

DECISION OF THE DIRECTOR

In the Matter of: *Business Practices and Consumer Protection Act, SBC 2004, c.2*

Respondent: Efficiency Solutions Comfort Services Inc.

Case Number: 31524

Adjudicator: Sean Hern, K.C.

Date of Decision: May 18, 2023

A. INTRODUCTION

1. Under statutory delegation, Consumer Protection BC (also known as the Business Practices and Consumer Protection BC Authority) is responsible for the administration of the *Business Practices and Consumer Protection Act, SBC 2004, c.2* (“*BPCPA*”).
2. Efficiency Solutions Comfort Services Inc. (“the Respondent”) is a heating, ventilation and air conditioning (“HVAC”) business operating in British Columbia, supplying furnaces, air conditioners, heat pumps and water heaters to the public, including through purchase, lease and loan agreements that are undertaken through door-to-door sales, which are referred to in the *BPCPA* as “direct” sales.
3. On February 17, 2023, a Consumer Protection BC Inspector (the “Inspector”) delivered to the Director and the Respondent a Report to the Director (“Report”) that alleged the Respondent violated section 189(5)(b) of the *BPCPA* by failing to comply with an inspection order issued under section 150(1) of the *BPCPA* to produce certain records.
4. I have been delegated the authority of the Director to decide if a contravention to the *BPCPA* has occurred. This delegated authority allows me to exercise the powers of the Director under Parts 9 and 10 of the *BPCPA*. A copy of the Report has been provided to me to perform these delegated adjudicative functions.
5. With a few exceptions, the *BPCPA* requires the Respondent be given an opportunity to be heard to any allegation before a determination is made and any potential statutory action is taken.
6. In a letter dated March 7, 2023, a hearing notice (or “opportunity to be heard”) on the allegation advanced in the Report was provided to the Respondent. The hearing notice invited the Respondent to formally respond in writing to the allegation with written submissions on evidence, explanations, interpretations of legislation and policies of Consumer Protection BC,

and other matters the Respondent considered relevant. The hearing notice outlined several possible consequences for the Respondent, should the allegation be confirmed, including an administrative monetary penalty and/or a compliance order. The Respondent was given until April 6, 2023 to provide its response materials.

7. The Respondent provided a written response to the hearing notice. The response did not question the sufficiency of the notice (i.e., being adequately informed of the specifics of the allegation) and did not request any further disclosure of evidence, clarification, or time to respond. The written response demonstrated the Respondent was afforded the rights required under the *BPCPA* prior to the Director exercising statutory decision-making powers.

B. ALLEGED CONTRAVENTION / LEGISLATION

8. The allegation against the Respondent is that contrary to section 189(5)(b) of the *BPCPA*, the Respondent failed to comply with an October 6, 2022 demand by the Inspector to produce seven of the Respondent's most recent direct sales contracts financed by Canadian Home Improvement Credit Corporation (or any other finance company that underwrites the Respondent's lease contracts) and seven of the Respondent's most recent direct sales contracts financed through a loan.

9. The demand for records was made under section 150 of the *BPCPA*, which states,

150 (1) For the purposes of an inspection, an inspector may do any of the following:

- (a) enter the business premises of a person at any reasonable time;
- (b) inquire into any business, affairs or conduct of a person;
- (c) inspect, audit or examine any record, goods or other thing or the provision of services in the premises;
- (d) inspect a vehicle or vessel that is being used for business purposes;
- (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) make a record, including a record on film, audio tape, video tape or otherwise, of the premises, vehicle or vessel and any thing in or on the premises, vehicle or vessel;
- (g) remove any record from the premises, vehicle or vessel for the purpose of making copies;
- (h) remove and retain any record, good or other thing that may be required as evidence from the premises, vehicle or vessel.

(2) The authority under subsection (1) must not be used to enter a private dwelling except with the consent of the occupant or with the authority of a warrant under section 152 [inspection under warrant].

10. It is alleged that the Respondent's failure to produce the requested records is contrary to 189(5)(b) of the *BPCPA*. Section 189(5) states:

(5) A person must not do any of the following:

- (a) supply false or misleading information to a person acting under this Act;
- (b) refuse or fail to provide information as required under this Act;
- (c) fail to comply with
 - (i) an undertaking,
 - (ii) a compliance order,
 - (iii) a direct sales prohibition order,
 - (iv) a property freezing order, or
 - (v) an order of a court under this Act;
- (d) contravene a provision of a trust agreement under section 40 [preneed cemetery or funeral services contract];
- (e) obstruct, hinder or interfere with an inspection under this Act;
- (f) purport to have a licence when the person does not.

11. While section 189(2) of the *BPCPA* provides that contravention of section 189(5) can be prosecuted as an offence, in this instance the Inspector recommends an administrative penalty, compliance order and costs of the Inspection be imposed on the Respondent pursuant to Divisions 2 and 4 of Part 10 of the *BPCPA*.

C. EVIDENCE IN THE REPORT TO DIRECTOR

(i) Relevant Exchanges between Consumer Protection BC and the Respondent

27. In June 2021, Consumer Protection BC received some complaints that suggested the Respondent was using direct sales contracts that did not comply with the *BPCPA*'s content requirements for such contracts. Consumer Protection BC initiated an investigation which led to an inspection demand whereby the Respondent was asked to produce copies of the ten most recent direct sales contracts entered into by the Respondent using a lease agreement with Canadian Home Improvement Credit Corporation (CHICC) and copies of the ten most recent direct sales contracts the Respondent had entered into using a finance company other than CHICC. On June 24, 2021, the second part of the demand was modified to demand copies of the Respondent's ten most recent direct sales contracts entered into using a financing company called Financeit.

28. After initially refusing to produce the records, the Respondent complied with the demand to produce ten CHICC contracts. In response to the second part of the demand, the Respondent advised that it could not produce its sales contracts involving consumer financing from Financeit as those contracts were submitted through a dealer portal to which the Respondent had no access.

29. With respect to the CHICC contracts provided by the Respondent, they were reviewed by Consumer Protection BC and all of them were observed to be non-compliant with the *BPCPA*. The deficiencies were noted as arising from the template being used as well as the manner in which the template was being filled out. In an email dated July 16, 2021, the Inspector explained to the Respondent why each CHICC contract was deficient, and concluded the email as follows:

As this was an educational exercise, we will not be taking any enforcement action regarding these non-compliant contracts. However, our office may choose to conduct an inspection of your client's contracts at a future date. If an inspection reveals your client has continued to enter into non-compliant direct sales contracts despite being shown what they need to change, this will in all likelihood result in enforcement action being taken that could include, in part, a compliance order, an administrative penalty or a direct sales prohibition.

30. With respect to the Financeit contracts, on July 9, 2021, the Respondent was instructed by Consumer Protection BC that Financeit's loan agreements did not even minimally meet the content requirements for direct sales contracts under the *BPCPA*. The Respondent was further instructed that it would need to immediately generate its own compliant direct sales contracts for sales financed by Financeit.

31. On September 3, 2021, the Respondent's legal counsel provided Consumer Protection BC with a new draft direct sales contract template that it said it would be using in conjunction with Financeit loan agreements.

32. In February 2022, Consumer Protection BC received a complaint from a consumer about a direct sales contract entered into with the Respondent on February 17, 2021. The contract included a loan agreement with a financing company named Reliance Comfort Limited Partnership, doing business as "UEI financial".

33. On August 23, 2022, Consumer Protection BC received an on-line complaint about the Respondent in relation to a direct sales contract. The contract provided for a heat pump to be installed on August 4, 2022 and indicated the cost of the heat pump was to be financed by a third-party loan, although purchase amounts were also faintly legible on the customer's copy of the contract. More importantly for the purposes of this decision, the contract used a different template than had been previously produced by the Respondent and Consumer Protection BC noted that the contract template was not compliant with the *BPCPA* in a number of respects.

34. In view of the evidence that the Respondent was continuing to enter into direct sales contracts that were not compliant with the *BPCPA*, the Inspector wrote to the Respondent a letter dated October 6, 2022, explained the deficiencies in the August 2022 contract, and advised that it would be conducting a follow-up inspection for the purpose of determining compliance with the *BPCPA*.

(ii) *The Inspection Demand and the Respondent's Failure to Comply*

35. In the October 6, 2022 letter, the Inspector made the following demand for production of records:

Pursuant to section 150 of the *BPCPA*, please provide seven of your most recent direct sales contracts financed by CHICC (or any other finance company that underwrites lease contracts) and seven of your most recent direct sales contracts financed through a loan. In the latter case, please provide a copy of the [sic] both the direct sales contract and the loan document.

Please provide the requested information no later than October 20, 2022.

(the "Inspection Demand")

36. The Respondent's legal counsel replied to the Inspection Demand in a letter dated October 20, 2022, quoting both the Inspection Demand and section 150 of the *BPCPA*. In its response, Respondent's counsel expressly refused to produce the records sought by the Inspection Demand. This refusal was reiterated in further correspondence from the Respondent's counsel on November 30, 2022 and January 18, 2023, and in its April 6, 2023 submissions in response to the Report to the Director.
37. Accordingly, what is at issue is whether there is any justification for the Respondent's failure to produce the records sought in the Inspection Demand.

(iii) *The Respondent's Position*

38. In its October 20, 2022 response to the Inspection Demand, as noted, the Respondent's counsel advanced a number of arguments in support of its position that it did not have to comply with the Inspection Demand. The Inspector replied to those arguments in subsequent emails to the Respondent's counsel. In the Report to the Director, the Inspector summarized the Respondent's prior arguments and the Inspector's position in relation to them. As noted, the Respondent was provided with a copy of the Report to the Director and has made written submissions in response to it. The Respondent's submissions regarding the Report to the Director do not adopt or incorporate all of the Respondent's previous submissions, but instead restate them as four arguments. These are addressed below.
39. First, the Respondent says that the 2021 matters are resolved and are not relevant to the October 2022 Inspection Demand.
40. Second, the Respondent says that the August 2022 complaint has been resolved and settled as between the Respondent and that customer. The implication of this submission appears to be either that all documentation from the August 2022 complaint is irrelevant to the current Inspection Demand, or that the Inspector has no jurisdiction to conduct an inspection based on evidence from a complaint that has been resolved.
41. Third, the Respondent says that the agreement with the customer that was the subject of the August 2022 complaint was in fact a purchase order and not a loan agreement, so despite the

erroneous ticking of the box on the form that indicated it was a loan agreement, the Respondent suggests that the agreement at issue in that complaint is not relevant to an inspection into the form of loan agreements being entered into by the Respondent.

42. Fourth, the Respondent says that it was not properly forewarned of the October 2022 Inspection Demand, and “puts the Inspector to the strict proof thereof”. While the Respondent acknowledges that the Inspector informed the Respondent on July 16, 2021 that Consumer Protection BC “may choose to conduct an inspection” of the Respondent’s contracts “at a future date”, the Respondent argues that “sometime in the future without a date or year is not the equivalent of a proper warning or an order”.

D. ANALYSIS

43. I find the Respondent’s arguments to be without merit.

44. An inspector’s jurisdiction under the *BPCPA* is not derived from, nor limited by, complaints from consumers. For reference, section 149 provides:

149 An inspector may conduct an inspection for the following purposes:

(a) determining compliance with

(i) this Act and the regulations,

(ii) the conditions of a licence, or

(iii) a compliance order, direct sales prohibition order, property freezing order, undertaking or court order made under this Act;

(b) assessing an applicant for a licence.

45. Also relevant is section 4 of the *Business Practices and Consumer Protection Authority Act*, SBC 2004 c. 3, which states:

The purposes of the authority are to deliver consumer protection services throughout British Columbia, to promote fairness and understanding in the marketplace and to administer in the public interest any Act, the administration of which is delegated to the authority.

46. There is nothing in section 149 that suggests a complaint that is resolved as between a consumer and a supplier precludes an inspector from making inquiries more generally into the manner in which the supplier conducts its business to ensure compliance with the *BPCPA*. Inspectors have a broader regulatory function than the adjudication of consumer complaints. If it were otherwise, the ability of Consumer Protection BC to perform its mandate would be seriously undermined, as a supplier could avoid scrutiny of its business conduct simply by settling individual complaints.

47. This disposes of the first three arguments advanced by the Respondent. The Inspector is not making an inquiry into a complaint, but rather has observed that the Respondent appears to be continuing to use contract templates that are not compliant with the *BPCPA*, and some of its

representatives appear to fill those contract templates out in a manner that gives rise to additional compliance concerns.

48. The evidence pointing to those potential compliance failures is derived from customers who have made complaints and forwarded their contracts to Consumer Protection BC in June 2021, February 2022 and August 2022. The evidence that the Respondent appears to be continuing to use contracts that are not compliant with the *BPCPA* is a sound basis for the Inspector to make the inquiry set out in the Inspection Demand.
49. With respect to the alleged lack of a proper warning that an inspection would be conducted, the legislation places no obligation on the Inspector to provide a “warning” of an impending inspection. While it is presumably possible that an Inspector’s statements can independently give rise to a procedural expectation that a warning will be provided before a certain action is taken, the Inspector in this case cannot reasonably be said to have created any expectation that a warning of an inspection on a specific date or within a specific timeframe would be provided. To the contrary, on July 16, 2021, the Inspector told the Respondent that Consumer Protection BC may choose to conduct an inspection of the Respondent’s contracts at a future date, which is what in fact occurred.
50. Accordingly, I find the Respondent has wrongly failed to produce the records requested in the Inspection Demand and thereby breached section 189(5)(b) of the *BPCPA*.

E. DUE DILIGENCE

51. Due diligence can serve as full defence to the contravention if the Respondent can demonstrate that it took all reasonable efforts to prevent the contravention. There is no evidence of due diligence in this case.

F. CONCLUSION

52. In the result, I find that the Inspection Demand is valid and should have been complied with. The Respondent’s refusal to do so is in contravention of section 189(5)(b) of the *BPCPA*.

G. ENFORCEMENT AND REMEDY

53. As the Director’s delegate, and having determined that a contravention has occurred, I may take one or more of the following actions:
 - i. Issue a compliance order, pursuant to section 155 of the *BPCPA*, directing the Respondent to:
 - stop a specified act or practice and take actions to correct the issue; and
 - pay Consumer Protection BC the costs of the relevant inspection;
 - ii. impose an administrative monetary penalty of up to \$5,000 on an individual or up to \$50,000 on a corporation pursuant to section 164 of the *BPCPA*.

54. A contravention to section 189(5)(b) of the *BPCPA* is prescribed for the purpose of an administrative monetary penalty (“AMP”) under the *Business Practices and Consumer Protection Regulation*. The *BPCPA* authorizes the imposition of a penalty of up to \$5,000 on an individual or up to \$50,000 on a corporation.
55. In the context of the factors under section 164(2) of the *BPCPA*, and consistent with a progressive enforcement model, I have decided that an AMP is not warranted for the contravention.
56. For the contravention of section 189(5)(b) of the *BPCPA* in the circumstances described above, I will however, make a compliance order and an award of costs.

Compliance Order

57. My delegated functions give me the authority to issue a Compliance Order following a determination that a contravention has occurred. The Compliance Order may, amongst other things, require the Respondent to:

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

58. The compliance order that I make in this matter is as follows:

1. The Respondent is ordered to forthwith comply with the Inspection Demand made under section 150 of the *BPCPA* on October 6, 2022, namely to provide seven of the Respondent’s most recent direct sales contracts financed by CHICC (or any other finance company that underwrites lease contracts) and seven of the Respondent’s most recent direct sales contracts financed through a loan. In the latter case, the Respondent is to provide a copy of both the direct sales contract and the loan document.
2. The records to be provided under item 1 of this Order are to be delivered via electronic mail to Inspector Eileen Diersch at eileen.diersch@consumerprotectionbc.ca.

(the “Compliance Order”)

59. The contracts that are produced pursuant to the Compliance Order should be the most recent contracts to the date of this order, not to the date of the October 6, 2022 Inspection Demand. This is consistent with the primary purpose of the Inspection Demand, which is to verify current compliance with the *BPCPA*.
60. Recognizing the extent of inspection resources allocated to the contravention of failing to comply with the October 6, 2022 Inspection Demand, as part of the Compliance Order I find it appropriate to order the Respondent reimburse Consumer Protection BC the costs of the associated inspection. I am informed the Inspector’s costs in relation to this matter are

\$1,853.77, which I accept as reasonable in view of the extent of the communications in the record. I order the Respondent to pay a portion of those costs in the amount of \$1,500 within 30 days of receipt of the Compliance Order.

H. RECONSIDERATION

61. The 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 receipt of the Compliance Order. The request for reconsideration must be in writing, identify the error the person believes was made, or the other grounds for reconsideration, and must be accompanied by a \$272 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 May 18, 2023, in Victoria, BC.



Sean Hern, K.C.