



DECISION OF THE DIRECTOR

In the Matter of: [privacy redaction] vs The Fahrenheit Yoga Studio Ltd. (dba BYSurrey)

Respondent: The Fahrenheit Yoga Studio Ltd. (dba BYSurrey)

Case Number: 30934

Decision Maker: Jason McColl
Senior Inspector
Consumer Protection BC

Date of Decision: October 13, 2020

INTRODUCTION

Consumer Protection BC administers the *Business Practices and Consumer Protection Act* (“BPCPA”) and the Consumer Contract Regulation (“CCR”).

On June 25, 2020 a complaint was filed with Consumer Protection BC by [privacy redaction] (“the Complainant”).

The complaint was made against The Fahrenheit Yoga Studio Ltd. dba BYSurrey (“the Respondent”). This business was previously named 0858649 B.C. Ltd., changing its name on October 23, 2009. [privacy redaction] is listed as the only Director of the Respondent.

The Respondent provided Yoga lessons and instruction (“the Services”) to the Complainant under what was purported to be a continuing services contract. The Services were provided by the Respondent at 15310 103A Ave Surrey BC V3R7A2.

The complaint was investigated by an Inspector. A Report to the Director (“the Report”) was written and submitted to the Director of Inspection & Case Management. The Report alleges that the Respondent failed to provide the Complainant with a refund after the Complainant properly exercised their cancellation rights because of a material change in the services provided by the Respondent. Precisely, the Report alleged the Respondent breached 25(6)(a)(ii) of the BPCPA.

OPPORTUNITY TO BE HEARD

Prior to taking action under the BPCPA, I am required to ensure the Respondent had an opportunity to be heard on the allegation made in the Report.

On September 8, 2020, The Inspector sent the Report along with a covering letter by registered mail to the Respondent. Purolator advises that the covering letter and the Report were received by the Respondent on September 11, 2020.

I have been delegated the powers of the Director to make determinations under the BPCPA and to exercise some of the powers of the Director under Part 10 of the BPCPA.

On September 11, 2020, I sent the Respondent a letter providing the Respondent an opportunity to be heard (“OTBH”) on the specifics and allegation raised in the Report. Canada Post advises that this registered mail letter was delivered to The Respondent on September 16, 2020. The deadline for response to the OTBH letter was September 24, 2020.

The OTBH was clear that in absence of a response, I would make my decision based solely on the information in the Report. To date I have had no response to my OTBH letter. Although I have received no response from the Respondent, I conclude that the requirement for providing an opportunity to be heard has been met in this case.

While I have reviewed all of the materials provided in the Report, I have only commented on the Report and submissions as necessary to explain and give context to my decision.

ALLEGED CONTRAVENTION

The Report advances that the Respondent contravened section 25(6)(a)(ii) of the BPCPA when it failed to refund money to a consumer within 15 days of receiving notice of the cancellation of a continuing services contract.

ISSUES

1. Whether the Respondent contravened section 25(6)(a)(ii) of the BPCPA?
2. If the Respondent contravened section 25(6)(a)(ii) of the BPCPA, what action, if any, should be taken?

COMPLAINT OVERVIEW

On November 7, 2019, the Complainant attended the Respondent’s business to purchase an annual membership. The Complainant paid the Respondent \$912.45 after applying the 5% GST to \$869.00 and was provided with a contract. On April 21, 2020, the Complainant sent an e-mail which requested a refund on the “unused portion of the fees”. On June 5, 2020 the Complainant sent a notice of cancellation via registered letter to the Respondent citing to a material change in the services provided by the supplier. The cancellation was sent via registered mail on June 5, 2020 and has a documented delivery to the Respondents business address on June 8, 2020.

EVIDENCE OF THE INSPECTOR

In the Report, the Inspector exhibits a copy of the payment along with a series of emails from the Complainant to Respondent and the price list from the Respondent’s website noting the prices for annual memberships. No responses to either the Inspector or Complainant from the Respondent are noted in the Report.

The Inspector concluded the Respondent and Complainant entered into a continuing services contract and the Contract was effectively cancelled when the Complainant sent a notice of cancellation of a continuing services contract to the Respondent by e-mail on June 5, 2020.

The Inspector concluded that due to a material change in the services provided by the Respondent under the Contract, (the closure of the yoga studio) the Complainant had the right to cancel the Contract under authority of section 25(2)(b) the BPCPA.

The Inspector exhibited a copy of both the e-mail noting the Complainant’s request to cancel and the reason for the cancellation, in addition to the formal notice of cancellation served on the Respondent. These cancellation requests were sent to the Respondent by the Complainant on April 21, 2020 and June 5, 2020 respectively.

The Inspector concluded the Complainant effectively cancelled the Contract on April 21, 2020 and the Respondent's failure to refund money received in respect to the Contract constituted a breach of 25(6)(a)(ii) of the BPCPA.

The Inspector used the date of purchase, November 7, 2019 and the notice of cancellation date, April 21, 2020 to calculate the remaining unused services. He noted that the remaining unused portion of the annual pass is 6 months.

EVIDENCE OF THE RESPONDENT

There has been no response to the allegation received from the Respondent

ANALYSIS

The Inspector alleged that the Contract was a continuing services contract, that the Complainant properly exercised their right to cancel the Contract and that the Respondent was required to refund an amount money to the Complainant equal to value of the services under the Contract that were not supplied to the Consumer.

Was there a Contract and if so, was it a continuing services contract?

The Complainant paid the Respondent an annual membership fee of \$912.45 (\$869.00 + 5% GST) on November 7, 2019. The payment is evidenced in a receipt offered by the Complainant. I take this to be the only written document supporting the existence of the Contract the Inspector alleges existed between the Complainant and the Respondent.

Review of the Respondent's website indicates that an annual membership is priced at \$869.00. This is consistent with the Complainant's assertion they purchased a one-year membership on November 7, 2019 from the Respondent. The evidence supports the Inspectors conclusion that a purchase of an annual membership was made and as such, a Contract of sorts between the Complainant and the Respondent did exist.

The Respondent's website also shows that memberships such as the one purchased by the Complainant allow for the unlimited use of, and access to, the Respondent's facility used for instruction of yoga lessons and for attendance at yoga lesson led by the Respondent's instructional staff.

In part, the definition of continuing services contracts includes those future performance contracts that call for a supplier to provide instruction in physical culture. I agree with the Inspector that that the Contract was of a continuing services nature in that I believe yoga lessons are instruction in physical culture and therefore captured under the CCR definition of continuing services contract. Stated differently, the Respondent was providing instruction in an activity (yoga) that I consider to be physical culture in its nature and purpose.

Did the Complainant have the right to cancel the Contract and did they cancel the Contract?

Section 25(2) of the BPCPA sets out that consumers can cancel continuing services contracts with suppliers if there have been material changes to the supply of services or the circumstances of the consumer. In the instant case, Consumer asserts that they had the right to cancel the Contract because of a material change of the supplier, specifically the unavailability of yoga classes.

BPCPA 25(4) of the BPCPA sets out a list of items that can be construed as a material changes in the supply of services. Included in the list is the discontinuance of operation by a supplier.

The Respondent's website indicates the business is currently closed. The email cancellation evidence offered by the Inspector indicates that the Complainant was having no success attempting to establish communication with the Respondent in March of 2020, supporting the assertion the Respondent had

ceased to operate in March of 2020. The evidence supports there has been a discontinuance of the supply of services called for under the Contract since March of 2020. I agree with the Inspector that under BPCPA 25(2)(b), the Complainant had the right to cancel the Contract.

Section 54 of the BPCPA governs the service and content requirements for cancellation notices for continuing services contracts. Effective cancellation of a continuing services contract requires a consumer to give the supplier notification of their intention to cancel and cite the reason for the cancellation. Service of the cancellation can be done by sending the cancellation notice to the email address of the supplier.

The Inspector alleges effective cancellation of the Contract was notice was sent to the Respondent by the Complainant in an e-mail of April 21, 2020. The evidenced offered by the Inspector clearly states the Consumer wished a refund for the unused portion of their membership because classes at the yoga studio were "on pause" indefinitely. The intention of the Consumer to cancel the remainder of the Contract was clear as was the reason for the cancellation. However, I cannot see the email address for the Respondent in the evidence offered by the Inspector. The evidence does suggest (through a third-party application) that cancellation email was sent to the Respondent on April 21, 2020, without the email address it cannot be reasonably confirmed what email address the cancellation notice was sent to. However, the Inspector also evidenced that the Complainant sent a cancellation notice form to the Respondent by registered mail on June 5, 2020. This cancellation notice form cites the intent and reason for the cancellation of the Contract. Section 54(3) of the BPCPA states all cancellations sent are deemed to have been given on the day it was sent. I see the evidence supporting the conclusion the Contract was properly cancelled and notice of the cancellation was given to the Respondent on June 5, 2020.

What is the amount of refund due the Complainant?

The amount and timing of any refund due a consumer who cancels a continuing serves contract is dictated by BPCPA 25(6)(a) operating with Sec. 3 of the CCR. For the instant case, the CCR formula to calculate the refund requires the calculation of "unused services" that is plainly what I construe as equal to a pro-rata calculation of the percentage of the amount paid to the Respondent by the Complainant and the percentage of the amount of services not available to be used by the Complainant since the effective date of cancellation.

My finding is that the effective date of cancellation in this case is June 5, 2020 rather than April 21, 2020 as advanced by the Inspector in the RD. This change necessitates a fresh calculation of the "unused services" referenced in the CCR. I have elected to calculate the amount of "unused services" as a percentage of the days of the year for which the Contract was in effect.

The Complainant had the Respondent's services available under the Contract from November 7, 2019 until the Contract cancellation date of June 5, 2020 (211 days). In a standard calendar year there are 365 days, leaving a remainder of 154 days until the supply of services was due to expire under the contract. Using the formula in CCR 3, 42.2% of the services due to be supplied under the Contract are subject to cancellation and naturally, 42.2% of the amount paid to the Respondent by the Consumer is subject to refund. 42.2% of the \$912.45 the Complainant paid to the Respondent under the Contract is \$385.05.

When was any refund due to be paid by the Respondent?

BPCPA 25(6)(a) requires any refund payable under that section to be made within 15 days of a notice of cancellation. As previously noted, I find the cancellation of the Contract to have been effective on the day it was sent to the Respondent's mailing address on June 5, 2020. Given this, the Respondent had until June 20, 2020 to refund the \$385.05 to the Complainant.

CONCLUSION

The Respondent failed to comply with Section 25(6)(a)(ii) of the BPCPA on and after June 21, 2020 when it failed to refund \$385.05 to the Complainant within 15 days of the Complainant cancelling a continuing services contract it had with the Respondent.

If the Respondent failed to comply with Section 25(6)(a)(ii) of the BPCPA, what penalties or remedial orders, if any, should be imposed?

DUE DILIGENCE

The Respondent is entitled to a defence of due diligence if it can be shown that it was duly diligent in taking all reasonable steps to prevent the contravention from occurring. There have been no actions taken by the Respondent to contact, acknowledge or action any inquiry or notice from the Complainant. The Respondent would reasonably have known that its cessation of business would draw inquiry and requests from clients who prepaid it for memberships. As of the date of this decision, I am advised the Respondent has not reached out to the Complainant or attempted to provide them a refund of any money. Given the preceding, I find that the Respondent's conduct does not show that it was in any way, diligent in preventing the contravention from occurring and continuing to occur.

ENFORCEMENT ACTION

Having found the Respondent to have contravened section 25(6)(a)(ii) of the BPCPA, I have the delegated authority under BPCPA sections 155 and 164 to take one or more of the following actions:

- Issue a compliance order
- Impose an administrative penalty

Imposing any penalty or remedial order is discretionary. However, if I find that a compliance order, or an administrative penalty is warranted, I am bound to follow the requirements of the BPCPA when taking such action.

COMPLIANCE ORDER

Section 155 of the BPCPA permits the Director to impose a compliance order upon the Respondent. A compliance order may be issued if the Director is satisfied that the person is contravening, is about to contravene, or has contravened the BPCPA. As I am satisfied the Respondent breached s. 25(6)(a)(ii) of the BPCPA, I find a compliance order ("this Order") to be an appropriate method of encouraging the Respondent to comply with the BPCPA in the future.

This Order will require that \$385.05 equal to the value of the unused services under the Contract, be refunded back to the Complainant by the Respondent within 15 days of the effective service date of this Order and, that the Respondent pay the Director partial costs of the Inspection in the amount of \$500.00 within 30 days of the effective service date of this Order.

:

- i. That the Respondent refund the Complainant the amount of \$385.05 by way of certified cheque or bank draft within 15 days of the effective service date of this Order.
- ii. That the Respondent provide the Director a copy of the certified cheque or bank draft no later than 7 days after it is sent to the Complainant.
- iii. That the Respondent reimburse the Director partial costs for the inspection in the amount of \$500.00 within 30 days of the effective service date of this Order.

ADMINISTRATIVE PENALTY

I have decided that an administrative penalty is not warranted for the contravention and circumstances for this case.

RECONSIDERATION OF THE COMPLIANCE ORDER

The Order may be reconsidered in accordance with Division 1 of Part 12 of the BPCPA. A request for reconsideration must be submitted within 30 (thirty) days of receiving this notice. The request must be

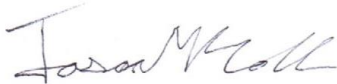
made in writing, must be accompanied by a \$252.00 (two hundred and fifty-two dollars) reconsideration application fee, and must identify the error the person believes was made or the other grounds for which the reconsideration is requested.

Please note that reconsiderations of determinations are subject to the provisions outlined in sections 181 and 182(2) of the BPCPA.

Requests for reconsideration should be addressed to:

Consumer Protection BC
Attn: Shahid Noorani, VP of Regulatory Services
200 – 4946 Canada Way, Burnaby, BC V5G 4H7

Considered on the 13th day of October 2020 in Burnaby, BC.



Jason McColl
Senior Inspector

Cc: File # 30934
Sean Sisett Director- Inspections & Case Management

Attachments: APPENDIX 1 – LEGISLATION

APPENDIX 1

Legislation

Business Practices and Consumer Protection Act

Definitions

17 In this Part:

"continuing services contract" means a future performance contract that provides for the performance of services on a continuing basis and is designated by regulation;

[...]

"future performance contract" means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does not include any of the following:

- (a) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount;
- (b) a contract for the supply of goods or services under a credit agreement, as defined in section 57 [definitions], if the goods or services have been supplied;
- (c) a time share contract;
- (d) a prepaid purchase card;

Continuing services contract – cancellation

25 (1) A consumer may cancel a continuing services contract by giving notice of cancellation to the supplier not later than 10 days after the date that the consumer receives a copy of the contract.

(2) A consumer may cancel a continuing services contract by giving notice of cancellation and the reason for the cancellation to the supplier at any time if there has been a material change.

- a) in the circumstances of the consumer, or
- b) in the services provided by the supplier.

(...)

(4) A material change in the services provided by the supplier occurs

- a) when, for reasons that are wholly or partly the fault of the supplier, the services are not completed, or at any time the supplier appears to be unable to reasonably complete the services within the period of time stated by the supplier under section 24,
- b) when the services are no longer available, or are no longer substantially available as provided in the contract, because of the supplier's discontinuance of operation or substantial change in operation, or
- c) when the supplier relocates his or her facility so that the distance between the supplier and the consumer is more than 30 km greater than when the supplier and the consumer entered into the contract, and the supplier does not provide reasonably comparable alternative facilities for the use of the consumer not more than 30 km from the consumer's location.

(5) Section 27 [refunds by supplier on cancellation] does not apply to a cancellation under subsection (2).

(6) If a consumer cancels a continuing services contract under subsection (2), the supplier must

- a) **within 15 days after the notice of cancellation has been given, refund to the consumer,**
 - i. in the case of a cancellation under subsection (2) (a), the portion determined in the prescribed manner of all cash payments made under the contract, less a prescribed amount on account of the supplier's costs, or
 - ii. in the case of a cancellation under subsection (2) (b), the portion determined in the prescribed manner of all cash payments made under the contract, and

b) within 30 days after the notice of cancellation has been given, return to the consumer every negotiable instrument executed by the consumer in connection with the contract.

How to give notice of cancellation

54 (1) *A consumer or supplier may give a notice of cancellation under this Part by any method that permits a person to produce evidence that the consumer or supplier cancelled the contract on a specific date, including*

- (a) delivering the notice in person, and*
- (b) sending the notice by registered mail, electronic mail or facsimile, to*

- (i) the consumer or supplier, as applicable, or*
- (ii) the postal address, electronic mail address or facsimile number shown in the contract for the person named in the contract as a person to whom notice of cancellation may be given.*

(2) *A notice of cancellation is sufficient if it indicates, in any way, the intention of the consumer or supplier to cancel the contract and, except in the case of cancellation under sections 21 (1) [direct sales contract — cancellation], 25 (1) [continuing services contract — cancellation] or 26 (3) [time share contract — cancellation], if it states the reason for cancellation.*

(3) *For the purposes of this section, a notice of cancellation that is given other than by delivery in person is deemed to have been given at the time it is sent.*

Consumer Contracts Regulation

Continuing services contract – calculation of refund to consumer after cancellation

3 (1) *For the purposes of section 25 (6) (a) [refund if material change] of the Act, the supplier must refund the portion of all cash payments made under the contract determined by the following formula:*

$$\frac{\text{(unused services)}}{\text{total services}} \times \text{portion of all cash payments}$$

Where

“unused services” means

- (a) unless the contract is expressed in terms of units to which paragraph (b) clearly applies, the time expressed in days remaining in the term of the contract at the date of cancellation, or*
- (b) the number of sessions or other service units remaining to be used at the date of cancellation;*

“total services” means

- (a) if unused services is expressed in days, the full term of the contract expressed in days, or*
- (b) if unused services is expressed in sessions or other service units, the total sessions or other service units provided for during the full term of the contract.*

Compliance orders

155 (1) *After giving a person an opportunity to be heard, an inspector may order the person to comply with this Act and the regulations if satisfied that the person is contravening, is about to contravene or has contravened this Act or the regulations.*

(2) *A compliance order must*

- (a) name the person in respect of whom the order is issued,*
- (b) describe the person's act or practice that is contravening, is about to contravene or has contravened this Act or the regulations,*
- (c) identify the section of this Act or the regulations that is being contravened, is about to be contravened or has been contravened,*

- (d) be dated and signed by the inspector issuing the order, and
 - (e) inform the recipient that the director may file the compliance order with the Supreme Court and that a filed order is deemed to be an order of the Supreme Court.
- (3)** In a compliance order, an inspector may order a person to stop engaging in or not engage in a specified act or practice.
- (4)** The director may include one or more of the following orders in a compliance order:
- (a) that a person reimburse any money or return any other property or thing received to a consumer or a class of consumers;
 - (b) that a person compensate other persons or a class of persons who have suffered loss or damage as a result of a contravention of this Act or the regulations;
 - (c) that a person take specified action to remedy an act or practice by which the person is contravening, is about to contravene or has contravened this Act or the regulations;
 - (d) that a person reimburse to the director all or a portion of the actual costs of any inspection, including actual legal costs, incurred by the director for the inspection of that person in respect of the contravention referred to in the compliance order.
- (5)** The inspector must serve a copy of the compliance order on the person named in the order.
- (6)** If a compliance order is made against two or more persons, all the persons against whom the order is made are jointly and severally responsible for complying with the order and are jointly and severally liable for the payment of any amounts the persons are required to pay under the order.
- (7)** A compliance order may be reconsidered in accordance with Division 1 of Part 12 [*reconsiderations*].