



## **DECISION OF THE DIRECTOR**

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In the Matter of:       The *Business Practices & Consumer Protection Act*

Respondent:             Wiebe & Jeske Burial & Cremation Care Providers Ltd.

Licence:                 23513

Case Number:         30340

Adjudicator:          Shahid Noorani

Date of Decision:      February 10, 2021

### **A. INTRODUCTION**

1. Consumer Protection BC by statutory delegation oversees compliance with the *Business Practices and Consumer Protection Act* (“Act”), and the *Cremation, Interment and Funeral Services Act*, and their associated regulations.
2. Wiebe & Jeske Burial & Cremation Care Providers Ltd. (“Wiebe & Jeske”, “respondent”, or “licensee”) is a company operating under a funeral provider licence granted by Consumer Protection BC pursuant to the above statutes.
3. The licence was first issued to the respondent by Consumer Protection BC (aka the Business Practices and Consumer Protection BC Authority) in 2004. The respondent had been issued a funeral provider licence under the province’s previous licensing regime. The licence has been renewed on an annual cycle by Consumer Protection BC continuously since 2004.
4. On June 15<sup>th</sup>, 2020, a Consumer Protection BC inspector (“inspector”) issued a Report to the Director (“Report”) alleging the respondent violated section 40 (5) of the Act by deducting more than the allowable amount from consumers’ payments made in respect of “preneed” funeral services contracts (“preneed contracts”).

5. The Report recommends the Director issue an order that the respondent “engage a certified auditor to examine and reconcile all financial circumstances related to preneed funeral services contracts executed [...] since it was licensed as a funeral provider.”
6. With a few exceptions, the Act requires the respondent be given an opportunity to be heard to any allegation before a determination is made and any potential enforcement action is taken.
7. I have been delegated the powers of the Director to make determinations under the Act and to exercise all powers under Parts 9 and 10 of the Act.
8. In a letter dated July 17, 2020 a hearing notice (or “opportunity to be heard”) on the matters raised in the Report was given to the respondent. The notice outlined several possible consequences for the respondent should the allegation be confirmed in the hearing, including a licence suspension (or conditions), a monetary penalty, and a remedial and costs order.
9. The respondent has replied to their opportunity to be heard (“response”). The response concedes the respondent “may have failed to ensure” it deducted only permitted amounts from payments for preneed contracts. It does not question the sufficiency of notice (i.e., being adequately informed of the specifics of the allegations), and has not requested any further disclosures of evidence, clarification, or time to respond. The response demonstrates that the respondent has been afforded the rights required under the Act prior to the exercise of statutory enforcement powers.

## **B. ALLEGED CONTRAVENTION / LEGISLATION**

10. The allegation against the respondent is stated as:

*[The respondent] failed to ensure that no more than 20% of the amount of money received under preneed funeral services contracts was deducted for selling expenses.*

11. Section 40 (5) of the Act is cited as the basis for the allegation. I reproduce the provisions of section 40 in its entirety:

### **Section 40 (the Act)**

*(1) In this section, "preneed interim account" means an account established by the supplier with a savings institution in British Columbia.*

*(2) This section does not apply to proceeds of insurance paid to a supplier.*

*(3) A supplier that receives an amount of money under a preneed cemetery or funeral services contract must deposit, within 5 days of receipt, any of the amount that is not a deduction for selling expenses into a preneed interim account or preneed trust account.*

*(4) If the supplier deposits money into the preneed interim account, the supplier must*

*(a) retain in the preneed interim account, until transferred under paragraph (b),*

- (i) the money, and
    - (ii) all interest received in relation to that money during the period in which that money is held in the preneed interim account, and
  - (b) transfer, within 21 days of deposit into the preneed interim account,
    - (i) into a preneed trust account, any of the money and related interest retained in the preneed interim account that is not a deduction for selling expenses, and
    - (ii) out of the preneed interim account, any of the money that is a deduction for selling expenses.
- (5) A supplier must not deduct for selling expenses more than 20% of the amount of money received under the preneed cemetery or funeral services contract.
- (6) The savings institution is the trustee of the preneed trust account established with it and must administer the account
- (a) in accordance with the regulations, and
  - (b) subject to paragraph (a), in accordance with the terms of a written trust agreement between the savings institution and the supplier.
- (7) The savings institution must not make a payment out of a preneed trust account except in accordance with this section or to pay the savings institution's fees and expenses.
- (8) The savings institution must pay to the supplier the whole or part of any money in the preneed trust account and any interest due on that amount if the supplier gives a written notice to the savings institution that
- (a) all or part of the obligations under the preneed cemetery or funeral services contract for which the money is held in the preneed trust account have been discharged, or
  - (b) the preneed cemetery or funeral services contract for which the money is held in trust has been cancelled.
- (9) The savings institution is not liable to the beneficiary of a preneed trust account for any refunds made in response to a notice under subsection (8), unless the savings institution knew, or ought to have known, that the notice was invalid.
- (10) The supplier must
- (a) give notice to the consumer within 15 days of the first time that money is deposited or transferred into the preneed trust account, and
  - (b) on the request of the consumer, give the consumer an annual report respecting the money in the preneed trust account paid under the consumer's preneed cemetery or funeral services contract.

### **C. THE INSPECTOR'S EVIDENCE**

12. The respondent submitted a preneed funeral services contract report (PFSCR) for the 2018 business year, pertaining exclusively to payments made by consumers and placed into a trust account held by TD Canada Trust ("TD" or "trustee"). The PFSCR was submitted to Consumer Protection BC in 2019 in accordance with annual reporting requirements under

the *Consumer Contracts Regulations* for all funeral providers and cemetery operators that enter into preneed contracts.

13. The respondent's PFSCR is a self-declared inventory and accounting of preneed contracts that have seen financial funding or other related activity in the previous financial cycle.
14. For the respondent, the PFSCR contains information about preneed contracts executed between 2005 and 2018, including the monetary value of services, deposits, amounts held, and withdrawals. The respondent's PFSCR recorded more than 2,200 preneed contracts still in force with the respondent prior to 2019. The inspector reviewed documents available to them at the respondent's place of business or that were later made available by the respondent related to consumers' payments for preneed contracts.
15. In the Report, the inspector describes and exhibits records showing instructions given by the respondent to the trustee to accept consumer deposit and scheduled instalment payments into the trust account. For many of these deposit and instalments payments, the presented records detail the exchanges of preneed funds from the trustee to the respondent.
16. The inspector examined business records from multiple sources including:
  - the respondent's 2018 PFSCR submission
  - file records detailing dates and amounts of deposit payments and instalment payments made by consumers to the trustee
  - trustee statements showing monthly credit/payment amounts to the respondent by the trustee based on instructions given to the trustee by the respondent to pay it money for taxes and selling expenses
  - Copies of TD Prepaid Services Deposit and Instalment Forms ("D&I Forms") instructing the trustee what to do each time it received consumer money to fund the preneed contracts.
17. After examining many preneed contracts and reviewing the corresponding business and trustee records, it appeared to the inspector the respondent was directing the trustee to deduct more than 20% from the amount of money being received from consumers to fund the preneed contracts. These deductions were made by the trustee to the credit of the respondent, usually acting on the instructions in the contract-specific D&I Form submitted to the trustee by the respondent.
18. When questioned by the inspector why the amounts placed in trust were apparently below the minimum 80% mandated under the Act, the respondent said they wanted to recoup as much as their selling expense as soon as possible so they could pay the commission owing to their preneed sales agent.
19. The respondent informed the inspector that the trustee would pay/credit the respondent by

an electronic fund transfer to the respondent's merchant account.

20. The respondent told the inspector that almost exclusively, the merchant account represented the sum of deposit of credit card sales for the respondent in the *preceding* period and electronic fund transfers made by the trustee under instructions given by the respondent. Debits made to the merchant account were to pay commissions to their preneed sales agent, to fund quarterly tax remittances, and to cover fees charged by the financial institution to administer the merchant account.
21. The respondent stated the monthly "net" carried forward balance (more than \$100,000) in the merchant account represented the difference (over-time) between deposits and debited amounts.
22. The inspector says:
  - on 23 occasions the respondent deducted more than 20% on the amounts of money received in relation to deposit payments for preneed contracts entered into between 2005 and 2015, as cited in Table 2 of the Report (each deposit payment belonging to a different consumer)
  - on hundreds of occasions the respondent deducted more than 20% on the amounts of money received for preneed instalment payments for preneed contracts entered into between 2005 and 2015, as cited in Table 3 of the Report (more than 400 individual instalments funding 10 different consumer preneed contracts);
  - on 15 occasions the respondent deducted more than 20% on the amounts of money received in relation to deposit payments for preneed contracts entered into between 2004 and 2016, as cited in Table 4 of the Report (each deposit payment belonging to a different consumer);
  - on hundreds of occasions the respondent deducted more than 20% on the amounts of money received for preneed instalment payments for preneed contracts entered into between 2004 and 2016, as cited in Table 5 of the Report (more than 700 payments to be made funding 15 different consumer contracts)
  - on 13 occasions the respondent deducted more than 20% on the amounts of money received in relation to deposit payments for preneed contracts entered into between 2009 and 2016, as cited in Table 6 of the Report (each deposit payment belonging to a different consumer)
  - on multiple occasions the respondent deducted more than 20% on the amounts of money received for preneed instalment payments for preneed contracts entered into between 2009 and 2016, as cited in Table 7 of the Report (involving 10 different consumer contracts)
  - the preneed funds held in trust for six consumers that entered preneed contracts between 2005 and 2014 did not meet (at a minimum) 80% of the total funds deposited with the trustee at the time the goods and services under the preneed

funeral services contract were required to be supplied to consumers. It was only when the call was made to the trustee to pay the consumer's full balance did it become known the respondent had received (for these six contracts specifically) more than \$7,300 in funds than allowed under 40 (5) of the Act, as cited in Table 8 of the Report.

23. The respondent admitted to the inspector that on 4 occasions in 2017 to 2018 it had preneed trust shortfalls relative to the requirement of 80% trust funding of consumers' payments. In these cases, the respondent "paid itself" from current revenues to cover the supply of funeral services to the consumers.
24. By way of explanation of evidence of deductions greater than 20% from preneed customer payments, the respondent told the inspector that its former preneed sales agent had been paid commissions derived from the deposit and subsequent instalment consumer payments. The alleged over-deductions relate to the sales agent's involvement in completing and submitting deposit instructions to TD and his wish to be paid the commission with minimal delay. The respondent enabled the sales agent to receive his commission whether the preneed contract involved full lump sum payment or instalment-funding terms.
25. The inspector concludes that on hundreds of occasions the respondent failed to ensure no more than 20% of the amount of money paid by consumers to fund preneed contracts (deposit and instalment payments) was deducted as retained amounts. Moreover, the respondent systemically caused the deduction of more than 20% and that the difference between what is currently held in trust for consumer is, at a minimum, more than \$130,000 less than the required amount to be held in trust for the approximate 2,200 preneed funeral services contracts executed by the respondent that are still "in force."
26. On January 21, 2020 Consumer Protection BC issued an Order to the trustee to "freeze" the merchant account ("the Freeze Order"). At the time the merchant account held a balance of \$100,437.73.
27. When asked by the inspector whether the respondent's current trust account was sufficient to fund all "in force" preneed contracts, the respondent's bookkeeper said, "she could not be certain."
28. The inspector recommends the respondent be ordered to engage a certified auditor to examine and reconcile all financial circumstances related to preneed contracts executed by the respondent since licensed as a funeral provider. The inspector specifically identifies the following records be audited:
  - records for the respondent's merchant account since 2004
  - trustee payment histories from TD for the yet undetermined number of paid out or cancelled trust accounts related to the respondent's business

- trustee payment histories and the current banking records for the 2471 “in-force” preneed contracts executed by the respondent identified in the PFSCR
- examination of all preneed funeral services contracts held by the respondent

**D. RESPONDENT’S EVIDENCE**

29. The respondent submitted a one-page letter as its response to the evidence in the Report and the allegations. The response did not provide any new documents.

30. The respondent says:

- Due to possible miscalculations by TD, the respondent may have failed to ensure it deducted no more than 20% of the amounts received under preneed contracts for selling expenses
- The errors in deductions greater than 20% resulted from not having effective internal controls in place to confirm TD’s calculations.
- The errors occurred in a very small number of files with absolutely no harm to any client families, as evidenced by zero consumer complaints.
- The errors were certainly not deliberate and there was no economic gain by the respondent.
- The respondent should have more closely monitored TD and wish this anomaly had been discovered sooner in previous CPBC inspections.

31. The respondent understands the Director has the authority to assess a penalty for this contravention [and] wish to provide the following:

- The respondent has not had previous enforcement actions for contraventions of a similar nature
- all efforts to minimize any actual or potential harm to our customers have been undertaken by the respondent
- when the errors became known, the respondent immediately ensured it did not continue
- the contravention was not deliberate
- there has been no economic benefit to the respondent through this contravention
- the respondent replied as soon as possible when made aware of the contravention and put forward proposals to mitigate the contravention’s effect
- The respondent has reviewed its processes and have put in place controls to ensure the contravention does not occur again
- In an attempt to correct the contravention, the respondent immediately engaged the services of an accountant to perform an audit/reconciliation. This process was put on hold following my letter dated July 22, 2020 [I note: reversing an earlier demand by me for the respondent to complete a certified auditing of the preneed records]

## E. ANALYSIS

### Scope of the deduction limit on payments received - interpretation

32. The inspector asserts the Act requires funeral service providers engaging in preneed contracts deduct no more than 20% from *any* money it receives from consumers in that connection. I agree and will explain why the 20% deduction limit for “selling expenses” needs to be construed as the limit on deductions on all preneed payment received, including for a deposit and each installment payment. In interpreting this provision, I consider the operation of section 40 in its entirety, as well as sections 36 (3) and 38 (2), concerning the right of cancellation and refunds owed to consumers upon cancellation.

Section 36 (3) allows: “a consumer may cancel a preneed cemetery or funeral services contract at any time by giving notice of cancellation to the supplier”.

Section 38 (2) refers to refund of “the amount *required to be deposited* in respect of the contract into the preneed trust account” [emphasis mine]

33. Sections 40, subsections (3) and (4) state [rephrased for continuity]:

“A supplier that receives an amount of money under a preneed cemetery or funeral services contract must deposit, within 5 days of receipt, *any of the amount that is not a deduction for selling expenses* into a preneed interim account or preneed trust account.

If the supplier deposits money into the preneed interim account, the supplier must (a) retain in the preneed interim account [the money and related interest retained *that is not a deduction for selling expenses*] until (b) [transferred] within 21 days of deposit into the preneed interim account (i) into a preneed trust account [...]

[emphasis mine]

34. The “requirement” for deposit in subsection (3) above incorporates reference to the “amount that is not a deduction” as set out in section 40 (5):

A supplier must not deduct for selling expenses more than 20% of the amount of money received under the preneed cemetery or funeral services contract.

35. Logically, the wording of subsection (3) does not decide the issue – the proper basis to determine the allowable deduction is precisely the question. However, I find that any question about which “amount of money received” (whether *any* payments or the amount “under the contract” on the whole) is resolved by the fact that subsection (3) appears to contemplate in the case of all interim or trust account deposits the distinction between amounts permitted to be



retained or deducted. Secondly, I consider the wording of section 38 respecting refunds on cancellation, similarly, to contemplate a division of consumer payments into the retained and deducted components. For the purposes of determining refunds owed for cancellation “at any time” (i.e., prior to completion of payment for a preneed), it is simpler and more consistent with consumers’ interests to insist that a maximum of 20% be withheld from refunds. The alternative, in which suppliers could withhold up to 20% of the full value of the preneed contract when a consumer cancels a partially funded preneed contract (keeping more than 20% of the actual amount paid, or perhaps denying the refund entirely on that basis), defeats the plain purpose of reference to the prescribed deduction limit in the cancellation provision and would work mischief and uncertainty in practice.

36. To conclude, the statutory deduction limit applies to money *given* by consumer as payment(s) for preneed contracts. In the case of deposit or instalment payments, the limit is on the payment received, and not the value of the preneed contract as a whole.

#### **Whether the respondent contravened sec. 40 (5) in relation to deposit payments**

37. I have reviewed the Report’s evidence and the supporting documents exhibited for the 51 consumers identified in Tables 2, 4, and 6 of the Report for whom it alleged the respondent deducted more than 20% from deposits given by consumers to fund preneed contracts. The evidence is clear that for each of these 51 consumers the respondent supplied D&I Forms to the trustee containing instructions they be credited more than 20% of the deposit payment. What is unclear for 33 of these consumers is whether TD followed through with the respondent’s instructions. I believe the inspector was fully aware of this evidentiary shortcoming, hence the recommendation the inspector has advanced for a reconciliation. That said, the D&I Forms and the instructions the inspector presents establishes enough of a concern and basis for me to require a further examination and reconciliation be done into transaction activity between the respondent and trustee on all preneed contracts to test for historic compliance with section 40(5) of the Act and, if required, to rectify any shortfall in amounts held in trust to fund preneed contracts between consumers and the respondent.

38. From this group of 51 consumers that paid deposit amounts to fund preneed contracts with the respondent, I have identified 8 consumers in Table 4 where the evidence convincingly shows deductions greater than 20%.<sup>1</sup> Supporting documents exhibited in Table 4 include the D&I Forms, as well as trustee records that show receipt of the deposits by the trustee and trust account balances. At a minimum, each consumer account should have held a balance of no less than 80% of the amount of the deposit amount paid. The records of trust account balances, however, clearly show significantly lower amounts for all 8 consumers. As an example, the consumer listed on line 9 of Table 4 paid a deposit of \$909.50 in June 2010, confirmed by

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<sup>1</sup> These consumers are identified in Table 4 as: [REDACTED]

trustee records.<sup>2</sup> The D&I Forms directed the trustee to deduct and forward \$900.00 (99%) to the respondent, and place only \$9.50 (1%) in trust. A trustee balance sheet shows that in October 2019 (9 years later), the consumer balance in trust was \$28.14.

39. Similarly, there is a group of 10 consumers identified in Table 6 where the supporting documents made available in the body of the report at pages 10-15 (i.e., not at Table 6) show the respondent received deductions from deposit payments greater than the 20% maximum.<sup>3</sup> In these instances, D&I Forms are accompanied by trustee transaction history records documenting the precise date the deposit amount was deducted and credited to the respondent. From these records it is plain to see the respondent was paid from deposit amounts, an amount exceeding the permitted 20% maximum. To illustrate, I describe the deposit transactions that took place with the consumer identified at line 6 of Table 6 who paid a deposit amount of \$1,014.45. The D&I Forms directed the trustee to deduct and forward \$1,010 (99.6%) to the respondent and to place \$4.45 (0.4%) in trust.<sup>4</sup> A trustee client history report confirms the deduction and that the funds were forwarded as instructed by the respondent.
40. These records were given to the inspector by the respondent and there has been no objection raised by the respondent as to the authenticity or accuracy of the records.
41. For the 8 consumers identified in paragraph 38 and the 10 others addressed in paragraph 39, I find the respondent took deductions from deposit payments greater than the allowed 20% maximum.
42. Each of these violations is a separate contravention, meaning that for this part of the allegation (i.e., deposit payments) I find 18 contraventions (a contravention for each consumer) to section 40(5) of the Act.

#### **Whether the respondent contravened sec. 40 (5) in relation to instalment payments**

43. The evidence in the Report for instalment payments is presented in much the same way as it is for the already reviewed deposit payments. Tables 3, 5 and 7 in the appendices section of the Report identifies 35 consumers for whom the inspector alleges the respondent received more than a 20% deduction from instalment payments. As was the case with the deposit payments, where only D&I Forms are produced, it cannot be said the trustee carried through with the respondent's instructions to deduct more than the allowed amount. This is the case for 26 of the 35 consumers. Therefore, the allegation as it relates to these 26 consumers is not proven. Notwithstanding, I repeat what was said earlier regarding some of the deposit payments, namely that the respondent's instructions in the D&I Forms create an absolute need for a

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<sup>2</sup> This consumer is identified in Table 4 as [REDACTED]

<sup>3</sup> These consumers are identified in Table 6 as: [REDACTED]

<sup>4</sup> This consumer is identified in table 6 as [REDACTED]

further examination and reconciliation to identify the instances where overdraws by the respondent have resulted in consumer contracts not being properly funded.

44. For 9 of the aforementioned 35 consumers (all 9 are listed in Table 7 of the Report), reliable records have been supplied in the form of trustee banking reports and records. These records are produced in the body of the Report at pages 10-18 (i.e., not at Table 7) and confirm the respondent received deductions greater than 20% from instalment payments made by consumers.<sup>5</sup> Looking to the consumer listed at line 9 of Table 7 as an example, this consumer made 12 monthly instalment payments of \$308.48. The D&I Forms directed the trustee to deduct and forward to the respondent \$110.35 (35.8%) from each payment, and to place \$198.13 (64.2%) in trust.<sup>6</sup> The trustee transaction history report confirms these 12 deductions and that the crediting of funds took place as instructed by the respondent.
45. My review of the records confirms that for these 9 consumers the respondent took instalment payments greater than the allowable maximum on 133 occasions.
46. Again, there has been no objection by the respondent about the authenticity or accuracy of the records.
47. Although open to me to find a section 40(5) contravention for each of these 133 instances, for this part of the allegation (i.e. instalment payments) I decide to instead attach a contravention to each consumer resulting in 9 contraventions to section 40(5) of the Act.<sup>7</sup>

#### **The trust shortfalls when funeral services required**

48. The inspector points out in several cases, some trust accounts that had been previously below the minimum of 80% of payments received eventually came into balance after the respondent ceased taking deductions that they would have otherwise been entitled to receive. This is significant to know because a simple look to account balances to confirm funding at an 80% level of money paid by consumers does not give a full picture of the number of consumers and number of times the respondent may have taken deductions greater than they were entitled. The inspector correctly points out that even where the account now appears to be in balance (based on 80% of money given by consumers), earlier over deductions may have resulted in the total balance of funds having a deficiency of interest in the individual consumer accounts because the interest was not being accrued on what should have been a larger principal amount in trust. This further supports the need for a reconciliation of the trust account.

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<sup>5</sup> These consumers are identified in Table 7 as: ██████████ x 22 payments; ██████████ x 2 payments; ██████████ x 1 payment; ██████████ x 59 payments; ██████████ x 10 payments; ██████████ x 25 payments; ██████████ x 1 payment; ██████████ x 12 payments; ██████████ x 1 payment.

<sup>6</sup> This consumer is identified in table 7 as ██████████.

<sup>7</sup> The following consumers are the same ones that over deductions for deposit payments as identified in Table 6. The over deductions to their instalment payments is a separate contravention: ██████████  
██████████

49. Table 8 of the Report is unique from the others in the Report because it deals with 6 consumers that faced trust “shortages” when it came time for the contracted preneed funeral services to be supplied by the respondent. These shortages were created by the respondent’s over deductions and non-compliance with section 40(5) of the Act. The fact the respondent did not require the further advancement of funds from a consumer but rather paid itself from its merchant account (the account where amounts in excess of the limit set by 40(5) of the Act were being credited by the trustee) to deliver the contracted services does not ameliorate from the occurrence of the violations. All this calls into question whether these trust shortfalls required families or representatives of descendants to pay additional funds to the respondent to receive “guaranteed” contracted funeral services. This brings me back to earlier comments about the need for a fuller examination and reconciliation to be done over the transactions in the respondent’s trust account to ensure complaint and proper funding of preneed contracts.
50. The evidence for each of the 6 consumers listed in Table 8 is supported by D&I Forms, trustee transaction history reports, and trustee pay-out sheets for the “full withdrawal for services upon death”. A review of these records makes it a simple exercise to figure out that the trust shortages were caused solely by the respondent’s over deductions to both deposit amounts and instalment payments. As an example, the consumer listed on line 1 of Table 8 entered a preneed contract with the respondent, providing a deposit payment of \$500.35. In accordance with the respondent’s instructions, the trustee deducted and returned to the respondent \$498.00 (99.5%), while placing only \$2.35 (0.5%) into the trust account. The consumer proceeded to make 89 monthly instalment payments of \$50.04, and for each of these payments the trustee followed the respondent’s instructions to deduct and return to the respondent \$49.29 (98.5%), and place only 0.75 (1.5%) in trust. When the time came for these funeral services to be supplied, the trustee remitted \$70.89 (\$69.10 principal and \$1.79 interest) to the respondent as the full amount residing in trust.<sup>8</sup>
51. The evidence for the other 5 consumers listed in Table 8 is mostly the same, showing clearly the respondent caused over-deductions from payments made by consumers, resulting in trust account shortages when the contracted funeral services were to be supplied. There has been no objection by the respondent about the authenticity or accuracy of these records.
52. My review of the records confirms that for these 6 consumers, between over-deductions for deposit and instalment payments, the respondent took payments greater than the allowable maximum on 231 occasions.<sup>9</sup>

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<sup>8</sup> This consumer is identified in Table 8 as [REDACTED]  
<sup>9</sup> [REDACTED] x 1 deposit and 89 instalments; [REDACTED] x 1 deposit 23 instalments; [REDACTED] x 1 deposit x 27 instalments; [REDACTED] 1 deposit x 28 instalments; [REDACTED] x 1 deposit x 1 instalments; [REDACTED] x 1 deposit and 57 instalments).

53. Each time one of these unlawful deductions took place to a deposit or instalment payment the respondent was in contravention to section 40(5) of the BPCPA. Although open to me to find a section 40(5) contravention for each of these 231 instances, for this part of the allegation (i.e., trust shortages caused by over deductions to deposit and instalment payments) I decide to instead attach a contravention to each consumer resulting in 6 contraventions to section 40(5) of the Act.

#### **Freeze Order on Merchant Account**

54. The inspector asserts his belief that approximately \$130,000 in trust account has potentially gone astray. Although not completely clear to me as to the derivation of this figure by the inspector, it is undeniable that unlawful deductions from the trust account have taken place and been placed into the respondent's merchant account. Money that should be properly vested and protected in trust has, at the direction of the respondent, been placed in a regular business type account.

55. Although the full degree of these over deductions is not yet known, I believe it necessary for the protection of consumer interests to keep the "Freeze Order" in place until a full reconciliation on the trust account can be done to determine, in part, what amount of money may need to be redirected back to trust from the merchant account to ensure consumer trust accounts are properly funded as required by section 40 of the Act.

#### **F. RESPONDENT RESPONSE AND DUE DILIGENCE DEFENCE**

56. My findings that the respondent breached section 40(5) of the Act follows consideration given to the respondent's submissions. For the reasons discussed below, I reject the explanations tendered and defence to the contraventions.

57. The respondent initiated and controlled this unlawful activity. Their answer to the contravention is mostly an attempt to shift that ownership of responsibility to others. To characterize the unpermitted charges as "possible miscalculations by TD" fails to acknowledge that they gave the trustee explicit written instructions to make deductions and to forward amounts greater than allowed.

58. The statement they "wish" the over deductions had been discovered at an earlier inspection implies an element of unknowingness on the part of their part and that had this unlawful activity been brought to their attention before the Report, things would have been done differently. Given it was the respondent directing the over deductions, the suggestion strikes me as disingenuous.

59. Due diligence can serve as a full defence to the contravention if the respondent can demonstrate it took all reasonable efforts to *prevent* the contravention. Based on the respondent's

submission and the evidence presented, the respondent cannot rely on this defence. Most of what the respondent submits, are measures taken *in response* to the contravention. These may be factors considered at any penalty phase that may take place, but they do not serve as proof of due diligence. The respondent has not demonstrated it took all reasonable efforts to avoid or prevent the contravention from happening. I will point out this certainly would have been complicated given the overwhelming evidence that the respondent's business practices were designed to make these unlawful deductions so that commissions could be paid early.

## **G. CONCLUSION**

60. I find the respondent has committed 33 contraventions to section 40(5) by taking deductions for selling expenses more than 20% of the amount of money received under preneed funeral services contracts.<sup>10</sup>

## **H. ENFORCEMENT & REMEDY**

### **Administrative Monetary Penalty**

61. Based on the evidence, I would usually move forward to considering the appropriateness of an administrative monetary penalty for the 33 confirmed contraventions. Applying the criteria under the Act, my discretion would allow me to impose an administrative monetary penalty for each contravention, with an amount that could be as high as \$50,000. However, I am prevented from applying any administrative monetary penalty in this case because the Act places a limitation period of 2 years from the date the contravention occurred. From the evidence before me I cannot identify an instance when a contravention falls within this timeframe.

### **Compliance Order**

62. My delegated functions give me the authority to issue a Compliance Order following a determination that a contravention has occurred. The Compliance Order may require the respondent to:

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

63. I have repeatedly indicated in this decision the absolute necessity for there to be a fuller examination done on the transaction history between the trustee and respondent. This will entail a complete reconciliation of the trust account to be done through a review of all preneed

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<sup>10</sup> 18 consumers identified in the section of this decision re: over deductions to deposits; 9 consumers identified in the section of this decision re: over deductions to instalments; 6 consumers identified in the section of this decision re: trust account shortfalls.

contracts; an examination of business, trustee and banking records for *every* consumer that has paid the respondent money to fund a preneed contract; an identification of all instances where unlawful deductions have taken place and; a confirmation that money paid by consumers is vested in a trust account at proper amounts.

64. Attached to this decision is a Compliance Order setting out specific actions to be taken by the respondent. This Compliance Order is issued for remedial purposes, as well as the ends of general and specific deterrence. Inspection costs in the amount of \$8,000.00 (eight thousand dollars) are to be paid by the respondent, recognizing the extent of Consumer Protection BC's inspection resources allocated in relation to the violations.

#### **I. RECONSIDERATION**

65. A Compliance Order 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 Compliance 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  
200 – 4946 Canada Way, Burnaby, BC V5G 4H7  
[shahid.noorani@consumerprotectionbc.ca](mailto:shahid.noorani@consumerprotectionbc.ca)

Decided on February 10, 2021 in Burnaby, BC.

“original signed”

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Shahid Noorani, Vice President