



DECISION OF THE DIRECTOR

In the Matter of: *The Business Practices & Consumer Protection Act, Consumer Contracts Regulation, and Cremation, Interment and Funeral Services Act*

Respondent: CARE Funeral Services (Vancouver Island) Ltd.

Licences: 49850, 71382, 77117

Case Number: 30900 [previously cited as #30337]

Adjudicator: Robert Penkala

Decision Issued: November 18, 2020

Introduction

Consumer Protection BC by statutory delegation oversees compliance with the *Cremation, Interment and Funeral Services Act*, the *Business Practices and Consumer Protection Act* (“Act”), and the *Consumer Contracts Regulation* (“Regulation”). CARE Funeral Services (Vancouver Island) Ltd. (“respondent” or “licensee”) is a company operating under three licences granted by Consumer Protection BC within this framework of regulation.

On July 21st, 2020, Consumer Protection BC notified the respondent of a decision reached at the conclusion of a formal hearing, finding that it had violated section 10 (1) of the Regulation, involving the failure to provide annual reporting, as prescribed, for preneed funeral services contracts. The decision includes a Compliance Order authorized by section 155 of the Act. The Order sets out specific reporting requirements as well as inspection costs imposed upon the respondent. Due to a technical drafting error, the Order was amended and reissued on September 8th. In effect, the amended Order extended until October 2nd the time for the respondent to file the reports specified in the Order, as well as the payment of inspection costs (the original dates for compliance were in August).

Subsequently, a Business Practices Officer for Consumer Protection BC prepared a “Report to the Director”, dated October 15th, alleging that the respondent had failed to comply with the Order, contrary to section 189 (5)(c)(ii) of the Act (the “section 189 allegation”). The Report

initiated a new hearing in the matter of the alleged breach of the Order. This was referred to me to adjudicate, after the respondent's opportunity to be heard, as a potential violation of the Act.

On October 15th I sent an email to the respondent attaching a formal notice of the hearing and procedures in respect of the Report. The responsible Business Practices officer also delivered the Report to the respondent in a separate email. The respondent was given an opportunity to address or defend against the section 189 allegation, in writing, by November 4th.

As a matter of procedural fairness, prior to any potential enforcement action the respondent must be provided with an opportunity to be heard. The notice letter I delivered advises that an adjudicator will determine whether the alleged violation occurred and alludes to the possibility of enforcement measures such as a monetary penalty, and licensing actions under section 146 of the Act, i.e., suspension, cancellation, refusal, or conditionalization (and additional inspection costs). I note that the email used for delivery of the notice letter and the Report is the same business email used by the respondent in its dealings with Consumer Protection BC to communicate on licensing matters as well as in the preceding hearing giving rise to the Order. When I sent notice of this hearing I received a "relay reply" in the Outlook email programme indicating the message was delivered to the recipient's server.

The respondent has not replied to the notice letter and Report, or "opportunity to be heard" in this case. However, I have no reason to believe the respondent's business email is not functional. It is found on its current licensing file as "contact information" and was used regularly in interactions related to this hearing (as seen in evidence in the original hearing leading to the Order). Further, the respondent's lack of response is consistent with its prior conduct, in which its principal, Mr Buckley, conveyed his view that Consumer Protection BC's position regarding the requirements of the Regulation was entirely misconceived. Mr Buckley indicated in the earlier hearing that the respondent licensee had fulfilled its reporting obligations and would not comply with Consumer Protection BC's demands. The respondent's failure to respond is therefore likely a deliberate choice. Notwithstanding the licensee's non-response, I am satisfied it has been afforded the procedural rights required for my exercise of statutory enforcement powers.

Alleged contravention & legislation

Consumer Protection BC's authority to issue and enforce a remedial order against the respondent at the conclusion of a hearing is found in section 155 of the Act (also incorporated in the *Cremation, Interment and Funeral Services Act*).

The most germane provisions for our purposes, establish that:

(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) [...].

(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) [...]

(b) [...]

(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.*

Section 189 (5)(c)(ii) of the Act prohibits the violation of the terms of a compliance order:

A person must not [...] fail to comply with [...] a compliance order,

Section 146 (1) of the Act concerns actions taken against licensees (incorporated by operation of section 55 (3) of the *Cremation, Interment and Funeral Services Act*, and thus applicable in this case).

The director may

(a) *refuse to issue or renew a licence,*

(b) *suspend or cancel a licence, or*

(c) *amend, impose or rescind conditions on a licence.*

(2) *Without limiting the authority of the director under subsection (1), the director may make a decision under subsection (1) if the applicant or licensee does any of the following:*

(a) *contravenes this Act or the regulations;*

[...]

EVIDENCE IN THE REPORT

- A complete copy of the Decision of the Director dated July 15th, 2020, giving rise to the Order is found at Exhibit #4 of the Report.
- The Report cites the amended Order of September 8th. The Order contains the following requirements:

1. The respondent must deliver to Consumer Protection **within 21 days of service of this Order**, completed preneed funeral services reports for business years 2018 and 2019 in accordance with the requirements of section 10 (1) of the Regulation.
 2. To ensure complete and consistent reporting, the respondent must use existing Consumer Protection BC resources designed for funeral services licensees in respect of their “section 10 (1)” obligations.
 3. The respondent must use such forms or templates as are available to licensees for the above purpose. It may use the Excel templates or worksheets sent to it via email by the Business Practices office on September 6, 2019, or follow the guidance and use the online tools accessible to licensees online at the following web address:
<https://www.consumerprotectionbc.ca/get-keep-licence/funeral-services/know-your-obligations/>
 4. Except with the express prior written permission of Consumer Protection BC, any failure to provide the information as to the stated time for compliance and completeness of the reports is a breach of the terms of this Order.
 5. The Respondent is ordered to reimburse Consumer Protection BC the amount of **\$700** for its inspection costs in this matter, to be paid **within 21 days of service of this order** to the respondent.
- The respondent has offered no further communication to Consumer Protection BC since delivery of the material referenced in paragraphs [7] to [11] of the REPORT. [i.e., the original and amended Orders, the decision of July 15th]
 - At the time of writing the REPORT, the respondent has failed to submit the 2018 or 2019 preneed reports as [required by] the Order.
 - At the time of writing the REPORT the respondent has also failed to pay inspection costs as ordered [...]

RESPONDENT’S EVIDENCE

The corporate respondent (in fact Mr Buckley, its owner and sole director) has not provided any documents by way of response in the hearing, or any other type of response in relation to the notice of hearing of October 15th.

ANALYSIS & DISCUSSION

The Order unambiguously stipulates the reporting requirements. Moreover, the decision of July 15th concerns substantially the content and form of the requirement set out by section 10 (1) of the Regulation. Together, the analysis in the decision and the express wording of the Order establish that the respondent received clear notice and direction regarding the requirements of the Order. In the absence of any evidence that compliance with the Order may have been impaired by any significant ambiguity or imprecision as to its drafting, I find that the respondent had sufficient notice about what the Order entails, and by when.

The author of the Report is a Business Practices officer. By way of background, her involvement in the unresolved matter of the 2018 and 2019 preneed reporting is established in the evidence in the hearing leading to the imposition of the original Order. Although not discussed in the Report, I take adjudicative notice that the Business Practices officer is involved in the administration of preneed reporting, among other matters pertaining to the respondent's licence, and has access to the licensing database or system integral to Consumer Protection BC's licensing function. I therefore accept her evidence as a firsthand witness, whose duties not only provide opportunity for direct observation of the licensee's preneed reporting generally, but also monitoring the license file in the case of the respondent to ascertain whether the outstanding matters have been resolved in accordance with the Order. In addition, before commencing this hearing, and again before adjudicating it, I queried the Business Practices officer about the respondent's actions in terms of the Order. In both instances the Business Practices officer informed me that she had no engagement with, and received no new information from, the respondent relating to compliance with the Order. (I also confirm that I have no personal knowledge of the respondent's intention or actions, to the extent that I may have received queries or new reporting submissions from the respondent in this matter.)

For the above reasons, I accept the statements of the Business Practices officer that the respondent has "offered no further communication to Consumer Protection BC" and has "failed to submit" the preneed reports required by the Order. Given the licence-administration context, I can conceive of no realistic chance that the respondent complied with the Order without the Business Practices officer's awareness. I conclude that the respondent breached terms #1, #2, #3, and #4. (I note that condition #4 of the Order contemplates that the respondent could in principle have deviated from the Order's cutoff date for reporting if expressly permitted in advance by Consumer Protection BC.)

The fifth component of the Order against the respondent concerns its responsibility for payment of inspection costs. The Business Practices officer asserts that the respondent has failed to pay. Again, I take it as a basic "given" in the institutional context, that the officer has firsthand knowledge in this connection. Also, it is relevant that in my email to the respondent delivering the original decision and Order in July, I referenced the Business Practice officer's email for the convenience of the respondent to arrange payment of costs. Further, it is within my sphere of

direct knowledge, as I routinely access case files in the Consumer Protection BC database to follow up on costs payments. Case management procedures involve the timely recording of payments made on enforcement files. In this instance (case #30337) no entries have been made, corroborating the Business Practices officer's assertion. I find that the respondent has neglected to pay the ordered inspection costs, in breach of condition #5 of the Order.

In summary, the respondent has committed a clear breach of the Order. The terms of the Order are unambiguous both in terms of the required actions and their timeline. It is a case of the respondent wholly failing to comply – there is no issue of “interpretation” of the Order's terms or partial but incomplete performance of the required actions. Thus, the Report's alleged contravention of section 189 (5) of the Act is borne out in this hearing.

Licensing action

On the basis of the section 189 contravention, I am authorized take an action against the respondent's licence. As mentioned above, the respondent has been notified in this hearing of the potential consequence as to its licence status, such as suspension, revocation, or imposition of conditions. At this stage of the unresolved preneed reporting and costs payment matters I do not believe a licence suspension, let alone revocation, to be appropriate. However, a measure to address the underlying and cumulative effect of the respondent's preneed reporting dereliction may be found in more specifically tailored licence conditions. With a view to stemming the further accumulation of unreported or improperly reported preneed contracts, and presumably as an incentive for the respondent to comply with the Order, I impose the following licence condition:

Whereas the licensee has not complied with an Order issued against it for contravening section 10 (1) of the *Consumer Contracts Regulation*, this licence does not permit the licensee to enter into or promote the sale of any preneed funeral services consumer contracts, as of the date this condition is imposed.

This condition and restriction forms part of the licence and will not be removed or modified until the licensee complies with the Order, as determined by Consumer Protection BC.

Any activity by the licensee in breach of the condition above is a contravention of the *Business Practices and Consumer Protection Act* and may be subject to enforcement action including monetary penalty, licence suspension or cancellation.

As mentioned, the respondent is a corporate entity controlling three Consumer Protection BC licences. This condition will be placed on all three licences operated by the respondent.

Compliance Order

As an adjudicator determining that the contravention occurred as alleged, I may take the following action:

Issue a compliance order (under section 155 of the Act), directing the respondent to:

- stop a specified act or practice;
- take actions to correct the issue; and,
- repay Consumer Protection BC its inspection costs in this matter.

I will issue an order for costs against the respondent. Preparation of the Report, to the extent that it requires review of the respondent's business practices and matters that are necessary to the hearing but preliminary to adjudication of the issue, falls in the scope of the ongoing inspection (or attempted inspection) of the respondent. In light of Consumer Protection BC's allocation of resources in relation to this violation, I impose additional **inspection costs of \$450** on the respondent.

Administrative penalty

As the violation of section 189 (5) is prescribed for the purpose of administrative penalty ("AMP") under the *Business Practices and Consumer Protection Regulation*, the Act authorizes imposition of a penalty of up to \$5,000 on an individual, or up to \$50,000 on a corporation (under section 164).

In the context of the factors under section 164 (2) of the Act (below), I have decided that an AMP is warranted for the contravention. The purpose is to effect deterrence and increase the likelihood of compliance, appropriate here due to the complete extent of the respondent's failure to comply, and an inspection and enforcement history involving similar issues.

Section 164 (2) of the Act sets out the following factors that must be considered before imposing an AMP:

- (a) previous enforcement actions for contraventions of a similar nature by the respondent
- (b) the gravity and magnitude of the contravention
- (c) the extent of the harm to others resulting from the contravention
- (d) whether the contravention was repeated or continuous
- (e) whether the contravention was deliberate
- (f) any economic benefit derived by the person from the contravention
- (g) the person's efforts to correct the contravention

For the violation at issue I consider all these factors. To determine the *amount* of an AMP that should be imposed I consider the section 164 (2) factors together with the Consumer Protection BC policy, "Calculation of Administrative Monetary Penalties Policy and Procedures" (the "Policy"). The Policy model and rationale are discussed below.

The Policy, normally applied by Consumer Protection BC, sets out how AMP amounts are calculated, starting with a base penalty amount. The Policy helps to ensure that calculations of AMP amounts are consistent, transparent, flexible, and proportionate to the contraventions at issue.

The Policy assists suppliers subject to AMPs in knowing how Consumer Protection BC interprets the Act and applies criteria determining AMP amounts.

According to the Policy, contraventions for which AMPs are imposed are first categorized into Type A, Type B, or Type C, as set out in the Appendix. Consumer Protection BC makes these assignments based on its purposes and experience in delivering consumer protection services in the public interest, and the consideration of two factors: (1) the inherent severity of harm specific to the contravention, and (2) the probability that a person will experience harm from the contravention.

After categorization of the contravention, the decision maker considers a set of “adjustment factors” laid out in the Policy. These “adjustment factors” are based on section 164 (2), plus one additional criterion consistent with the legislation. The Policy requires the decision maker to choose a “gravity” value for each adjustment factor based on consideration of the relevant aggravating or mitigating circumstances.

When applying the Policy, the decision maker must consider all the factors under section 164 (2) in arriving at the AMP amount that should be imposed. The decision maker continues by deciding in his or her discretion whether the amounts in the Policy or different amounts are imposed based on consideration of the factors under section 164 (2) (and the additional criterion) and any other relevant circumstances.

In the respondent’s notice of this hearing, I identify the Policy and advise that it will be applied as part of any decision that may impose an AMP. This notice further states that the Policy can be viewed on our website and would be otherwise provided to the respondent upon request. Therefore, in this hearing the respondent has had an opportunity to respond to the Policy by making submissions on the appropriateness of its application or its consistency with the Act. However, I have not received any submissions from the respondent focussed on the Policy.

Calculation of the AMP amounts

I first apply the Policy to calculate an AMP amounts. I then decide whether that amount or a different amount should be imposed based on section 164(2), the additional criterion, and any other relevant circumstances.

Breach of section 189 (5) of the Act is a Type C contravention under the Policy (Appendix A, page 14, line #115). It represents the highest level of inherent severity and potential harm for prescribed contraventions according to the Policy. Consequently, according to the AMP “Matrix” in part 4.3 (page 5) of the Policy, the “base” amount for penalty is \$5,000 for a business. Depending on “Gravity Level” in the Matrix, the minimum is \$3,500 and maximum \$15,000.

My assessment of the adjustment factors applicable to these contraventions under the Policy’s penalty matrix is set out in the table below set out on the following page.

Adjustment Factor	Effect on Gravity	Analysis
1. Previous enforcement actions for contraventions of a similar nature	1	As noted in the Report, Consumer Protection BC has taken previous statutory enforcement actions against the respondent. In 2013 the respondent failed to comply with an order in respect of required disclosures for consumer contracts (AMP imposed). In 2015 the respondent did not provide information to an inspector as required (subject of a compliance order). Although both instances occurred at least 5 years ago and relate to different specific circumstances, I find a common relevant thread in this history. This factor merits a moderate adjustment as <i>aggravating</i> for the purpose of penalty.
2. Gravity and magnitude of the contravention	2	I find the blatant breach (disregard) of an order to be a serious matter. The extent of the breach is notable for both the significant reporting obligations involved (two business years and detailed reporting called for in sec. 10 of the Regulation), and the subversion of the Order's intended resolution of a longstanding dispute, as discussed in the original decision. This factor merits adjustment for <i>aggravation</i> of penalty.
3. Extent of the harm to others resulting from the contravention	0	There is no concrete evidence of harm to others resulting from the contravention, and no evidence in support of an inference sufficient to merit an adjustment relative to this criterion.
4. Whether the contravention was repeated or continuous	1	The Report does not allege multiple breaches of the Order. Compliance with the Order requires fulfilment of both preneed reporting and payment of costs; however I consider the issue fundamentally to be the respondent's disregard of the Order on the whole. However, the relevant period of the breach, is now more than one month in duration (beginning October 3 rd). I consider the continuity of the violation to merit an adjustment as an aggravating factor.
5. Whether the contravention was deliberate	1	I consider the respondent's complete non-engagement in complying with the Order to ground an inference of intent or equivalent reckless disregard of the Order.
6. Economic benefit derived by the person from the contravention	0	I am unaware of any evidence that the respondent derived economic benefit specific to the contravention.

<p><i>7. Whether the person made reasonable efforts to mitigate or reverse the contravention's effects</i></p>	<p>1</p>	<p>The Report suggests that the effect of the contravention is to interfere with the licensing body's ability to scrutinize consumer preneed contracts and related monetary matters. These matters pertain to core concerns of the regulator and I accept that in this case the respondent has done nothing to ameliorate the effect of failing to complete its preneed reports.</p>
<p><i>8. The person's efforts to correct the contravention & prevent recurrence</i></p>	<p>1</p>	<p>The nature of the breach relates to specific instruction and use of a reporting method intended to resolve the underlying issues, which the respondent has not adopted. The respondent has taken no steps to correct the contravention or to prevent its continuation. In that sense, the respondent's disregard of the Order causes daily recurrence of the violation as long as it continues.</p>

Final Calculation of AMP

According to my application of the Policy and its AMP Matrix, the overall adjustment for the section 189 (5) violation involves a “plus seven” score in consideration of the factors above.

The Policy determines that the violation is a Type C contravention with a base penalty amount of \$3,500. In this case, having found a gravity level of eight after adjustment per the Matrix, I apply a penalty of **\$10,000**. In this hearing no additional relevant circumstances have been brought to bear on my analysis and calculation of penalty as to vary it from the Policy amount. Attached to these reasons is a Notice of Administrative Penalty in the amount of **\$10,000**.

The penalty is in my view significant, as befits a violation reflecting the respondent's refusal to engage with basic requirements of the statutory licensing scheme underlying the Order's rationale. By way of justification of this penalty, it is important to emphasize the purpose of deterring disregard or possibly contempt for the licensing authority's administration of the regulatory scheme. Furthermore, compliance with formal orders must not be perceived to be “optional”. I note that the penalty, while substantial, is not at the very high end of the scale authorized by the Act. It is well below the statutory maximum of \$50,000 and I take it to be reasonable and proportional.

RECONSIDERATION OF ORDER AND PENALTY

A compliance order or monetary penalty may be reconsidered in accordance with Division 1 of Part 12 of the Act, subject to the provisions outlined in sections 181 and 182 (2). A request for reconsideration must be submitted within 30 days of delivery of the order to the respondent. The request must be in writing, identify the error the person believes was made or other grounds for reconsideration, and be accompanied by a \$252 application fee. A request for reconsideration should be addressed to:

Consumer Protection BC
Attention: Shahid Noorani, Vice President, Regulatory Services
200 – 4946 Canada Way, Burnaby, BC V5G 4H7
shahid.noorani@consumerprotectionbc.ca

Conclusion

The respondent has failed to comply with the terms of the Order, as alleged, in contravention of section 189 (5). The respondent's persistence in neglecting to rectify the matters identified in the Order, and its repeated engagement in conduct of a similar nature merits a significant monetary penalty and actions against its licence, in this case a licence condition restricting further contracting for preneed funeral services. The respondent is ordered to pay Consumer Protection BC's additional costs incurred in the inspection in respect of the contravention, including issuance of the Report and initiation of this hearing.

Considered on November 11, 2020 in Vancouver, BC

A handwritten signature in black ink, appearing to read 'R Penkala', written over a horizontal line.

Robert Penkala
Manager, Enforcement Hearing