



# Civil Resolution Tribunal

Date Issued: March 1, 2024

File: SC-2023-001317

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Landry v. NewSmile Technology Canada Inc.*, 2024 BCCRT 210

B E T W E E N :

MARIE ANNETTE RACHEL LANDRY

APPLICANT

A N D :

NEWSMILE TECHNOLOGY CANADA INC.

RESPONDENT

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## REASONS FOR DECISION

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Tribunal Member:

Peter Mennie

## INTRODUCTION

1. This dispute is about dental treatment.
2. The applicant, Marie Annette Rachel Landry, purchased aligners to straighten her teeth from the respondent, NewSmile Technology Canada Inc. (NewSmile). Ms.

Landry says that her teeth were not straightened. She asks for a full refund and claims \$1,399.

3. NewSmile says that Ms. Landry did not follow her treatment plan and did not upload biweekly photos of her teeth as required under its refund policy. NewSmile says this means Ms. Landry is not eligible for a refund.
4. Ms. Landry is self-represented. NewSmile is represented by an authorized employee.

## **JURISDICTION AND PROCEDURE**

5. 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.
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.

## **ISSUE**

8. The issue in this dispute is whether Ms. Landry is entitled to a refund from NewSmile.

## EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicant Ms. Landry must prove her claims on a balance of probabilities. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.
10. It is undisputed that Ms. Landry purchased teeth aligners from NewSmile in July 2021. NewSmile created a preview for how Ms. Landry's teeth would look at the end of the treatment. Ms. Landry approved the treatment preview and paid \$1,200 for NewSmile's aligners.
11. After her treatment finished, Ms. Landry emailed NewSmile and said that her teeth did not look like the treatment preview she approved. NewSmile's dental team reviewed the photos and said that Ms. Landry's teeth had relapsed, meaning her teeth shifted back to their old position after the treatment was completed. NewSmile said that Ms. Landry could achieve the results she wanted if she purchased additional aligners, called refinements, for \$499.
12. Instead of refinements, Ms. Landry chose to purchase a retainer for \$199. Ms. Landry says that the retainer fits perfectly, which proves that her teeth did not relapse. She argues that NewSmile sent her the wrong aligners which is why her treatment results do not match the treatment preview she approved. However, it may be that the retainer would fit even if Ms. Landry's teeth relapsed. I find this is a technical matter which is outside ordinary knowledge and must be proved by expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283). On the evidence before me, I cannot conclude that NewSmile sent Ms. Landry the wrong aligners.
13. NewSmile says Ms. Landry did not follow the treatment plan. It says Ms. Landry should have finished treatment of her upper teeth on May 20, 2022. NewSmile refers to a May 25, 2022 email where Ms. Landry says she just finished her upper teeth treatment. NewSmile says this means that Ms. Landry did not change aligners every two weeks as required under its treatment plan. I note that the emails NewSmile

submitted as evidence are undated, however I infer that NewSmile is referencing an email where Ms. Landry confirms that she finished her upper teeth treatment.

14. I find that Ms. Landry followed NewSmile's treatment plan. The email Ms. Landry sent says "I have now completed" the upper teeth treatment, but does not say when she finished her treatment. I accept Ms. Landry's evidence that she completed her upper teeth treatment according to NewSmile's schedule. Ms. Landry sent photos of her teeth to NewSmile during the treatment process. NewSmile's dental team never suggested that Ms. Landry did not follow the treatment plan. Instead, NewSmile's dental team decided that Ms. Landry's teeth relapsed after treatment. I find that this is the most likely explanation for Ms. Landry's teeth not matching the initial treatment preview she approved.
15. NewSmile relies on its refund policy to deny Ms. Landry's claim. It says its policy requires customers to upload photos of their teeth every two weeks through the NewSmile App. The refund policy had no requirement to upload photos every two weeks when Ms. Landry purchased her aligners in July 2021. The refund policy did say that it changes and it is the customer's responsibility to return to the website periodically to check for updates. NewSmile updated its refund policy in August 2022 to say that refinements would not be provided free of charge unless the customer uploaded photos of their teeth every two weeks.
16. NewSmile's submissions state that customers who follow the treatment plan may be eligible for free refinements under the "NewSmile Guarantee". NewSmile says it sent Ms. Landry emails reminding her that her NewSmile Guarantee would be void if she did not upload photos every two weeks. NewSmile provided one email as evidence, dated May 17, 2023, addressed to Ms. Landry which had this reminder. This is after Ms. Landry filed a Dispute Notice at the CRT. I find that NewSmile has not proven that it informed Ms. Landry of this requirement during her treatment.
17. The parties' emails are in evidence. NewSmile's customer representative encouraged Ms. Landry to upload photos every two weeks but did not say it was mandatory. Ms. Landry provided photos whenever NewSmile requested them. NewSmile informed

Ms. Landry that she was required to upload photos every two weeks on August 29, 2022. It was only on December 22, 2022 that NewSmile informed Ms. Landry that this was mandatory under NewSmile's refund policy.

18. I find that NewSmile cannot rely on its requirement to upload photos to deny Ms. Landry's claim. NewSmile updated its refund policy in August 2022. Ms. Landry had already completed her treatment at this time. NewSmile may have changed its refund policy, however it cannot impose these terms retroactively on Ms. Landry. Under the parties' contract, there was no requirement to upload photos every two weeks during Ms. Landry's treatment. I find that Ms. Landry complied with NewSmile's refund policy as it existed when she purchased her aligners and during her treatment.
19. The relevant terms of NewSmile's refund policy during Ms. Landry's treatment state that:
  - a. If Ms. Landry was unhappy with her results then NewSmile will help her achieve the results of her treatment preview,
  - b. If Ms. Landry did not follow her treatment plan then NewSmile will charge for refinements which will typically be \$399, and
  - c. NewSmile does not guarantee any specific result and 90% attainment of the treatment preview is considered a success. NewSmile's dental team determines whether there has been a 90% attainment of the treatment preview.
20. I find that it was a term of the parties' contract that NewSmile would provide refinements free of charge if Ms. Landry followed the treatment plan and was unhappy with her results. This is implied by the provision which states there is a charge for refinements if the treatment plan is not followed. NewSmile's submissions confirm that Ms. Landry would have received refinements for free if she had uploaded photos twice per week. As noted above, I find that the parties' contract did not require Ms. Landry to upload photos every two weeks. So, I find that NewSmile breached the parties' contract by failing to provide Ms. Landry with refinements free of charge.

21. I note that NewSmile referred to the 90% attainment disclaimer in its submissions but did not say specifically that Ms. Landry had met or exceeded this threshold. The 90% attainment is also determined by NewSmile's dental team and NewSmile did not provide any evidence from their dental team on this issue. So, I find that this provision does not apply to this dispute.
22. I turn to consider Ms. Landry's claim for damages.
23. Damages for breach of contract are generally intended to put the innocent party in the position they would have been in if the contract had been carried out. Ms. Landry's teeth relapsed and NewSmile refused to provide Ms. Landry with free refinements. I find that Ms. Landry will need to purchase aligners from a different company to straighten her teeth. Neither party provided evidence about the cost of another treatment. Ms. Landry paid \$1,200 for her aligners from NewSmile. On a judgment basis, I assume that the cost of aligners will be the same at another company. So, I award Ms. Landry \$1,200 as damages.
24. Ms. Landry also asks for \$199 for the cost of her retainer. She says this was needed to prove that NewSmile sent her the wrong aligners, so I find that Ms. Landry is claiming the cost of the retainer as a dispute-related expense. However, I found that the most likely explanation for Ms. Landry's failed treatment was that her teeth relapsed. This means that the retainer did not prove anything relevant in this dispute. So, I do not award Ms. Landry \$199 for the cost of the retainer.
25. The *Court Order Interest Act* applies to the CRT. Ms. Landry is entitled to pre-judgment interest on the \$1,200 from July 24, 2021, the date she bought the aligners, to the date of this decision. This equals \$82.20.
26. 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. I find Ms. Landry was largely successful in this dispute so she is entitled to reimbursement of \$125 in CRT fees.

## ORDERS

27. Within 30 days of the date of this order, I order NewSmile to pay Ms. Landry a total of \$1,407.20, broken down as follows:

- a. \$1,200 as damages,
- b. \$82.20 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$125 in CRT fees.

28. Ms. Landry is entitled to post-judgment interest, as applicable.

29. This is a validated decision and order. 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. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Peter Mennie, Tribunal Member