’s address, or refused to provide the applicant with a service that was actually was available. This conclusion is supported by paragraph 10 of the respondent’s service agreement, which the applicant had to confirm agreement with before completing the service order. Paragraph 10 states, in part:

You may only subscribe for Internet Service if available in your geographic area. VMedia reserves the right to deem Internet unavailable to you at any time.

25. I find that while the respondent offered to confirm whether service was available at the applicant's address in Nelson, it never offered or promised that such service was definitely available. Moreover, if the applicant had not used a false name for the second subscription, the ongoing miscommunications between the parties may have been avoided since the respondent could have looked up the previous account information.
26. For these reasons, I conclude there was no breach of the BPCPA. For the same reasons, I also find the applicant has not proved fraudulent misrepresentation by the respondent. The 4 elements of civil fraud, also known as fraudulent misrepresentation, are as follows, as set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at paragraph 21:
- a. A false representation made by the respondent;
  - b. Some level of knowledge of the falsehood of the representation on the part of the respondent (whether through knowledge or recklessness);
  - c. The false representation caused the applicant to act; and
  - d. The applicant's actions resulted in a loss.
27. I find the applicant has not proven these 4 elements of fraud. As explained above, I find the waiver on the respondent's website means it never represented that service was definitely available in Nelson, so it made no false representation to that effect.
28. I also find that the applicant has not proven that the respondent's actions resulted in a loss. The applicant says they were able to get internet service from Shaw, and there is no evidence before me that Shaw's service was different or more expensive. Moreover, while the applicant says they lost several weeks of income from missed translating work, they did not provide any records to support that claim. Also, since alternative internet service was available from Shaw, the applicant could have mitigated any income loss by immediately signing up for Shaw internet services immediately after the respondent's December 5, 2017 email stating that its

services were not available. In the alternative, the applicant could have accessed the internet elsewhere, such as a library or café.

29. I would also not order punitive damages in this case, even if the applicant had proved deception or misrepresentation. Although the tribunal has jurisdiction to order punitive damages, this remedy is usually reserved for malicious and high-handed conduct: *Benda v. Cao et al*, 2018 BCCRT 323.
30. In *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 SCR 1085, the Supreme Court of Canada said the purpose of punitive damages is to punish extreme conduct worthy of condemnation, and that punitive damages are very rare in contract cases. Following a breach of contract, as in this case, an injured party is only entitled to have what the contract provided for, or compensation for its loss. The Court said punitive damages may only be awarded in respect of conduct deserving of punishment because of its harsh, vindictive, reprehensible, and malicious nature. I find there is no evidence in this case that the respondent engaged in such conduct. While it was frustrating for the applicant to have the subscription accepted and then denied 10 days later, I find there is no evidence that the respondent gained anything, and no evidence that it deliberately misled the applicant. Again, I note that if the applicant had not used a false name for the second subscription, the matter could have been resolved much more quickly.
31. For all of these reasons, I find the applicant is not entitled to damages, and I dismiss the applicant's claims.
32. The tribunal's rules provide that the successful party is generally entitled to recovery of their fees and expenses. The applicant was unsuccessful and so I dismiss their claim for reimbursement of tribunal fees. The respondent did not pay any fees and there were no dispute-related expenses claimed by either party.



## **ORDER**

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

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Kate Campbell, Tribunal Member