CONSUMER PROTECTION BC

DECISION OF THE DIRECTOR

In the Matter of:	The *Business Practices and Consumer Protection Act,* S.B.C. 2004, c. 2; and *Consumer Contracts Regulation*
Respondent:	Marina's Swim School Corp.
Case Number:	30893
Adjudicator:	Robert Penkala
Date of Decision:	October 4, 2020

INTRODUCTION

Marina's Swim School Corp. ("respondent", or "Marina's") operates a swimming pool facility in Richmond, British Columbia where it offers swim lessons at various levels for children and adults.

In June 2020, Consumer Protection BC received a complaint filed by a consumer regarding swim lessons he had purchased for two daughters, to be provided by Marina's. He says his daughters had 3 lessons out of 13 contracted for, after several postponements, before Marina's discontinued the lessons due to Covid-19. The complainant says requested cancellation of the remaining lessons and sought a prorated reimbursement of approximately $750. However, he says, Marina's "refused multiple times" to honour the request for cancellation and refund. Marina's, for its part, offered to provide the lessons with "full credit" when its business resumed after the Covid-19 shutdown.

In late June an inspector for Consumer Protection BC notified the respondent of the complaint and explained the basis for cancellation and refund according to the *Business Practices and Consumer Act* and the *Consumer Contracts Regulation.* Marina's told the inspector that it was unable to provide a refund, and the inspector then issued a Report to the Director on August 24th alleging it had violated the Act by failing to issue the refund sought by the complainant.

OPPORTUNITY TO BE HEARD

Prior to an enforcement action under the Act, the respondent must be provided with an opportunity to be heard.

After being advised that the inspector's Report had been delivered to Marina's, on August 27th I sent a notice to the respondent advising it of a hearing being commenced on the basis of the Report. The notice refers to hearing procedures, including the respondent's right to respond, and to potential consequences should the allegation against it be upheld, i.e., monetary penalty and an order for compliance, restitution, and costs. Marina's responded on September 4th, defending its refusal to give the refund by citing its "no cancellation" term in the original agreement with the complainant. The respondent did not pose any questions to me about the issues in the hearing or about its procedures, nor did make any further submissions, though it had been given until September 9th to do so. I conclude that the requirement for providing an opportunity to be heard has been met.

ALLEGED CONTRAVENTIONS / LEGISLATION

The allegation against the respondent is that it failed to provide a refund on the basis of the complainant's exercise of his right to cancellation under the Act. Refunds for cancellations made in accordance with the relevant provisions of section 25 of the Act must be provided within 15 days. The requirement to provide refunds within 15 days is stated in section 25 (6), reproduced below, and is "prescribed" by regulation for the purpose of monetary penalty.

Consumer Contracts Regulation

Section 2

The following future performance contracts that provide for the performance of services on a continuing basis are designated for the purposes of the definition of "continuing services contract" in section 17 of the Act:

(a) […]

(b) a contract that provides

(i) for instruction, training or assistance in physical culture, body building, exercising, weight loss, figure development or self defence, or

(ii) for the use by a consumer of the facilities of a health studio, gymnasium or other facility used for any of the purposes referred to in subparagraph (i);

(c) […]

Business Practices and Consumer Protection Act

Section 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.

(3) […]

(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) […]

(5) […]

(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) […]

<u>Inspector's Evidence</u>

- The complainant paid the respondent $972.97 to provide 13 swim lessons to each of his two children: proof of payment by cheque is shown as an evidence Exhibit.

- A receipt issued to the complainant by Marina's makes reference to "winter 13L x 2 + tax by cheque".

- In December 2019, Marina's emailed the complainant that the start date of the winter session was delayed until January 20th.

- Marina's delayed the start date again, to February 1st, and on January 31st a third time, for a further three weeks.

- On February 24th Marina's confirmed that the first lesson for one of the children could take place the following day.

- On March 21st Marina's notified the complainant it was closed due to Covid-19.

- In reply the complainant asked if there was a time frame to refund parents for the cancelled classes: the respondent deferred answering his query until after reopening.

- On April 10th the complainant emailed Marina's to ask about refund plans.

- Marina's said in reply it hoped to restart lessons on May 1st.

- The complainant informed Marina's that if the opening was after May 5th he would like a refund for all remaining lessons.

- On May 3rd the complainant emailed Marina's, stating his wish to cancel the lessons and receive a refund for 10 unused lessons out the 13 paid for.

- On May 4th Marina's advised the complainant it was postponing lessons until further notice: the complainant replied to Marina's he was cancelling the unused lessons and demanded a refund of $748.43 [his calculation of a prorated refund].

- Between May 9th and May 15th the complainant sent four more emails to the Respondent demanding a refund.

- On May 15th Marina's emailed the complainant stating they are not able to process the request for cancellation and refund. It stated that after the facility reopened, it would be able to discuss refunds or credits.

- The complainant replied, saying he would like a refund instead of waiting for Marina's reopening

- On June 2nd the complainant sent Marina's a Consumer Protection BC form entitled "Notice of Cancellation of a Continuing Services Contract due to Material change in the Circumstances of the Supplier". Two days later he

followed up with an update request.

- On June 7th Marina's told the complainant it has a "negative balance" in its account and cannot provide any monetary refund at the moment. It offered the complainant several options:
    - continue lessons starting June 15th
    - put the rest of the lessons on hold for 12 months, with an option to start the lessons any time during this period
    - wait until September 2020 when Marina's "will try to organize" a 50% refund

- On June 10th the complainant and respondent continued their communication, featuring information that:
    - the complainant can keep credit for the 10 lessons per child until summer 2021;
    - Marina's has large financial debts but will try to provide a 50% refund in September.

- The complainant notified the respondent that the options provided were not suitable, and that according to the Act he should receive a refund for 10 out of the 13 lessons, within 15 days of his cancellation notice of June 2nd .

- The respondent replied, citing its "rule" of no refunds after the first lesson and reiterated its offers of credit for 12 months and a 50% refund in September. The respondent again stated that money for the refund did not "physically exist".

- June 26th the inspector emailed the respondent to investigation the dispute.

- Three days later Marina's replied, stating a policy of "*no refund after the 1st lesson.*"

- The inspector explained his view that the respondent's policies do not take precedence over consumers' cancellation rights found in the Act. The Inspector applied the refund "formula" in the Regulation and asserted that a refund $748.44 was payable to the complainant. Marina's responded that the company is a private entity "with its own rules and policies."

- The inspector followed up, stating that businesses operating in British Columbia must comply with provincial laws. The inspector notified Marina's that if it did not accept the application of the Act and Regulation and provide a refund, he would take steps to initiate a formal hearing.

- Marina’s replied that the complainant knew the respondent’s policies and willingly registered for lessons with the respondent.

- On July 6th the Inspector notified Marina’s that a Report to the Director will be prepared to set the matter down for a hearing.

- At the time of Report completion Marina’s had not issued a refund to the complainant.

Respondent’s Evidence

The respondent’s evidence is contained in its response to the Report sent to me on September 4th. The respondent states, verbatim:

- Our School has No Refund Policy.
- All parents put sign that they agree with that. I attached the signed out forms.
- We offer to [*the complainant* – privacy redaction] to finish the lessons, but he refused. This proposal is still active.

Secondly, a copy of the registration form, submitted in the response, signed by the complainant, includes the words:

> “I […] understand that the fee is non-refundable in part or in full once the swim package commences.”

ANALYSIS

Application of continuing services contracts definition

I have reviewed the correspondence between the inspector and Marina’s, correspondence between complainant and Marina’s, and considered the Report’s “analysis and conclusions” regarding the allegation. The evidence asserts that the complainant exercised a specific statutory right to cancel the contract on the premise it is a *continuing services contract.* It is evident that the inspector, in correspondence and in the Report, believes the provision of swim lessons to fall within the scope of continuing services contracts. His letter to the respondent giving notice of the complaint characterizes the matter as relating to “a continuing services contract executed between your business and [the complainant]”, and subsequently cancelled by the complainant. The Report, in turn, summarizes certain alleged facts – that the respondent is a “supplier” under the Act, that it had a contract to provide swim lessons to the complainant’s children, and that the *continuing services contracts* provisions of the Act apply to the case. The Report (and earlier correspondence) refer to and cite the Regulation’s description of continuing services contracts. The Regulation does not, however, prescribe swim lessons as an activity governed by the stipulations of continuing services contracts.

In the context of the proceedings on the whole, I consider the respondent to have been advised of the application to its services of the relevant provisions of the Act and Regulation. I must also be satisfied that the inspector's contention is substantially correct. Therefore I will consider whether the application is supported in view of the Regulation and the facts.

It is common ground that Marina's provides swim lessons and facilities to consumers and that the consumer contracted with it for the provision of services. The Regulation defines continuing services contracts (in relevant part) as providing –

(i) for instruction, training or assistance in physical culture, body building, exercising, weight loss, figure development or self defence, or

(ii) for the use by a consumer of the facilities of a health studio, gymnasium or other facility used for any of the purposes referred to in subparagraph (i)

Do Marina's swim programmes fit within the meaning of the above? I take as a common-sense proposition that swimming can be a form of exercise, an activity pursued for enhancing physical fitness. It is described various dictionaries as sport, activity, recreation, or even "art" (as in skill). I am certain that in *some contexts* the provision of swim lessons and facilities is mainly oriented toward the goals of exercise, fitness, or participation in sports competition. In the case of Marina's, I believe the overarching purpose of the programmes is to enhance fitness and develop skills lending themselves to that end, or toward a competitive level of swimming. The respondent's website states:

> "Our methodology comes from some of the best international swimming talent. Based on the progress of our swimmers, we can guarantee positive results for all of our students.
> […] Our instructors come from diverse backgrounds and are each deeply dedicated to helping our students achieve their goals as swimmers. Some of our instructors were champions of Canada in swimming and medalists of International competitions. The founder of Marina's Swim School earned his Masters degree in Physical Education and has over 25 years experience as a swim instructor and coach."

I find that Marina's promotes its swim programmes with particular "goals" for its students that seem to relate to higher levels of proficiency arising from training methods that imply, necessarily, the purposes of exercise or fitness. I therefore conclude that the provision of services in the context of this case falls within the scope of the Regulation with respect to continuing services contracts.

Marina's responses to the original cancellation attempts, to the inspector's intervention, and its notice of this hearing illustrate that it believed and continues to believe that its "private" agreements with consumers are not captured by the Act and Regulation. Although it has not set out a well-reasoned case for its business being outside the scope of continuing services contracts, its misapprehension seems closer to an honest but mistaken belief than to belligerence in the face of forceful precedent or direct regulatory jurisdiction.

Whether the contract was properly cancelled & refund due

The Report refers to both several attempts by the complainant to cancel the contract in early May and in early June. An email from the complainant to the respondent conveying his intention to cancel sent on May 3rd is unequivocal, as to intent. Section 54 of the Act, however, requires that cancellations of future performance contracts (of which continuing services contracts are a subspecies), state a "reason" for cancellation. Although I do not consider the May 3rd cancellation to be sufficient in this regard as a standalone notice of cancellation, I take into account another email sent by the complainant that queries the respondent about the date on which postponed lessons are to resume, and clearly indicates that the intent to cancel if the lessons do not resume by May 5th.

Prior to these communications, it had been evident by March, according to communication from Marina's to its clients, that lessons for the "Winter session" were postponed and would not continue until April at the earliest. There is no dispute between the parties that the complainant's children received instruction in three lessons and that 10 additional lessons from the contract were to be provided at some point. Before May 5th the respondent told the complainant that lessons were postponed "until further notice" due to the restrictions imposed by the public health authorities. The complainant, evidently not satisfied with the further deferral of the Winter sessions beyond May, gave notice of cancellation with a demand for a refund prorated according to the remaining 10 lessons out of 13.

Although the May 3rd cancellation is unequivocal as to its intent, looked at in isolation it lacks a clear reason for cancellation. In my estimation, however, the cancellation is part of ongoing communication from the complainant to the respondent that essentially provides the context and reason for the cancellation. It is plain that the lessons were originally to be provided in the "winter", i.e., before end of March, and due to delays in commencement were "extended" by the respondent into April. The complainant therefore cancelled the remaining 10 lessons because he took the position that the recommencement of lessons after early May was not what he had subscribed to – i.e., the completion of 13 lessons by the end of March.

I find that the cancellation of May 3rd, seen in its context, is in fact effective cancellation in accordance with the Act. In addition to this, however, the Report cites the complainant's cancellation using a form that expressly refers to the Act as a basis for cancellation of a continuing services contract. While that form sets out three separate potential bases for cancellation found in section 24 (4) (a), (b), and (c), it seems to me that, again, in context, the cancellation notice must in this instance refer to subsection (4) (b). That provision relates to services "no longer available, or […] no longer substantially available as provided in the contract, because of the supplier's discontinuance of operation or substantial change in operation". Marina's registration form (effectively, the expression of contractual agreement) as well as the receipt it issued and its subsequent communications to the complainant are proof that the in substance the parties had agreed to lessons to be provide by the end of March. In April and May, when the complainant engaged the respondent regarding resumption of classes and the possibility of a partial refund, the

services were not available as intended by the parties' contract. Note that, unlike cancellation under subsection 4 (a), subsection 4 (b) does not require the non-provision of services to be wholly or partly the supplier's fault.

For the reasons just given, if I am wrong about the sufficiency of the complainant's cancellation of May 3rd, I believe the June cancellation is a valid substitute. (Receipt of cancellation notices by the respondent is not in dispute, as Marina's responded to the complainant on both the May and June cancellations.) Thus, initially (prior the Consumer Protection BC's involvement) the respondent was obligated to recognize the complainant's cancellation and give a prorated refund by no later than May 19th. When the first cancellation was not recognized, the respondent later was subject to a second cancellation made formally on the footing of section 25 of the Act. If the first cancellation was in some way equivocal or uncertain, the second was in any case effective and the respondent was obligated to accommodate the refund demand before June 18th.

For the reasons stated above, I find that the respondent did fail to comply with section 25 (6) of the Act.

Marina's has stated at several points that payment of the refund was not financially possible at the relevant times. However, it did not submit inability to pay the refund in its response to the hearing (seen above). Marina's has produced no evidence aside from its representative's statements in emails during the complaint dispute attesting to the state of affairs. I do not find such bare, undocumented, assertions to be persuasive. The claim lacks any detail or corroboration, where I expect a business in such profound financial distress should be able to substantiate such a claim with business records or credible witness statements. I am unable to accept that Marina's was, in the absence of evidence of insolvency or similar financial distress, incapable of paying $750 to the complainant at any time from May to June.

Having determined that the Act and Regulation are applicable to the respondent and to the dispute at hand, similarly I cannot Marina's contractual limitation of the complainant's cancellation rights. Private common law agreements cannot supersede provincial legislation that defines and regulates particular types of consumer contracts. Where the Act grants and enforces consumers rights, those rights, in accordance with section 3, may not be voided or waived except as expressly permitted by the Act.

DUE DILIGENCE

The respondent is entitled to a defence of due diligence in the matter of the contravention if it demonstrates it took all reasonable steps to prevent its occurrence.

I am unable to find any basis to determine that the respondent took all reasonable steps to prevent the contravention from occurring. I have already canvassed the sparse excuses of the respondent for its view that its private contracts are not governed by the applicable legislation and for its

asserted inability to pay the refund at issue. Due to its complete unwillingness to resolve the matter, it is deprived of the argument that it made its "best efforts" in the circumstances, as well. Had the respondent made a bona fide attempt to settle the dispute with the complainant it is possible the matter of this hearing may have been averted altogether, or I would be compelled to consider attempts to resolve the complaint as relevant to due diligence. In the absence of any such submissions or conduct, I find the respondent is not entitled to the defence of due diligence.

CONSEQUENCES

Having found the respondent responsible for violating section 25 (6) of the Act, I have authority under the Act to consider the following enforcements actions:

- a compliance order including restitution to the consumer and reimbursement of Consumer Protection BC's costs of inspection; and,
- an administrative monetary penalty ("AMP")

COMPLIANCE ORDER

Under section 155 (1) of the Act, I may issue a compliance order if I am satisfied the Respondent is contravening, is about to contravene, or has contravened the Act. I have considered the need for enforcement action, and find a compliance order for the contraventions to be warranted.

Attached to this decision is a compliance order requiring the respondent:

i. to pay to [*the complainant* – privacy redaction] the amount of **$748.44**; and,

ii. to reimburse Consumer Protection BC partial costs of the investigation ("inspection") in the amount of **$500** within 30 days of service of the compliance order.

Factors in Administrative Penalty

Per section 164 (1) of the Act, an AMP may be imposed where a person contravenes a compliance order. Under section 164 (2) of the Act, before such a penalty can be imposed, the following factors must be considered:

(a) Previous enforcement actions for contraventions of a similar nature by the person

There have been no previous enforcement actions by Consumer Protection BC against the Respondent for similar contraventions.

(b) The gravity and magnitude of the contraventions

The essence of the breach is deprivation of the complainant of $750 for, at present, four months. The breach may in fact be serious from the perspective of the complainant, however the Report gives no evidence specifically on this point.

(c) *__The extent of the harm to others resulting from the contraventions__*

The extent of the harm is as mentioned above – deprivation of a consumer of a refund of $750 for a period of about four months, thus far.

(d) *__Whether the contravention was repeated or continuous__*

There is no evidence of repetitive contraventions, however it may be said that the violation has been continuous for approximately 3-4 months.

(e) *__Whether the contravention was deliberate__*

I do not view this contravention as deliberate but more the result of the Respondent's failure to exercise due diligence, its response to financial disruption of its business due to Covid-19, and its failure to grasp the applicability of the Act and Regulation to its business practices.

(f) *__Any economic benefit derived by the person from the contravention__*

It is reasonable to assume that by failing to relinquish the money paid for the cancelled programmes the respondent derived some measure of economic benefit from the contravention.

(g) *__The person's efforts to correct the contravention__*

The respondent has not indicated any intention to reverse its position and arrange to pay the refund or to re-examine its practices in light of the requirements of the Act and Regulation.

__DECISION ON PENALTY__

After considering the factors under section 164 (2) of the Act, I have decided that an administrative penalty could be warranted for the contravention. On the whole, however, I recognize that the respondent has never previously been notified of the application of the continuing services contracts provision (it is not a licensee subject to regulatory direction and inspection), and has not had the case presented to it in great detail prior to this hearing. I am also mindful that it has very probably been affected in 2020 by the public health emergency and attendant restrictions that would severely curtail revenue for a business of its kind, unexpectedly, for several months. Further, the imposition of a significant monetary penalty on a business in (it says) a precarious financial situation would only impede its ability to fulfil monetary conditions of an order including the complainant's remedy and payment of costs ordered in the ordinary course against a respondent

found in contravention of the Act after a hearing. For these reasons, in the specific circumstances here, I exercise the discretion to forgo imposition of a monetary penalty. In doing so, I note that the imposition of the Order, if it does not deter future conduct of a similar nature by the respondent, may result in further proceedings and monetary penalties.

RECONSIDERATION OF ORDER

The Order may be reconsidered in accordance with Division 1 of Part 12 of the Act. A request for reconsideration must be submitted within 30 days of receiving this notice. The request must be in writing, must be accompanied by a $252 reconsideration application fee, and must identify the error the person believes was made or 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 Act.

Requests for reconsideration should be addressed to:

Consumer Protection BC
Attention: Shahid Noorani, Vice President, Regulatory Services
200 – 4946 Canada Way, Burnaby, BC V5G 4H7

Considered on October 4, 2020, in Vancouver, BC

Manager, Enforcement Hearings

Enc. Compliance Order