



DECISION OF THE DIRECTOR

In the Matter of: *Business Practices and Consumer Protection Act [SBC 2004] c. 2, and Home Inspector Licensing Regulation*

Respondent: Clinton Fox

Licence Number: 70283

Case Number: 31012

Adjudicator: Shahid Noorani

Decision Issued: March 29, 2021

A. INTRODUCTION

Consumer Protection BC administers the *Business Practices and Consumer Protection Act* (BPCPA) and the *Home Inspector Licensing Regulation* (HILR). Clinton Fox is engaged in the occupation of home inspection through Assure Property Solutions Inc. A Consumer Protection BC home inspector licence has been issued to Clinton Fox. For clarity, Clinton Fox is the licensee and the respondent in this decision.

On November 5, 2020, an inspector with Consumer Protection BC (“the inspector”) issued a Report to the Director (Report) alleging the respondent had contravened the BPCPA by failing to provide information required under the BPCPA.

If the alleged contravention is proven, Consumer Protection BC is authorized to order the respondent to take actions to correct its practices and to pay costs of the inspection related to the Report. Additionally, the allegation may be subject to an administrative monetary penalty. Finally, the authority to impose conditions, suspend, or cancel, a home inspection licence may be exercised.

B. OPPORTUNITY TO BE HEARD

Prior to an action being taken under the BPCPA, the respondent must be provided with an opportunity to be heard. A notice of hearing (hearing notice) was sent to the respondent. It provided the respondent with the opportunity to submit a written reply to the Report. The hearing notice indicated that after the opportunity to respond was completed, a decision maker

for Consumer Protection BC would determine whether the alleged violation occurred and may take an enforcement action if considered warranted. The hearing notice further stated that if the decision maker confirms a violation and imposes an administrative monetary penalty, they would apply the factors in section 164 (2) of the BPCPA before determining the monetary amount, and that they would also be guided in calculating monetary penalties by Consumer Protection BC policy.

The respondent replied to the opportunity to be heard, supplying a written submission on December 2, 2020. Following this, and at the request of the respondent, an oral hearing took place on February 19, 2021. A further request by me for information was completed by the respondent on March 15, 2021. I conclude an appropriate and full opportunity to be heard has been provided to the respondent.

C. ALLEGED CONTRAVENTIONS

The Report alleges the respondent contravened the BPCPA when on October 23, 2020 it:

1. Failed to provide information required under the BPCPA, contrary to section 189(5)(b) of the BPCPA

D. LEGISLATION

Business Practices and Consumer Protection BPCPA

Section 1

In this BPCPA:

“consumer transaction means (a) supply of good or services....to a consumer for purposes that are primarily personal, family or household (b) a solicitation, offer, advertisement or promotion by supplier with respect to a transaction referred to in paragraph (a)

“supplier” means person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by (a) soliciting goods of services...(b) soliciting, offering, advertising or promoting with respect to a consumer transaction referred to in paragraph (a) of consumer transaction

Section 149

An inspector may conduct an inspection for the following purposes:

- (a) determining compliance with
- (i) this BPCPA and the regulations,

(ii) [...] (b)

Section 150

For the purposes of an inspection, an inspector may [...]

(a) [...];

(b) inquire into any business, affairs or conduct of a person;

(c) [...] (d);

(e) require any person who has possession or control of any of the records, goods or other things in the premises, vehicle or vessel to produce the records, goods or things;

(f) [...] (h)

Section 183(2)

All documents that are required or permitted under the BPCPA to be given or served on a person must be given or served in the following ways:

(a) [...] (b);

(c) if the person is a supplier

(i) [...] (ii)

(iii) by sending a copy by electronic email to the electronic email address provided by that person

(iv) [...] (v)

(d) [...] (e)

Section 189 (5)

A person must not [...]

(a) [...]

(b) refuse or fail to provide information as required under this BPCPA

(c) [...] (f)

E. EVIDENCE OF THE INSPECTOR

On August 5, 2020 an inspection of the respondent was initiated with the inspector sending a letter requiring the production of home inspection contracts, home inspection reports, and marketing material. The respondent was to supply the inspector with this requested material within 5 days of receipt of the letter.

When the material was not supplied by the respondent, the inspector telephoned the respondent on August 15th. The respondent told the inspector he was on vacation and would be returning in a couple of weeks. When the purpose of the inspection was explained to the respondent, he replied, "I pay you to investigate me?"

Following the telephone call the inspector sent an email to the respondent extending the deadline to produce the requested material to August 28th.

On August 28th the inspector sent the respondent a reminder that the requested documents were due by end of the day.

On September 9th the inspector sent an Inspection Notification and Demand (First Notification) to the respondent by registered mail. The First Notification cited authority under section 150 of the BPCPA and a requirement that the respondent produce copies of: (i) 2 home inspection contracts for each month in the period November 2019 to July 2020 (18 contracts total); (b) home inspection reports related to the 18 home inspection contracts requested; (c) marketing materials such as brochures, advertisements, business cards, vehicle advertisements. The respondent was given a date of September 21st to provide the inspector with the documents.

On September 21st the respondent sent a series of emails with attachments relating to the requested material. In one of these emails the respondent indicated there were 11 attachments. In that same email the respondent advised no home inspections had been performed during the requested period of November 2019 to July 2020.

In a follow up email, the inspector informed the respondent there were only 6 attachments, not 11 as he had indicated, and that no marketing material had been received. The inspector also requested the respondent to advise when the last home inspection was completed and to produce copies of contracts and reports.

The respondent advised he had received some "bounce backs" to emails sent and wanted to know which information was still missing. The email response also attached two photographs of marketing material. Minutes after sending this email, the respondent sent three more emails, attaching photographs of marketing material along with other documents that did not relate to documents requested in the First Notification.

The inspector's email back to the respondent confirmed receipt of the marketing material. It also repeated two questions asked in an earlier email: When was the last home inspection conducted? Where are you operating from? To this the respondent replied, "Correct. The rest are 5 images."

On September 30th the Inspector sent the respondent a second Inspection Notification and Demand ("the Second Notification") by registered mail. A few days later the Second Notification

was returned to the inspector from Canada Post and marked as “moved.”

On October 8th the inspector emailed the Second Notification to the respondent. A deadline of October 22nd was given for the respondent to provide: (i) 2 home inspection contracts for each month in the period May 2019 to September 2020 (ii) home inspection reports related to the requested home inspection contracts (iii) total number of home inspections completed in 2018 (iv) total number of home inspection completed in 2019 (v) total number of home inspections completed in 2020 (vi) date of last home inspection (vii) current business address. The respondent was given a date of October 22nd to provide the inspector with the requested information and documents.

The respondent did not provide the inspector with a response to the Second Notification. On November 5th the Inspector served the respondent with the Report.

The Report alleges the respondent contravened the BPCPA by failing to provide information, as required in the Second Notification, to an inspector acting under authority of section 150 of the BPCPA.

F. EVIDENCE OF THE RESPONDENT

The respondent only became aware of the Second Notification when the Report with exhibits was delivered.

Had the Second Notification been received prior to the Report, the respondent “would have gladly provided this information without hesitation.”

The evidence demonstrates there were multiple issues with email correspondence.

The Second Notification that was returned as “moved” was an error and attempts have been made with Canada Post to rectify this issue.

The photograph submitted by the inspector showing the returned registered mail envelope for the Second Notification cannot be relied on because the “moved” sticker conceals the address.

The October 8th email attaching the Second Notification was “missed by genuine mistake.” There was never an intention to avoid sending the information.

Diligent efforts were taken by the respondent to get Consumer Protection BC the required information and to comply with all requests. The failure to meet the deadline was caused by challenges with mail delivery.

The information and documents requested under the Second Notification have been provided as part of the response to this hearing.

Rather than prepare the Report the inspector should have telephoned the respondent to find out why information and documents had not been provided. This would have allowed the respondent to become aware more information and document were still required and given the respondent an opportunity to rectify the issue.

There is no staff person that actively monitors emails; however, there is an “active phone number” that is answered during regular business hours. A notation should be added to the respondent’s licensing file that “all important information” be communicated by telephone.

G. ANALYSIS

The respondent is a supplier, as defined under the BPCPA and subject to an inspection for the purposes of ensuring compliance with the BPCPA and HILR. When exercising inspection powers, an inspector may give reasonable and sufficient notice to a supplier to require information or records that relate to the inspection to be produced. The BPCPA permits that such a notice be given by electronic mail to an email address given by the supplier. When this method of communication is used, the notice is considered received on the third day that it is sent. If all of this takes place, there is no further requirement for an inspector to prove or confirm the notice was received by the supplier.

The Second Notification was sent to the respondent by electronic email. The email address was one that had been recently used by the respondent to exchange emails with the inspector. It was also the email address recorded by the respondent on their home inspector licence renewal application. I cannot see where a critical view can be taken to the inspector’s process of sending the Second Notification by electronic email. This method of communication was reasonable and sound.

The respondent says there were multiple issues with email exchanges taking place with the inspector that pre-date the emailed Second Notification. I have looked at the evidence with an eye to see if a possible disruption to the email could be to blame for the respondent’s failure to comply with the Second Notification. The evidence does not support such an occurrence. The respondent was asked by me specifically about the emailed Second Notification. The reply back that “it was missed by genuine mistake” tells me the email was successfully transmitted and served. From the time of the emailed Second Notification and receipt of the Report (when the respondent says they first became aware of the Second Notification) almost 4 weeks passed. I find this to be an astounding amount of time to have “missed” an email of this nature. For me, this lack of attentiveness does not serve as a reasonable explanation for the respondent’s failure to respond to the emailed Second Notification. I pause here to simply note that I do not consider the Second Notification that was sent by registered mail to have been served on the respondent.

As to the respondent’s request to have a note placed on its licensing file that all future “important information” take place by telephone, I simply repeat what was discussed earlier

about the allowance given under the BPCPA for communications to be served by email. As such, Consumer Protection is at liberty to continue to use electronic mail to serve to serve documents on the respondent, provided the electronic email address is one given by the respondent.

H. DUE DILIGENCE

The respondent is entitled to the complete defence of due diligence against the allegations if it shows that all reasonable steps were taken to prevent the contravention. The onus is on the respondent to establish this defence. The respondent provides its electronic email address to others and also uses the same electronic email address for its own communications; however, it says it does not “actively ...answer emails.” I would expect reasonable measures to include the respondent having a more developed process in place to monitor incoming email communications, particularly when the Respondent has established this this form of communication with the regulator. I find the defence of due diligence has not been established by the respondent.

I. CONCLUSION

I conclude the respondent contravened section 189(5) of the BPCPA when it failed to provide information required under the BPCPA, specifically to an inspector exercising inspection powers under section 150 of the BPCPA. The contravention relates to the Second Notification.

In making this decision I offer no commentary as to whether the documents and information provided to me by the respondent to meet the requests under the Second Notification are compliant with BPCPA and HILR requirements. I have provided this material to the Inspections and Case Management (ICM) team for their review. This decision does not prevent any action that may be taken by ICM following their review.

J. ENFORCEMENT ACTION

As an adjudicator determining that certain violations occurred, I may take one or more of the following actions:

1. Issue a compliance order (under section 155 of the BPCPA), directing the respondent to:
 - stop a specified BPCPA or practice and take actions to correct the issue;
 - pay Consumer Protection BC the costs of the relevant inspection, including creation of the Report.
2. Impose a penalty of up to \$5,000 on an individual, or up to \$50,000 on a corporation, pursuant to section 164 of the BPCPA. A contravention to section 189(5) is prescribed for the purpose of administrative penalty under the *Business Practices and Consumer Protection Regulation*.

3. Take an action against the respondent's licence, such as suspending, revoking, or imposing conditions to operate.

I have considered these possible enforcement actions and have determined that a compliance order for the contraventions to section 189(5) to be appropriate. I also consider the imposition of an administrative monetary penalty to be warranted.

Compliance Order

Having found the respondent responsible for a contravention to section 189(5) of the BPCPA, I have authority per section 155 (4)(c) of the BPCPA to require the respondent to take a specified action to remedy a contravention. With the imposition of the administrative monetary penalty, I have exercised my discretion to not require the respondent to pay inspection costs. The requirements of my order are set out in the Compliance Order issued with this decision.

Administrative penalty

As per section 164 (1) of the BPCPA, an administrative monetary penalty ("AMP") may be imposed where a person contravenes a prescribed provision of the BPCPA. Section 189(5) is prescribed by the *Business Practices and Consumer Protection Regulation*, and, therefore, may attract an AMP.

Section 164 (2) of the BPCPA 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 decide whether an AMP should be imposed. If imposing an AMP, to determine the *amount* 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 the AMP amount is 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, and that suppliers subject to AMPs know how Consumer Protection BC interprets the

BPCPA and analyses the criteria determining AMP amounts. Consumer Protection BC has developed the Policy from its experience and expertise in providing consumer protection services, and from its mandate to administer the BPCPA in the public interest.

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 is considering all the factors under section 164 (2) in his or her calculation or analysis of the AMP amount that should be imposed. The decision maker continues by then deciding in his or her discretion whether the amounts in the Policy or different amounts imposed based on consideration of the factors under section 164 (2) (and one additional related 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 in paper form upon its 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 criteria in the BPCPA. However, in this hearing I have not received any submissions from the respondent on the Policy.

I have determined that an AMP should be imposed for the respondent’s BPCPAs in supplying false or misleading information to an inspector. I now will consider the specific AMP to be applied.

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 consideration of the factors under section 164(2) and one additional criterion, and any other relevant circumstances.

A breach to section 189(5) of the BCPA is a Type C contravention under the Policy (page 14 Appendix A, line 115). I agree with this categorization given the circumstances of this violation. It represents the appropriate level of 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 \$3,250 for an individual.

My assessment of the adjustment factors applicable to these contraventions under the Policy’s penalty matrix is set out in the table below and on page 9.

Adjustment Factor	Effect on Gravity	Analysis
1. Previous enforcement actions for contraventions of a similar nature	0	There are no previous enforcement actions by Consumer Protection BC against the respondent. I maintain the gravity level at neutral.
2. Gravity and magnitude of the contravention	0	Failing to provide information to an inspector exercising inspection powers under the BCPA is a serious contravention that undermines the regulatory authority of Consumer Protection BC. It is important there be a deterrence created against this type of unlawful activity, achieved by the imposition of an administrative monetary penalty. I have, however, not to increase the adjustment factor.
3. Extent of the harm to others resulting from the contravention	0	There is no evidence or basis to infer harm to others resulting from the contraventions. I maintain the gravity level at neutral.
4. Whether the contravention was repeated or continuous	0	The contravention was not repeated or continuous. I maintain the gravity level at neutral.

5. <i>Whether the contravention was deliberate</i>	0	I have no reason to believe the respondent's actions were of a deliberate or intentional nature. I maintain the gravity level at neutral.
6. <i>Economic benefit derived by the person from the contraventions</i>	0	I have no reason to believe the respondent derived any economic benefit from the contravention. I maintain the gravity level at neutral.
7. <i>Whether the person made reasonable efforts to mitigate or reverse the contravention's effects</i>	-2	Since the time of receipt of the Report and the lodging of an allegation, the respondent has provided the information and documents required under the Second Notification. I have accounted for this as a mitigating factor in the calculation of the penalty amount by reducing the gravity level for this adjustment factor.
8. <i>The person's efforts to correct the contraventions & prevent recurrence</i>	0	The respondent has not presented evidence or demonstrated any measures being introduced to ensure future electronic emails communications served by Consumer Protection will be reviewed and responded to by required deadlines. I maintain the gravity level at neutral.

Final Calculation of AMP

According to my application of the Policy and its AMP Matrix, the overall adjustment for the section 189(5) contravention involves an overall score of “minus two.”

The Policy determines that a violation of section 189(5) is a Type C contravention with a base penalty amount of \$3,250 for an individual. In this case, having found a gravity level of “minus two” (after adjustments) and in following the Matrix, I apply a penalty of **\$2,750**. 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 **\$2,750**.

K. RECONSIDERATION OF ORDER AND PENALTY

A compliance order or monetary penalty may be reconsidered in accordance with Division 1 of Part 12 of the BPCPA, 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
200 – 4946 Canada Way, Burnaby, BC V5G 4H7
shahid.noorani@consumerprotectionbc.ca

Decided on March 29, 2021 in Burnaby, BC.



Shahid Noorani, Vice President