



Civil Resolution Tribunal

Date Issued: December 21, 2020

File: SC-2020-004088

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Jones v. Macdonald*, 2020 BCCRT 1444

BETWEEN:

NICOLE JONES

APPLICANT

AND:

JAIME MACDONALD

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about the private sale of a used Nintendo Switch gaming system. The applicant, Nicole Jones, says she purchased the gaming system from the respondent, Jaime Macdonald. She says 2 months later she discovered that Nintendo had banned the gaming system from its online services 8 days after she purchased it. Ms. Jones claims a refund of the \$380 she paid Mr. Macdonald.

2. Mr. Macdonald says the gaming system was working properly when he sold it to Ms. Jones. He says Ms. Jones did not complain about its function until 10 weeks later and so Ms. Jones is not entitled to a refund.
3. The parties are each self-represented.

JURISDICTION AND PROCEDURE

4. 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). 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. Some of the evidence in this dispute amounts to a "he said, she said" scenario. The credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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 the interests of justice.

7. 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.
8. 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

9. The issue in this dispute is whether Mr. Macdonald breached an implied warranty of durability, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, as the applicant Ms. Jones bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
11. The parties agree that Mr. Macdonald advertised a used Nintendo Switch gaming system (gaming system) on Facebook Marketplace. Ms. Jones says she contacted Mr. Macdonald on March 18, 2020 and he informed her the gaming system was a year old and “in like new condition”. She says Mr. Macdonald also informed her that he had updated the software that day. The parties agreed on a sale price of \$380. Ms. Jones says she went to Mr. Macdonald’s house to complete the transaction and he turned on the gaming system to show her it worked. Ms. Jones says she did not have knowledge or understanding of gaming systems.
12. Ms. Jones says after purchasing the gaming system, she connected it to her television and created a Nintendo account so her 6 year old and 9 year old children

could access Nintendo's online games. She says for the next 2 months her children used the gaming system for offline chip games. From time to time, her children told her an error message appeared but she did not investigate it because she was busy working from home and her children were still able to use the gaming system for chip games. She says in mid-May 2020 her children tried to play an online game and an error message with an error code appeared that stated that the user could not connect to online services

13. Ms. Jones contacted Nintendo on May 15, 2020. In a May 17, 2020 email, Nintendo stated that her gaming system was banned on March 26, 2020 due to unauthorized or fraudulent activity prior to that date and that Nintendo would not release the ban. The email did not state when the activity leading to the ban took place.
14. Ms. Jones says she spoke with a Nintendo representative who informed her that:
 - a. Bans are put into place when someone has altered the actual device/machine, typically through actions such as piracy or hacking,
 - b. Whomever engaged in this activity has experience in, or knowledge of, computer programming, and it would have taken quite a bit of time to do what they did,
 - c. The person would have been fully aware of exactly what they did and the gaming system could not have been tampered with accidentally,
 - d. It could take Nintendo several weeks to detect unauthorized activity, investigate it, and impose a ban, and
 - e. The ban was for life and could not be reversed.
15. Ms. Jones says she unsuccessfully tried to obtain the name of the user who attempted the activity from Nintendo. She says she even sent it a summons form but was unsuccessful since Nintendo is located in the United States and not within CRT's jurisdiction.

16. Ms. Jones's evidence about her conversation with Nintendo is hearsay. While hearsay evidence is admissible in CRT proceedings, in the circumstances I place little weight on it. I find the cause of the ban is technical in nature. Aside from the May 17, 2020 email, Ms. Jones did not submit a statement or report about when the unauthorized activity took place or about the level of computer knowledge required to attempt that activity.
17. Ms. Jones says Mr. Macdonald's actions caused the ban since it was put in place 8 days after she purchased the gaming system. Ms. Jones submitted Mr. Macdonald's LinkedIn profile and says it showed that he has the knowledge and experience to perform the activities that would trigger the ban.
18. Ms. Jones says she informed Mr. Macdonald of the situation and requested a refund but he refused to provide one.
19. Mr. Macdonald says Ms. Jones tested the gaming system and it was in working condition when she purchased it. He also pointed out that Ms. Jones's children used it for 2 months before they discovered online services were banned. He says any problems developed after the gaming system was purchased. Mr. Macdonald also says that despite the ban, the gaming system still works and can still be used for offline games.

Sale of Goods Act

20. The *Sale of Goods Act* (SGA) governs the sale of goods to customers. Section 18(c) of the SGA says that there is an implied condition that the goods will be durable for a reasonable period of time having regard to their normal use and to all the surrounding circumstances of the sale.
21. In this case, Ms. Jones responded to Mr. Macdonald's Facebook advertisement and he stated that the gaming system was a year old and in "like new" condition. I infer the gaming system was normally used for both online and offline games and that Ms.

Jones purchased it to be used both online and offline since she immediately set up an online Nintendo account after purchasing it.

22. Based on Nintendo's email, I find that the gaming system's online services were banned on March 26, 2020, 8 days after Ms. Jones purchased it. Even though the app's children used the gaming system primarily for offline games during the first 2 months, I find it was not durable since it could not be used for online services after March 26, 2020. I accept that Ms. Jones did not have knowledge of gaming systems and I find it unlikely that either her or her young children had the sophistication to use the gaming system for unauthorized or fraudulent activities that would lead to a ban.
23. I find that since online use was banned 8 days after purchase, the gaming system did not meet the implied warranty in section 18(c).

Remedy

24. Ms. Jones says the gaming system is "essentially useless" because its software cannot be updated and online games cannot be accessed due to the ban. She also says the chip games cannot be saved or backed-up on the Nintendo cloud, so a game's progress cannot not be saved for use on other devices.
25. Although Ms. Jones's children used the gaming system almost exclusively for offline games after it was purchased, since Ms. Jones set up an online Nintendo account, I find Ms. Jones intended to use the gaming system's online services as well.
26. Ms. Jones seeks a refund of \$380, the amount she paid for the gaming system. Ordering a full refund would result in double recovery for Ms. Jones since she still has the gaming system and it still works for offline games. I find that since the gaming system's function is limited, Ms. Jones is entitled to a refund of 50% of the purchase price, which is \$190.

CRT FEES AND INTEREST

27. The *Court Order Interest Act* applies to the CRT. Ms. Jones is entitled to pre-judgment interest on the \$190 refund from March 26, 2020, the date the ban went into effect, to the date of this decision. This equals \$1.39.
28. 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. Since Ms. Jones was partially successful, I find Ms. Jones is entitled to reimbursement of 50% of the CRT fees, which is \$87.50 in CRT fees. Ms. Jones did not claim dispute-related expenses.

ORDERS

29. Within 14 days of the date of this order, I order Mr. Macdonald to pay Ms. Jones a total of \$278.89, broken down as follows:
- a. \$190 as a partial refund for the Nintendo Switch gaming system,
 - b. \$1.39 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$87.50 in CRT fees.
30. Ms. Jones is entitled to post-judgment interest, as applicable.
31. 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.

32. 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.

Rama Sood, Tribunal Member