



DECISION OF THE DIRECTOR

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

Respondent: Above and Beyond Funeral Services Corp. carrying on business as Devlin Funeral Home

Licence Number: 72215

Case Number: 30304

Adjudicator: Robert Penkala

Date of Decision: April 14, 2020

Introduction

Consumer Protection BC administers and enforces the *Business Practices and Consumer Protection Act* (hereinafter the “Act”). Above and Beyond Funeral Services Corp. carrying on business as Devlin Funeral Home (“Devlin”, “respondent”, or “licensee”) is a company providing funeral services in British Columbia under a licence granted by Consumer Protection BC pursuant to the *Cremation, Interment and Funeral Services Act*.

An inspector has issued a Report to the Director (“Report”) based on several inspections conducted in 2019 bringing forward an allegation that the respondent contravened section 36 (1)(d) of the Act. Specifically, the allegation is that the respondent entered into “preneed” funeral services contracts with consumers without observing contractual requirements prescribed by the Act. The matter has been referred to me by the director to decide in a proceeding (“hearing”), in accordance with statutory authority.

As a consequence of the hearing, I may decide to take licensing action against the respondent including suspension, revocation, or imposition of conditions. Under the Act the alleged breaches are also prescribed for the purpose of monetary penalty. However, in this case the Act does not authorize such penalties due to the passage of more than two years since the occurrence of the violations.

Opportunity to be heard

Prior to any possible enforcement action, the respondent must be provided with an opportunity to be heard. On February 25th, 2020 I gave notice to Devlin of the hearing, allowing until March 16th to respond to the Report. On March 10th I received a written response to the allegations from Devlin's owner and operator. Based on this exchange of notice and response, I am satisfied that Devlin has had a suitable opportunity to be heard.

Alleged contraventions / Legislation

Section 17 of the Act defines a "preneed cemetery or funeral services contract" (for convenience also called "preneed" herein), as:

[...] a future performance contract that provides for cemetery or funeral services for one or more persons who are alive at the time the contract is entered [...]

The Report asserts that the respondent violated section 36 (1)(d) of the *Business Practices and Consumer Protection Act*, according to which:

A preneed cemetery or funeral services contract must [...] provide a space for the written acknowledgement by the consumer that the consumer has received the information required by section 35 to be disclosed

In turn, section 35 provides that:

Before a consumer enters into a preneed [...] funeral services contract, the supplier must disclose, in writing, the following information:

- (a) if under the contract the consumer is required to obtain and maintain insurance and to assign the right to the amount payable under the insurance to the supplier,
 - (i) the portion of the insurance premiums paid by the consumer that will be refunded if the insurance is cancelled, and*
 - (ii) that sections 38 and 45 [refunds on cancellation] do not apply if the insurance is cancelled;**
- (b) if under the contract the supplier is to receive money that must be deposited into a preneed trust account, the portion of the price paid by the consumer that will be refunded if the contract is cancelled.*

For the reasons below, I confirm the allegations set out by the Report concerning breach of these provisions of the Act. In reaching my conclusions I have considered the evidence exhibited in the Report, but for brevity I will refer to it in a somewhat summary, rather than detailed, manner.

The Inspector's Evidence

- In October 2016 the respondent purchased an existing funeral services business and applied to Consumer Protection BC for licensing’;
- In January 2017 a “pre-licensing” inspection discovered that the previous licensee had apparently been the assignee of third-party insured preneed funeral services contracts, evidenced only by insurance policy documents rather than preneed contracts meeting the requirements of the Act. These deficient preneeds were transferred to Devlin;
- An inspection in May 2018 found that after the transfer of the business in 2017, the respondent had entered more third-party insured preneed contracts and used a contractual form designed for “trusted” preneeds (i.e., funded by consumer money held in trust). The Report exhibits copies of 17 such contracts (most executed in early 2017);
- In June 2018 the inspector sent detailed instructions to the respondent outlining how to remedy the preneed contractual compliance issues, as well as providing a contract “template” suitable for the third-party insured preneeds;
- In October 2019 the inspector conducted a “follow-up” inspection to assess whether the previously identified issues with third-party insured preneeds had been addressed by Devlin (i.e., the lack of preneeds corresponding with insurance policies and use of trust preneed contracts instead of insured preneed contracts);
- Between November 2019 and January 2020 the inspector attempted to ascertain whether Devlin had substituted “correct” contracts in relation to the discrepancy between trust and insured preneeds of 2017. Devlin did not provide the proof requested by the inspector;
- In January 2020 Devlin provided copies of a further 15 contracts executed as trust preneeds in 2018 rather than preneeds corresponding to third-party funeral service insurance policies (which in fact they are).
- In this hearing, on March 11th, I received confirmation from the inspector issuing the Report that Devlin had replaced or re-executed the 17 non-conforming 2017 insured preneeds made out as “trust” preneeds with contracts deemed by the inspector to comply with the Act.

Evidence of Devlin

The respondent owner sent a two-page letter for my consideration in the hearing. She does not produce any new documents, but rather provides a statement, which I will reproduce or paraphrase in part below:

- The third-party insurer did not give Devlin copies of its “goods and services agreement” and when asked “for a file copy they advised me that they did not keep copies.”
- I continued to defer the [insured] pre-need problem. Other matters were taking up my time and simply took precedence [...]
- As a new business owner I have been requested to fulfill numerous requests from your [organization] [...] The learning curve of the funeral business along with [licensing requirements] and setting [customer-service] priorities left the [insured preneed] contracts “in the pile on my desk of things to do.”
- Some examples of what took [precedence] are:
 - acquiring my Funeral Director and Embalmer’s licence
 - operating a crematorium
 - contracting with the Coroner’s office to deal with transfer and storage of human remains
 - morgue renovation
 - hiring staff for regulatory reporting, and adjusting to new preneed reporting requirements
 - health issues, staff issues
- “I have decided to no longer deal with a 3rd party insurer for my pre-needs as it seems to cause confusion and problems.”
- I hired a new staff member to fulfill the requests from Consumer Protection BC concerning the third-party insured preneed contracts. [Previously] I “did not have the manpower”
- “We have now fulfilled your requirements [...] and all other requests, and are in full compliance.”

Analysis & discussion

The Report asserts that the licensee’s conduct violates section 36 (1)(d). I have reviewed all of the contracts cited by the Report relating to 17 third-party insured preneeds Devlin entered in 2017. The evidence is clear that in fact the contracts do not have a “space” for the consumers’ acknowledgment of having had disclosure of the information required by section 35, supporting the Report’s central allegation. More fundamentally, it appears that the alleged breach is merely a function of a larger contractual defect, which involves the failure to provide, at all, the insurance-related cancellation and refund information and non-application of other cancellation rights, as required by section 35. The alleged breach is secondary to the larger non-disclosure issue that makes compliance with section 36 (1)(d) an impossibility. It is, nonetheless, a contravention in its own right.

I have also considered Devlin’s submission in this matter. It does not attempt truly to rebut the allegation, nor does it provide any evidence capable of doing so. Instead, I would characterize the response as being more in the nature of “excuse” than counterargument. In that sense, Devlin’s submission may potentially relevant to considerations of degree of responsibility or “mitigating circumstances”. In conclusion, I find that the Report clearly sets out evidence to support the allegation, and I find that the cited contravention did occur as alleged.

Finally, for clarity, I do not proceed in this hearing with the suggestion in the Report that an additional 15 insured preneeds from 2018 are relevant to the alleged violation. The Report indicates that Devlin is named as the “funeral establishment” for insurance certificates and policy enrolments for funeral services, however allegedly Devlin did not execute its own corresponding preneeds in those case (and therefore if treating the insurance documents *as* preneeds, failed to make any of the disclosures required by the Act). This evidence is not supported by any documents for 14 of the 15 alleged “contracts” and does not figure in the inspector’s analysis or conclusion respecting the central allegation. I therefore make no factual finding in this regard.

Due Diligence

The respondent is entitled to a (complete) defence of due diligence if it shows it took all reasonable steps to prevent the contraventions. In reviewing Devlin’s submission, outlined above, I find that it is consistent observation made by the inspector in the Report concerning Devlin’s failure to rectify the contractual compliance matters originating in 2017 by January 2020. The inspector states that the respondent-owner informed her that the continuing non-compliance was a “conscious decision” to prioritize other matters she deemed more critical to running the business. I note also that a significant part of the inspector’s interactions with the licensee dealt with options or instructions aimed at rectifying the contractual deficiencies, and I agree that in principle a significant degree of rectification was probably attainable based on that direction. In my view, a defence of due diligence in order to succeed requires evidence of “reasonable efforts” made notwithstanding obstacles or constraints inherent in business realities. Devlin’s response offers no real evidence of reasonable efforts in that sense. Alternatively, if I were to consider “impossibility of performance” as an excuse (which may be implied in the submission), I would not accept that the impediments described were onerous to that degree.

Enforcement action

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

- Suspend, revoke, or impose conditions on Devlin’s funeral service provider licence;
- Issue a compliance order (under section 155 of the Act), which may direct the Respondent to:
 - stop a specified act or practice;

- take specific actions to correct the issue; and,
- repay Consumer Protection BC the costs of this inspection.

I have considered each of these possible enforcement actions and find it appropriate for reasons of general and specific deterrence to proceed with the issuing of an order for compliance, with inspection costs, against the licensee. Enforcement action in this instance serves the Act's objective to ensure certain disclosures are made to consumers and reinforces licensees' compliance with Consumer Protection BC inspection protocols as the regulatory body for funeral service providers.

Compliance Order

Having found the Licensee responsible for contravening section of the Act, I have authority to order reimbursement of Consumer Protection BC's costs for the related inspection including preparation of the Report for this hearing. Recognizing the resources allocated to discovering and documenting the violation, I impose **inspection costs of \$1,800** on the respondent. The Order enclosed with this decision gives formal notice to that end.

Conclusion

Based on the evidence before me, I find the respondent responsible for the alleged contravention and correspondingly liable to penalty under the Act. The Respondent is ordered to pay Consumer Protection BC's costs in the inspection, including issuance of the Report.

Decision issued on April 14, 2020 in Vancouver, BC



Robert Penkala
Manager, Enforcement Hearings

Delivery to respondent by email.