

## **DECISION OF THE DIRECTOR**

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

**Respondent:** Bath Time Innovations Inc.

**Case Number:** 30228

**Adjudicator:** Robert Penkala

**Date of Decision:** October 15, 2019

### **INTRODUCTION**

Consumer Protection BC is responsible for the administration and enforcement of the *Business Practices and Consumer Protection Act* (the “Act”) and is authorized to impose administrative penalties and issue remedial orders where businesses (“suppliers”) violate the Act.

Bath Time Innovations Inc. (“Bath Time”, or “respondent”) is a company formerly operating from a location in Port Coquitlam, BC. On September 17, 2019 a Consumer Protection BC inspector (“Inspector”) issued a Report (“Report”) based on a consumer complaint against Bath Time documenting a dispute about refund of a deposit of \$9,123 after a customer’s cancellation of agreements (contracts) for certain home renovations or improvements. The Report sets out allegations that Bath Time’s use of defective contracts and its failure to provide a refund upon a consumer’s exercise of cancellation rights violate the Act. To date, the refund issue in the original complaint apparently remains unresolved.

### **OPPORTUNITY TO BE HEARD**

In my letter to Bath Time of September 18<sup>th</sup>, 2019 initiating a hearing of the Report’s allegations, I requested that the Respondent reply to the Report in writing, providing any evidence or explanations submitted by way of rebuttal, defence, or mitigation. In that letter, I advised the respondent that a failure to respond could result in the Report being adjudicated solely on the basis of Inspector’s evidence. Bath Time provided no documents or other submissions relevant to the hearing by the deadline of October 2<sup>nd</sup>.

Despite the foregoing, I am confident that the respondent has had an opportunity to respond in this proceeding. On September 18<sup>th</sup> I delivered an email to the business email address of the principal person representing Bath Time in the investigation of the complaint and also in a previous hearing. The email is clearly used by and for the business, and I have no technical indication or other reason to believe the email has become inoperative. Attached to the email was formal notice of the start of the formal hearing. Further, I attempted delivery of the letter initiating the hearing by registered mail, which Canada Post tracking indicates is being held for pickup, with notification to the respondent given on September 23<sup>rd</sup> of the pickup location. The tracking information also shows that Canada Post gave

a second notice to the delivery address on October 1<sup>st</sup> that the mail is being held at a postal outlet. As of today's date, the respondent has not picked up the letter or replied to my email. In attempting to serve the letter by registered mail, I used an address for delivery given in Bath Time's corporate registration record. I believe in all probability that the respondent received both the emailed notice and the Canada Post notices of delivery and chose not to respond.

## **ALLEGATIONS**

The Report raises the following allegations against Bath Time:

1. The Respondent contravened sections 19 and 23 (2) of the Act by using a consumer contract not in compliance with statutory requirements applicable to *future performance contracts*.
2. The Respondent contravened section 27 of the Act by not issuing a refund within 15 days to a consumer who cancelled a *future performance contract* in accordance with the Act.

Each of these allegations is explained in more detail later in this decision.

## **RELEVANT LEGISLATION**

The provisions of the Act directly applicable to the allegations are reproduced below:

### **Section 17**

*"future performance contract" means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed [...]*

### **Section 19**

*A [...] future performance contract [...] must contain the following information:*

*[(a) through (d) omitted]*

*(e) a detailed description of the goods or services to be supplied under the contract*

*(f) an itemized purchase price for the goods or services to be supplied under the contract;*

*[(g) to (h) omitted]*

*(i) a detailed statement of the terms of payment*

*[(j) to (o) omitted]*

### **Section 23 (2)**

*In addition to the information required under section 19, a future performance contract must contain the following information:*

*(a) the supply date;*

*(b) the date on which the supply of the goods or services will be complete*

### **Section 23 (5)**

*A consumer may cancel a future performance contract by giving notice of cancellation to the supplier not later than one year after the date that the consumer receives a copy of the contract if the contract does not contain the information required under subsection (2) and section 19.*

## Section 27

[...] *if a contract is cancelled under this Division, the supplier must refund to the consumer,*  
*(a) within 15 days after the notice of cancellation has been given, and*  
*(b) without deduction except as provided for in this Division or in the*  
*regulations,*  
*all money received in respect of the contract, whether received from the consumer or any*  
*other person.*

## Section 54 (2)

*A notice of cancellation is sufficient if it indicates, in any way, the intention of the consumer or supplier to cancel the contract and, except in the case of cancellation under sections 21 (1), 25 (1,) or 26 (3) if it states the reason for cancellation.*

### **SUMMARY OF UNDISPUTED EVIDENCE**

- On October 25, 2018 the complainant and Bath Time completed two documents that appear to be Bath Time order forms for bathroom renovations or installations (these are identified in the Report as the “Contracts”, reproduced at Tabs #1 and #2).
- The two orders state a total cost to the purchaser of approximately \$36,494.
- Items and pricing identified on the two orders consist of:
  - “Gold 5x8 Tub pkg” (\$13,258)
  - “2 led lights in tub area” (“Aprox \$550”)
  - “Bigger vanity & wall repair” (“Aprox \$950”)
  - “5x8 Gold shower package” (\$17,898)
  - “heated tile floor add aprox \$2,500 to remove floor & add heated floor with timer & prep.”
  - “Note: need Ron to remove fire place to make room bigger to add shower to power room. Extra bill.”
- Each work order has an entry for a 25% deposit amount, which, together is a charge of \$9,123.46.
- A third document [Tab 3] is an authorization for Bath Time to charge the customer’s credit card, as it states, “for the purpose of renovation installation, non refundable deposits, product orders and change order forms”.
- The credit card authorization is completed with details of the complainant’s credit card and signed by her.
- On October 26, 2018 Bath Time processed two credit card payments on the complainant’s credit card totalling \$9,123.46.
- Other than the date of the work orders and credit card authorization, the documents relating to the proposed renovations and installations state no dates for the start or completion of the provision of goods and services.
- On May 28<sup>th</sup>, 2019 the complainant cancelled the contract, citing its failure to meet the requirements of the Act.
- The delivery of the cancellation notice is attested to by a process servicer in an “affidavit of personal service” dated May 30<sup>th</sup>, 2019.
- According to the Report, the complainant made “repeated attempts to contact” Bath Time prior to cancellation. No work on the renovations or installations had commenced by May 15<sup>th</sup>, 2019, when the complainant issued the notice of cancellation.

- Since the complainant cancelled the agreement and demanded return of her deposits, as of the writing of the Report Bath Time has kept all the money it took from the complainant.
- In June 2019 the complainant initiated a formal complaint with Consumer Protection BC. In July 2019 an Inspector notified Bath Time of the complaint and requested copies of Bath Time's copies of the "contracts" related to the disputed orders.
- The Inspector includes copies of two emails delivered to Bath Time requiring it to produce documents by certain deadlines in July and August. After the first email, Bath Time replied by email requesting an extension of time, proposing August 15<sup>th</sup>. On August 16<sup>th</sup> the Inspector advised Bath Time that if it did not provide the documents by August 19<sup>th</sup> he would "proceed with a Report". The Inspector states that Bath Time gave no further response subsequently.

## **ANALYSIS**

### **Future performance contract / section 19 & 23 disclosures**

The Inspector characterizes the two work orders as agreements involving the complainant's partial payment for goods and services (deposits), future delivery of goods and services, and future completion of payment. According to the Report, the orders therefore align with the definition of *future performance contracts* in the Act. The complainant's authorization for Bath Time's use of her credit card for payment, described in relation to the document exhibited at Tab 3, is also consistent with the two work orders demonstrating the existence of a contractual agreement.

The Report also states that the orders were not signed by the complainant, and that her authorizing the use of her credit card was not intended to permit the taking of the deposits, but was rather "to hold their place for the services of the Respondent", notwithstanding that the authorization form refers to "non-refundable deposits" and the orders themselves seem to include calculation of two 25% deposits. Further, there is no evidence that the complainant disputed the taking of more than \$9,000 in deposits on October 26<sup>th</sup> 2018 until she gave a notice of cancellation on May 15<sup>th</sup> 2019 (i.e., over 6 months later).

As set out above, there are elements of uncertainty as to the intentions of the parties in the context of the making of the work orders. It is not clear from the evidence whether the work orders were meant to be no more than "quotes" (or a proposal) for the renovations rather than a firm agreement. However, on balance I agree with the Report's characterization of the agreement as a *future performance contract* under section 17 of the Act: the scope of work outlined, the specific calculation of costs, the credit card authorization and taking of deposits, and the complainant's apparent tacit acceptance over a period of several months of Bath Time's processing of a substantial deposit on the renovation, together lead me to conclude that a future performance contract was indeed formed. Consequently, all the disclosures set out in sections 19 and 23 the Act are applicable to the work orders (and the credit card authorization) deemed to be "the contract" in this case.

The Report cites three alleged deficiencies of the contract under sections 19 and 23. I note that in principle any one omission could be a reason for the consumer to cancel the contract within one year as per section 23 (5) of the Act (assuming, as in the present matter, the contract is never fully performed).

### **Requirement for a detailed description of goods & services**

The main features of the contract in terms of the cost of the proposed renovations involve installation of a "gold package" shower, a "gold package" tub, and a heated tile floor (at a cost of approximately \$35,000). None of these items are described in any further detail with respect to specific materials, components, manufacturers or models. The contract gives no details of the work to be done other than the implied installations, removal of a floor, wall repair, and waste removal. It does not refer, for

example, to any provision of plans or drawings, delivery of any goods to the residence, plumbing-related work, obtaining permits, or the actual or estimated time and cost of labour for the renovations. I therefore find that the contract describes the renovations and installations at a “basic” or “minimal” level but falls noticeably short of providing a detailed description of the goods and services to be supplied. In this respect, then, the contract contravenes section 19 (e) of the Act.

The Report also alleges a contractual failure to itemize prices for the goods and services to be supplied per section 19 (f) of the Act. I find that the contract does not contain a form of “itemized” pricing of the project components (albeit in some cases only approximate pricing). However, due to the lack of detailed description of project components, the contracts appear to lack the degree of “itemization” one might expect. For this reason, I believe the simplified itemization merely corresponds to the deficient description discussed above and is not a distinct contravention.

Finally, regarding the section 19-based allegation, I turn to the purported lack of a “detailed statement of the terms of payment” in the contract. I find that the contract, through an associated credit card authorization, describes the means by which payment is to be made. However, it does not provide any information about the timing or conditions for any of the payments, whether pertaining to the initial deposits or the remaining 75% balance and completion of payments (which may include adjustments for any price approximations in the contract). For this reason, I endorse the Report in respect of the alleged violation of section 19 (i) by Bath Time.

### **Section 23 (2) - start& completion dates**

The Report alleges that the contract fails to specify (a) a date of supply (start date), and, (b) the date upon which provision of goods and services is to be complete (end date), as required by section 23 (2). There is no indication on the three pages of the contract in evidence (the two work orders and the credit card authorization) on what dates Bath Time was to begin work or finish the project. No other evidence from the complainant or respondent has been produced in the hearing as to any understanding or agreement between the parties about such dates. I find that this proves a breach of section 23 (2), as alleged.

### **Section 27 – refund upon cancellation**

According to section 23 (5) of the Act, a consumer has the right to cancel a *future performance* contract deficient in terms of the content required by sections 19 and 23 of the Act within one year of receiving a copy of the contract. As seen above, the complainant’s right to cancellation is established due to three specific contractual deficiencies (or, really, any one of them).

Also, in case there is no suggestion in the evidence that the contract was performed to any extent beyond the mere proposal to undertake the renovations. Consequently, I have no concern that the cancellation came too late in relation to the “future performance” initially intended.

I accept that the complainant’s notice of cancellation in this case was effective on or about May 28<sup>th</sup>, 2018 and Bath Time was obligated to return the full deposit amounts within 15 days. I note that up to the time this hearing began, there is no evidence known to me that the disputed refund matter has been resolved. Given a valid cancellation under the Act, Bath Time’s failure to act on the refund demand contravenes section 27 of the Act.

### **DUE DILIGENCE**

The respondent is entitled to a “defence of due diligence” if it shows that it took all reasonable steps to prevent the contraventions, and they occurred despite such efforts. There is no evidence in the Report of Bath Time meaningfully engaging in the complaint investigation process. It does not appear to have provided the records requested by the Inspector, nor any statements relevant to an assessment its

conduct. Further, despite notice to Bath Time that this matter could be adjudicated on the basis of the Report alone should it fail to respond, it provided no submissions in the hearing. I am therefore unable to consider the defence of due diligence in this case.

### **ENFORCEMENT ACTIONS**

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

- Issue a compliance order (under section 155 of the Act), which may include orders:
  - to take specified action to correct the issue;
  - to reimburse a consumer or provide suitable compensation (restitution); and,
  - to repay Consumer Protection BC the costs of this inspection.
- Impose an administrative penalty of up to \$5,000 on an individual, or up to \$50,000 on a corporation (under section 164 of the Act).

I have considered each of these possible enforcement actions and determined that the circumstances merit a compliance order against the respondent to issue the refund owed to the complainant, and to reimburse Consumer Protection its costs of the inspection (investigation). I will also add to an existing order made by Consumer Protection BC that relates to *future performance contract* content requirement, by requiring Bath Time to ensure its contracts include adequate details about goods and services and the terms of payment. Further, a monetary penalty for the contravention of section 27 is an appropriate measure with a view to both specific and general deterrence of behaviour tied tangibly to harm to consumers.

### **Compliance Order**

Having found Bath Time responsible for contraventions of sections 19 (e) and (i), 23 (2), and 27 of the Act, I have authority under the Act to order restitution of the deposit payments and reimbursement of Consumer Protection BC's costs for the relevant inspection, including preparation of the Report for this hearing. In the case of the refund of deposits demanded by the consumer / complainant, I order Bath Time to **return \$9,123.46** within 15 days of service of the Order. Recognizing the resources allocated to discovery and documentation of the violations, I impose **inspection costs of \$750** on Bath Time. The Order enclosed with this decision gives formal notice to that effect.

### **Administrative penalty**

As per section 164 (1) of the Act, an administrative monetary penalty ("AMP" or "penalty") may be imposed where a person contravenes a prescribed provision of the Act. Sections 19, 23, and 27 of the Act are prescribed for the purpose of imposition of an AMP. After considering the factors under section 164 (2) of the Act (below), I determine that an AMP is warranted for the breaches of the Act demonstrated in this case.

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

- (a) previous enforcement actions for contraventions of a similar nature by the supplier
- (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 Act 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 Act 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 should be imposed 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, the Respondent has had an opportunity to respond to the Policy by making submissions on the appropriateness of its application or its consistency with the criteria under the Act. However, in this hearing I have not received any submissions from the Respondent on the Policy or any similar subject matter.

I have determined that an AMP should be imposed for not providing the required full refund under section 27 of the Act after the complainant’s exercise of her right to cancellation under section 23 (5) of the Act.

**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.

Violation of section 27 of the Act is a “Type C” contraventions under the Policy. I agree with the categorization of the contravention in the present circumstances at a relatively high level of inherent severity and potential harm as contemplated by the Policy.

My assessment of the adjustment factors applicable to these contraventions under the Policy’s “Penalty Matrix” is set out in the table below:

<b>Adjustment Factor</b>	<b>Effect on Gravity</b>	<b>Analysis</b>
<b><i>1. Previous enforcement actions for contraventions of a similar nature</i></b>	<b>+3</b>	In a hearing [case #30119] concluded May 29 <sup>th</sup> , 2019 Bath Time was found to have violated sections 19, 23, and 27 of the Act. An AMP of \$6,500 was issued and Bath Time was directed to refund a deposit of nearly \$14,000 to a consumer due to a cancellation. The timing of the earlier decision virtually coincides with the cancellation at issue in the current hearing. In other words, the previous decision has a direct bearing on the more recent dispute by putting the respondent on notice regarding suppliers’ obligations in respect of cancellations and refunds. The previous enforcement action therefore has an aggravating effect on penalty in this case.
<b><i>2. Gravity and magnitude of the contraventions</i></b>	<b>+1</b>	A consumer protection body must be attuned to actual consumer monetary loss, and the risk of further losses posed to other consumers by the respondent’s conduct. In this case Bath Time sets out no credible basis for its refusal to issue the refund after notice of lawful cancellation. The overall seriousness of the contraventions is highlighted by the combination of a lack of contractual specificity about the goods and services, unclarity about the terms of payment, and the respondent’s keeping of a substantial deposit without any explanation or relation to the provision of goods and services. I consider the contraventions to be relatively serious.
<b><i>3. Extent of the harm to others resulting from the contraventions</i></b>	<b>+1</b>	This matter relates to a monetary loss of more than \$9,000 and is therefore clearly harmful to the consumer.
<b><i>4. Whether the contraventions were repeated or continuous</i></b>	<b>0</b>	Within the scope of the Report and this hearing, the Respondent is responsible for one instance of breaching the future performance contract and refund issuance requirements, and there is no evidence of additional



		violations. There is no basis to find an “aggravating factor” of repetition or continuity.
<b>5. Whether the contraventions were deliberate</b>	+2	At the time of the original transaction in October 2018, it is probable that Bath Time was not aware of the application of the Act to its contracts. The disclosure-related deficiencies are not clearly deliberate. However, after having been the subject of a complaint investigation and hearing in a very similar (section 27) refund dispute and receiving proper notice of cancellation in this case, the respondent deliberately chose not to respond to the demand for return of the deposits.
<b>6. Economic benefit derived by the person from the contraventions</b>	+2	I believe Bath Time was motivated by and derived economic benefit from the contravention of sec. 27, which resulted in it retaining two deposits for work and materials that were never supplied. Bath Time received a windfall of \$9,000 without giving anything of value to the consumer and evidently without any relation to its expenses or costs for the proposed project.
<b>7. Whether the person made reasonable efforts to mitigate or reverse the contraventions’ effects</b>	0	There is no basis to find that the Respondent has mitigated or reversed any aspect of the contraventions.

**Final Calculation of AMP**

The Policy determines violation of section 27 is a Type C contravention with a base penalty amount of \$5,000. For this violation, application of the AMP “Matrix” involves five contributing aggravating factors, and no mitigation of penalty. Thus, the adjustment to “gravity level” of the contravention, overall, is *plus nine*. Therefore, in this case I apply a penalty of \$12,500 per Part 4.3 of the Policy (penalty matrix). Attached to these reasons is a Notice of Administrative Penalty in the amount of **\$12,500**.

**Compliance order**

I am of the mind that in this case an order against Bath Time is an appropriate action in order to compel correction of its business practices, stipulate restitution to the complainant, and reimburse Consumer Protection BC for costs in the investigation, all pursuant to section 155 of the Act. Therefore, I order Bath Time:

1. to include in its future performance contracts for renovation and home improvement services the information required by sections 19 (e) and (i) of the Act, namely:
  - a. detailed descriptions of the goods and services to be supplied; and,

- b. a statement of the specific terms of payment in effect for all payments due from consumers under the contract.
2. to pay to the complainant Patricia Salvidge a **refund of \$9,123.46** within 15 days of receipt of the Order, and in any case **by no later than November 4<sup>th</sup>, 2019**;
3. to pay to Consumer Protection BC costs for the inspection of this matter in the amount of **\$750**, to be paid within **30 days** of delivery of the Order to the respondent.

## **CONCLUSION**

If the Respondent wishes to request reconsideration in this matter within 30 days of receiving these reasons, in accordance with sections 181 and 182 of the Act, it may apply to Consumer Protection BC:

- by fax to 604-320-1663;
- by electronic mail to [shahid.noorani@consumerprotectionbc.ca](mailto:shahid.noorani@consumerprotectionbc.ca);
- or by mail or courier to the address below:

Consumer Protection BC  
Attention: Shahid Noorani, VP of Regulatory Services  
200 – 4946 Canada Way  
Burnaby, BC V5G 4H7

Considered on October 15, 2019 in Burnaby, BC

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Robert Penkala  
Manager, Enforcement Hearings

Method of Service: Registered Mail and electronic mail