



DECISION OF THE DIRECTOR ON RECONSIDERATION

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

Respondent: **Efficiency Solutions Comfort Services Inc.**

Case Number: **31747**

Adjudicator: **Shahid Noorani**

Date of Decision: **July 25, 2024**

A. INTRODUCTION

1. On April 3, 2024 Sean Hern, K.C. (a delegate of the Director) delivered a decision that found the Respondent in contravention to section 19(j) of the *Business Practices and Consumer Protection Act* (“BPCPA”) when it failed to disclose the total price of the contract in seven direct sales contracts entered into between the period July 27, 2021 and May 18, 2023.
2. Exercising authority under Part 10 of the BPCPA and as delegated by the Director, Adjudicator Hern imposed three determinations against the Respondent for the contravention to the BPCPA: (1) an administrative monetary penalty of \$4,500; (ii) a compliance order requiring the Respondent to clearly state the total price in each direct sales contract and to reimburse the Director partial costs of the inspection in the amount of \$500.00 (iii) a three month direct sales prohibition order preventing the Respondent from entering into or soliciting direct sales contracts. These three determinations will be collectively referred to in this decision as “the determinations.”
3. On May 3, 2014 the Respondent’s legal counsel submitted a written request that Adjudicator Hern’s decision and the accompanying determinations be reconsidered. As Vice President for Consumer Protection BC, I have been delegated full powers of the Director to decide if

legislative requirements to accept a reconsideration have been satisfied, and to undertake reviews of determinations accepted for reconsideration.

4. On May 9, 2024, I wrote to the Respondent indicating a reconsideration on the three determinations would proceed and that the determinations were stayed pending the outcome of the reconsideration. My correspondence also invited the Respondent to provide any further reconsideration submissions and documents by May 23, 2024.
5. The Respondent did not provide further submissions or documents to the ones dated May 3, 2024.
6. For the reasons that follow, I confirm Adjudicator Hern's finding of a contravention to section 19(j) of the BPCPA; however, in exercising authority the same powers and duties of the original decision maker, I have decided to vary the duration of the direct sales prohibition order and the amount of the administrative monetary penalty. The compliance order issued by Adjudicator Hern is confirmed.

B. LEGISLATION

7. The legislation relevant to this reconsideration decision includes portions of the BPCPA as follows:

Section 180 – Definition

In this Division, "**determination**" means

- (a) a decision, order or ruling in respect of a matter that relates to a compensation fund,
- (b) a decision under section 146 [*actions by director respecting licence*],
- (c) a compliance order,
- (d) a direct sales prohibition order, or
- (e) a notice imposing an administrative penalty.

Section 181 – Reconsideration by Director

- (1) A person may request the director to reconsider a determination
 - (a) within 30 days of receiving the later of
 - (i) the determination, and
 - (ii) any written reasons respecting the determination, or
 - (b) within the time period specified by the director, if the director is satisfied that

- (i) special circumstances existed which precluded the filing of a request for reconsideration within the time period required in paragraph (a), and
 - (ii) an injustice would otherwise result.
- (2) The person must make the request in writing and must identify the error the person believes was made or the other grounds for which reconsideration is requested.
- (3) If the director decides to reconsider a determination,
 - (a) the director must give notice to any person that the director considers will be affected by the reconsideration of the determination, and
 - (b) the determination is stayed unless the director orders that the determination is not stayed.

Section 182 – Powers of Director on Reconsideration

- (1) If the director reconsiders a determination, the director
 - (a) has all the powers and duties the director had with respect to the determination, and
 - (b) subject to subsection (2), may confirm, vary or cancel the determination.
- (2) The director may vary or cancel a determination referred to in paragraphs (a), (c) and (e) of the definition of "determination", only if the director is satisfied that new evidence has become available or has been discovered that
 - (a) is substantial and material to the determination, and
 - (b) did not exist at the time of the review or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
- (3) If the director has delegated powers and duties respecting a determination referred to in paragraphs (b) and (d) of the definition of "determination", the director must not delegate the reconsideration of the determination to the same person.
- (4) If the director made a determination referred to in paragraph (b) or (d) of the definition of "determination", the director must delegate the reconsideration to one or more persons who did not participate in the determination.
- (5) The director must give written reasons for the director's decision in respect of the reconsideration to the person who made the request under section 181 (2) or a person given notice under section 181 (3).
- (6) For certainty, a decision made under this section may not be reconsidered.

C. PRELIMINARY MATTER

8. The BPCPA creates a scope of reconsideration for an administrative monetary penalty and compliance order that is different than the scope of reconsideration for a direct sales prohibition order.
9. Under section 182(2) of the BPCPA, an administrative monetary penalty and a compliance order can only be varied or cancelled on a reconsideration if the Respondent presents “new evidence” that is substantial and material, and which did not exist at the time of the original decision, or if it if did, could not have been discovered through an exercise of reasonable diligence. The Respondent has not presented “new evidence” in its reconsideration submissions and materials.
10. A direct sales prohibition order is not subject to the “new evidence” rules for a reconsideration under the BPCPA. For this type of determination, a Respondent needs to identify an error or other grounds to support a reconsideration request.
11. Even though the Respondent has not presented “new evidence” that would allow for a variance or cancellation of the administrative monetary penalty or the compliance order, I believe it would be impractical to separate those two determinations and say they cannot be reconsidered because the “new evidence” test has not been met while still proceeding with a reconsideration of the direct sales prohibition order. A reconsideration of the direct sales prohibition order demands that the contravention giving rise to the determination be reviewed. If through that review the contravention was cancelled, it only makes sense that all the determinations linked to the contravention should also not be allowed to stand. Accordingly, a reconsideration on all three determinations will proceed.

D. RESPONDENT’S SUBMISSIONS ON RECONSIDERATION

12. The Respondent submits Adjudicator Hern made an “incorrect statement” in saying that there was no dispute that the total cost for each rental contract was not disclosed in any of the seven agreements or contracts at issue. The Respondent says that for each of the seven rental contracts considered by Adjudicator Hern, the total price is given in section 5 of the contract - Terms and Conditions.
13. During Consumer Protection BC’s internal review, the Respondent provided fourteen contracts that were a combination of seven rental contracts and seven finance contracts. Included with the Respondent’s reconsideration submission were copies of these fourteen contracts. The Respondent’s position is that all fourteen contracts are fully compliant with the BPCPA, including

with the disclosure of total price requirements. The Respondent also notes that the seven finance contracts were never mentioned in Adjudicator Hern's decision.

14. At paragraph 32 of the decision, Adjudicator Hern states the Respondent "did not pay heed" to the clear and concise instructions given to them by the Consumer Protection BC Inspector in July 2021 about deficiencies in contracts that had been previously reviewed. The Respondent says that it "did pay heed to advice" as evidenced in the finance contracts, and that these finance contracts were "never considered during the investigative process nor mentioned in the context of the Decision." The Respondent goes on to say that after receiving "a written warning and report," they took immediate steps to ensure the rental and finance contracts came into compliance with the BPCPA, including explicitly disclosing the cost of borrowing and the total amount in section 5 – Terms and Conditions.
15. As a further demonstration of the Respondent "heeding advice" given to them by the Inspector, the Respondent notes the reason for the wide date span for the seven most recent rental contracts (2021-2023) is because the Respondent has discontinued use of rental contracts, except for clients not eligible for financing of the equipment. The Respondent says this shows it "did not ignore its responsibilities to increase sales as suggested in the Decision" and that the rental sales have been reduced significantly. The Respondent does not want to put consumers at risk or to be labelled as acting in that fashion.
16. The Respondent says it was an error by Adjudicator Hern to assume direct sales are not a large component of the Respondent's business model. According to the Respondent, direct sales do make up a large part of their business model.
17. The Respondent has been duly diligent in taking all reasonable measures to be in compliance with the BPCPA. This includes working with the Inspector since 2021 to bring contracts into compliance. The Inspector failed to provide clear direction on content requirements for direct sales contracts and it was the Inspector that explicitly refused to give advice to the Respondent on whether their updated templated contract was in compliance with the BPCPA.
18. The Respondent pleads that a direct sales prohibition order will significantly impact the business in its day-to-day operations. The Respondent further says they have ceased entering direct sales agreements as of April 3, 2024.
19. The Respondent denies order and penalties are warranted in the circumstances.

E. ANALYSIS AND DECISION

20. The Respondent takes issues with Adjudicator Hern not considering the Respondent's seven finance contracts. To be clear, the finance contracts had nothing do with the either of the two allegations raised by the Inspector in their Report to Director. Both allegations advanced by the Inspector and presented to Adjudicator Hern turned squarely on the Respondent's rental contracts. As such, the documents relied on by the Inspector were only the rental agreements. The Inspector was not obliged to present the finance contracts into their Report when they had nothing do with the allegations. The documents relied on by the Inspector were disclosed to the Respondent, meaning the Respondent had opportunity to present other documents and contracts (including the finance contracts) to the hearing if they wanted them to be part of the evidentiary record. It cannot be said by the Respondent that producing the finance contracts at the exploratory investigative stage to the Inspector is the equivalent of introducing them into hearing. Adjudicator Hern's decision cannot be criticized for not considering evidence that was not the subject of the allegations and which was never presented to him. With all that said, the finance contracts have been given to me by the Respondent in this reconsideration and I have taken them into account in my decision.
21. In examining the seven rental contracts I note at the outset that in each contract the section with templated language that reads, "Total cost under the contract, including rent, taxes and cost of borrowing (including annual adjustments)" has been left blank or not completed to reflect a monetary amount. The Respondent says the total price is located at section 5 in the Terms and Conditions. For each of the seven rental contracts I have carefully reviewed section 5 and all the other terms and conditions that make up the rental contract. Note: each rental contract is templated with a term of 120 months. At section 5 the templated information sets out the standardized values and costs/charges associated with monthly rental charges. I have reproduced that information into the following table for each monthly rental described in section 5 of the contract:

| Monthly Rental | Total lease value/capitalized amount/cash value | Total lease cost | Implicit finance charges |
|--|---|------------------|--------------------------|
| \$14.99 | \$1,185.99 | \$2,110.24 | \$924.25 |
| \$29.99 | \$2,372.77 | \$4,221.89 | \$1,849.13 |
| \$39.99 | \$3,163.95 | \$5,629.66 | \$2,465.71 |
| \$49.99 | \$3,955.14 | \$7,037.43 | \$3,082.29 |
| \$59.99 | \$4,746.33 | \$8,445.20 | \$3,698.87 |
| \$69.99 | \$5,537.51 | \$9,852.96 | \$4,325.45 |
| Incremental Costs: for every \$1.00 change in the monthly rental add: | \$79.12 | \$140.78 | \$61.66 |

22. At Section 6 – Adjustments to Payments, the contract notes payments will increase by 3.5% annually on each anniversary of the commencement date.
23. I have calculated the total cost for each monthly rental (after applying the annual 3.5% increase) and can confirm it matches the “total lease cost” as set out in section 5 of the contracts. Although not described in the agreements as “total cost,” I do not believe s. 19(j) of the BPCPA prescribes that this phrase be used, only that the total amount be disclosed.
24. For the seven rental contracts at issue, two of them are for a monthly rental amount of \$59.99 (\$62.98 including taxes). For these two rental contracts belonging to Kyle Addington dated April 13, 2023, and Andre Harvey dated May 18, 2023, the Respondent has disclosed the total lease cost or total price of the contract in section 5 of Terms and Conditions for each contract. There is no contravention to section 19(j) of the BPCPA for these two rental contracts.
25. For the remaining five rental contracts at issue, one belongs to a consumer identified as Michael Webster dated February 26, 2022 with a monthly rental of \$98.99 (\$103.93 including taxes); three consumers identified as Amande Villanueva dated September 28/29, 2021; Pang- Hueng Cheung dated July 26/27, 2021; and Tina Smith dated February 28/March 1, 2022 each have monthly rental amounts of \$99.99 (\$104.98 including taxes); one consumer identified as Leanne Boetter dated March 23/24, 2023 has a monthly rental amount of \$105.36 (\$110.63 including taxes). In these five contracts the “total lease contract” is not described in section 5 of the contract or elsewhere in the rental contract. To calculate the “total lease cost” for these five rental contracts a consumer would be forced to do their own calculations, using the incremental cost formula given in section 5 of the contract that says for every \$1.00 change in the monthly

rental add \$140.78 accordingly. A consumer with a monthly rental amount of \$99.99 wanting to know the total cost or total lease cost would have to look to the stated total cost for a \$69.99 monthly rental (which is given in section 5 as being \$9,852.960) and then add to it the product of \$140.78 (incremental fee) multiplied by \$30.00 (the difference between \$69.99 and \$99.99). Requiring a consumer to undertake such an exercise in calculation is not a disclosure of the total price under section 19(j) of the BPCPA. Adjudicator Hern's comments at paragraph 27 of his decision about section 19(j) of the BPCPA deserve repeating here: "The legislative purpose of this is to ensure that a customer clearly understands the complete financial burden of the contract before entering into it."

26. I find the Respondent failed to disclose the total price of the agreement, contrary to section 19(j) of the BPCPA for the five rental contracts referenced in paragraph 25 of this reconsideration decision.

F. DUE DILIGENCE

27. The seven finance contracts presented to me by the Respondent seemingly show the Respondent to be in compliance with section 19(j) of the BPCPA. For the reasons already discussed, the same cannot be said for the Respondent's rental contracts. Dating back to at least 2021, Consumer Protection BC has communicated its concerns to the Respondent about their failure to disclose information under section 19 of the BPCPA, including section 19(j) specifically. The Respondent submits the Inspector was not clear in their direction on content requirements for direct sales contracts. The Inspector's communications to the Respondent read to me as clear and straightforward. Either through choice or neglect, the Respondent did not disclose the "total lease cost" for all monthly rental charges they offered, only disclosing it for some of the monthly rental charges. Moreover, the "incremental costs" language in section 5 of the rental contracts shows the Respondent turned their mind to there being other monthly rental charges beyond those described in section 5 of the contract. Rather than give the total lease cost for these other offered monthly rental charges, the Respondent decided wrongly to make the consumer use a formula to calculate the total lease cost or total cost.
28. Due diligence can serve as a full defence to the contravention if the Respondent can demonstrate they took all reasonable efforts to prevent the contravention. Reasonable measures in the circumstances here would have included ensuring section 5 of the contracts provided the total lease costs (total cost) for all offered available monthly rental charges rather

than doing this for some and giving a formula to calculate the total lease cost for others. I find the Respondent has not made out the defence of due diligence.

G. CONCLUSION

29. The Respondent contravened section 19(j) of the BPCPA by failing to disclose to the total price in five contract or agreements. The Respondent has not established a defence of due diligence to the contravention.

H. ENFORCEMENT AND REMEDY

30. At paragraph 37 of his decision Adjudicator expressed his concerns about the Respondent not taking compliance with the BPCPA sufficiently seriously. I share some of these concerns, notably the length of time that the contravention has spanned. The Respondent was first alerted by the inspector to issues with the contracts (including section 19(j) of the BPCPA) in July 2021. Looking at the five rental contracts that I have already found be in non-compliance, I note the contravention for failing to disclose the total price of the agreement was still happening in March 2023 (the Leanne Boetter agreement). As Adjudicator Hern points out, the changes that needed to be made were simple ones. I believe enforcement action is necessary to achieve compliance, something that has not been obtained through the education and voluntary compliance methods used by the inspector. I also believe enforcement action is necessary to effect deterrence.

31. In their submissions the Respondent says that if enforcement action is to be taken, the Director's 2002 decision in Direct Credit BC Inc. should be referenced as a demonstration of compliance and deterrence being achieved through a compliance order and without the need for an administrative monetary penalty. I was the decision maker in the Direct Credit BC Inc and in that matter ordered the payday lender to bring loan agreements into compliance. The Respondent says they will agree to a similar order requiring their rental contracts no longer be used until such time as Consumer Protection BC deems the contracts to be satisfactory. My decision to only impose a Compliance Order in the Direct Credit BC Inc. was influenced by my belief that previous communications from the inspector about the business' non-compliance were not clear and that the decision and accompanying Compliance Order were meant to provide that clarity. In this case, and as I have already indicated, the inspector's communications

to the Respondent were clear and straightforward. There are notable distinctions between the Direct Credit BC Inc. decision and this matter.

32. Section 182(1) of the BPCPA gives me all the powers and duties that the Director (or their delegate) had on the original determination. This authority is qualified somewhat for administrative penalties and compliance orders to only confirming, cancelling or varying these types of determinations if the new evidence threshold under the BPCPA is satisfied. I have already provided reasons why the reconsideration of the direct sales prohibition order necessitates that the administrative penalty and compliance order be reviewed alongside the direct sales prohibition order, notwithstanding there has not been new evidence presented in this reconsideration.
33. For the contravention to section 19(j) of the BPCPA, I have decided to issue a direct sales prohibition order that varies the order issued by Adjudicator Hern; to impose an administrative penalty that varies the amount ordered by Adjudicator Hern; and to confirm the Compliance Order put in place by Adjudicator Hern. I discuss in more detail each of these determinations in the paragraphs that follow under this section of the decision.

Direct Sales Prohibition Order

34. Adjudicator Hern was asked in the Report to Director to issue a twelve-month direct sales prohibition against the Respondent. He decided that a three-month prohibition was appropriate. In their submissions the Respondent says Adjudicator Hern made an error in assuming that direct sales are not a large component of the Respondent's business model. I believe the basis of Adjudicator Hern's decision to impose the three-month prohibition was based on evidence of the rental contracts and the Respondent being in non-compliance with the BPCPA, not the volume of the of direct sales conducted by the Respondent. I have taken into consideration that, although the Respondent was in contravention to section 19(j) of the BPCPA, there was some level of disclosure on total price (total lease cost) in the contracts for some of the offered monthly rental charges. Moving forward the Respondent needs to take active steps to ensure that the total cost for all offered monthly rentals makes its way into and is fully disclosed in the contracts. I believe a two-month direct sales prohibition order delivers an appropriate message to the Respondent about using contracts that are compliant with the BPCPA and, at the same time, focuses the Respondent on using the period of time to do whatever is necessary to bring its contracts and their use into compliance with the BPCPA.

Therefore, I vary Adjudicator Hern's determination to reduce the term of the direct sales prohibition order from three-months to two-months. The other requirements of Adjudicator Hern's direct sales prohibition order remain intact. Attached to this decision is the varied order setting out terms of the two-month direct sales prohibition.

Compliance Order

35. The compliance order issued by Adjudicator Hern required the Respondent to comply with section 19(j) of the BPCPA by clearly stating in its direct sales contracts the total price of each contract over the term, expressed as a dollar value. The second requirement of the compliance order was for the Respondent to pay partial inspection costs in the amount of \$500.00. I believe the issuance of a compliance order with the terms set out by Adjudicator Hern to be appropriate and reasonable to the circumstances. The compliance order issued by Adjudicator Hern is confirmed. Attached to this decision is the confirmed compliance order. Note: the only change made is to date of payment for inspection costs and some language identifying the names of the consumers whose contracts were not in compliance.

Administrative Monetary Penalty

36. I agree with Adjudicator Hern's assessment that an administrative monetary penalty is warranted. I see an administrative monetary penalty as an appropriate enforcement action to be taken in this matter, meant to correct the Respondent's non-compliance and to be a deterrent.
37. Adjudicator Hern went through a careful analysis of the two-year limitation under the BPCPA to impose an administrative penalty and which of the non-compliant contracts could attract an administrative monetary penalty. Where I must depart from Adjudicator Hern's reasons is with his conclusion that there are three non-compliant contracts that fall within the limitation period to impose an administrative monetary penalty. Included with the three agreements that Adjudicator Hern concluded were in non-compliance and subject to an administrative monetary penalty were two agreements with monthly rentals of \$59.99. I have already concluded that contracts with this monthly amount had the total price (total lease) disclosed in the templated language in section 5 of the contract; therefore, these contracts were in compliance and cannot be subject to an administrative penalty. This then leaves one contract (the Leanne Boetter contract dated March 23/24, 2023) with a monthly rental amount of \$105.36 as the only non-

compliant contract that falls within the two-year limitation period for an administrative penalty to be imposed.

38. In determining the amount of the administrative penalty to be imposed, Adjudicator Hern considered the factors under section 164(2) of the BPCPA along with the Consumer Protection BC policy “Calculation of Administrative Monetary Penalties and Procedures” (“the Policy”). The Respondent’s reconsiderations submissions did not make mention of the Policy but did speak to the appropriateness of any enforcement action, should it be imposed.
39. In deciding that an administrative monetary penalty should be applied in this case, I am bound to follow the section 164(2) criteria under the BPCPA. I also agree with the application of the Policy as a guidance document in ensuring the calculation of an administrative monetary penalty amount is consistent, transparent, flexible, and proportionate to the contravention at issue. I have reviewed Adjudicator’s analysis of the section 164(2) criteria and the Policy and, except for one criterion or adjustment factor addressed in Adjudicator Hern’s decision, agree with the analysis and the assessments. The only change I make is to the criterion or adjustment factor on “whether the contravention was repeated or continuous,” by reducing the effect on gravity for this specific criterion from a scaled score of “1” to “0.” Adjudicator Hern assigned this score based on the contraventions being repeated on three occasions. I make this change to reflect my finding that there was one non-compliant contract that fell within the two-year limitation period that could draw an administrative monetary penalty. The net effect of this change is that the overall gravity level is reduced from “2” to “1.” Under the Policy, an overall gravity level of “1” for a Type B contravention (the category that a section 19(j) contravention falls into under the Policy) calculates an administrative penalty amount of \$4,000.00. I retain discretion to impose a different administrative monetary penalty and have decided that the \$4,000.00 amount is appropriate. Adjudicator Hern’s determination of an administrative monetary penalty is varied to this effect. Attached to this decision is a Notice of Administrative Penalty in the amount of \$4,000.00

I. JUDICIAL REVIEW

40. A Respondent to a reconsideration decision and determination may seek a judicial review by bringing a petition in the British Columbia Supreme Court under the Judicial Review Procedures Act.

Considered on July 25, 2024, in Burnaby BC.



Shahid Noorani
Vice President, Regulatory Affairs