CONSUMER PROTECTION BC

DECISION OF THE DIRECTOR

In the Matter of:	*Business Practices and Consumer Protection Act* [SBC 2004] c. 2, and *Payday Loans Regulation*
Respondent:	Springhill Enterprises Ltd. also carrying on business as Check Station
License Number:	50745
Case Number:	30346
Adjudicator:	Robert Penkala
Decision Issued:	May 20, 2020

INTRODUCTION

Consumer Protection BC administers the *Business Practices and Consumer Protection Act* and the *Payday Loans Regulation*. Springhill Enterprises Ltd doing business as Check Station is a licensed payday lender operating in British Columbia. On January 24th, 2020, Consumer Protection BC conducted an inspected of its location in New Westminster. On February 24th, 2020 an inspector issued a Report to the Director alleging that the respondent had, between April and December 2019, failed to ensure that repayment terms for two loans were set in accordance with the definition of "payday loans" and in eight other cases failed to correctly disclose the annual percentage interest rate (APR) for payday loans.

If the alleged contraventions of the Act are found to have occurred Consumer Protection BC is authorized to order the respondent to take actions to correct its practices and pay costs of the inspection related to the Report. Additionally, the provisions of the Act cited in the Report's allegations may be subject to administrative monetary penalties (AMPs). Finally, the authority to impose conditions on, suspend, or cancel, a payday lending licence may also be exercised.

OPPORTUNITY TO BE HEARD

Prior to an action being taken under the Act, the respondent must be provided with an opportunity to be heard. On March 3rd I sent the respondent notice of this hearing, giving it until March 23rd to

respond in writing to the Report. The notice indicated that after the respondent's opportunity to respond, an adjudicator for Consumer Protection BC would determine whether the alleged violation occurred and take enforcement action if warranted. It stated that if the adjudicator confirms the violations and imposes an AMP, he will apply the factors in section 164 (2) of the Act before determining the monetary amount, as well as being guided in calculating monetary penalties by Consumer Protection BC policy. Check Station responded in this hearing by email, attaching a one-page letter addressing the Report. I conclude on this basis the required opportunity to be heard has been provided to and exercised by the respondent.

ALLEGED CONTRAVENTIONS

The Report alleges that the respondent contravened the Act, , and of the Act when it:

- extended loans of money purporting to be "payday loans" when they were not [section 5(1)];
- failed to include the annual percentage rates for the cost of borrowing (APR) in payday loans it executed with borrowers [section 112.06 (2)(k)];
- failed to review the APR and cost of credit in payday loan agreements and to obtain the borrower's initial on the APR and cost of credit for the loans [section 112.06(4)]

LEGISLATION

Business Practices and Consumer Protection Act

Section 5 (1)

A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

Section 112.06

(2) A payday lender must ensure that the loan agreement includes […] (k) the total cost of credit and the APR for the payday loan; [(a) through (j) omitted]

(3) […]

(4) Before the borrower signs the loan agreement, the payday lender must

(a) review with the borrower the matters described in subsection (2) (k) […], and

(b) require that the borrower initial [the cost of credit and APR disclosures] in the agreement.

EVIDENCE OF THE INSPECTOR

- The Inspector obtained and reviewed 11 loan agreements for loans extended by Check Station to two individual borrowers between April and December 2019.

- "Table 2" of the Report itemizes three loans, each of which is allegedly for a term of 63 days.
- In several respects (not repeated here), Check Station made representations in the loan agreements identifying them as "payday loans" (incorporating various terms required by the Act in its regulation of payday loans).
- The 8 loans itemized in Tables 3 and 4 of the Report either fail to state an APR (in 5 cases) or state an APR alleged to be incorrect.
- None of the 8 loans in Tables 3 and 4 evidence the borrower's initials to acknowledge his review of the loan APR.

EVIDENCE OF THE RESPONDENT

The respondent has submitted a statement from its owner and operator, and no other documentary evidence. Below is the response to the allegation, in a summarized form:

- Check Station's software system was calculating APRs correctly for "single and 3 repayment loans", however it was "not even calculating an APR" for "2 payment loans".
- Check Station had to manually input APRs, or the "2 payment loans" would be assigned incorrect APRs by the system.
- The problem with APR calculation noted above is "being corrected by our software company."
- Very few customers were "entitled to payments over two months" and affected by the incorrect or missing APRs.
- Check Station is "a small payday loan and cheque cashing store trying to operate to the best of our abilities" in an "extremely tough" business environment.

ANALYSIS

Check Station does not dispute the Report's allegations. It does not address the allegation concerning misrepresentation of non-payday loans as payday loans at all. Though it refers to deficiencies in its software system to explain the missing or incorrect APRs, it introduces no further evidence in relation to any of the assertions or analysis in the Report. However, I must assess the evidence in the Report on its own terms before drawing any final conclusions about the allegations.

Misrepresenting non-payday loans as payday loans

As demonstrated in the Report, payday loans as defined by the Act cannot exceed a 62-day term. I find that the Check Station records cited by the Report prove that two of the three loans in Table 2 were in fact for terms of 63 days. The third loan is for a term of 55 days and therefore cited by the inspector in error. The first two loan agreements contain language identifying them as "payday loans" subject to the certain requirements under the Act. I agree, therefore, that the first two loans

cited in Table 2 exceed the period permitted for payday loans and in a technical sense cease to be payday loans even though extended by a licensed payday lender. There is no evidence to suggest that Check Station consciously misrepresented the loans as payday loans. However, the Act does not specify that "deceptive acts" must be intentional – it merely requires the making of representations that have the ability or tendency to mislead. I find it very likely that a borrower would believe that a loan with a 63-day term is a payday loan when represented as such, when in fact it is not. For this reason I conclude Check Station violated the prohibition against deceptive acts stated in section 5(1) of the Act in two instances.

The inspector asserts in the Report that the two "non-payday" loans have APRs that "far exceed maximum permissible" under the Criminal Code of Canada (payday loans being exempt from those Criminal Code provisions). I will only note here that I make no determination in that respect, lacking authority to do so.

Failure to state APR in payday loan agreements

The loan agreements that are the subject of the second allegation involve two sub-allegations. In 5 cases the loans simply do not have an APR calculation, whereas in the remaining 3 loans the APR is stated, however not in accordance with the required calculation under section 6 of the Disclosure of the Cost of Consumer Credit Regulation. i.e., incorrectly. Section 112.06(2)(k) of the Act requires disclosure of payday loan APRs in such agreements, therefore the 5 loans without any calculation (which I confirm) are plainly in breach.

The second part of the allegation relates to the requirement to state the APR in the prescribed manner. "APR" is defined in the Act with reference to a method of calculation set out in regulation. Therefore the disclosure stipulated by section 112.06(2)(k) of the Act entails an APR stated in loan agreements in conformance with the "section 6" calculation mentioned above. The inspector demonstrates the calculation of the APR in two ways: one, "by hand", following the prescribed formula (Appendix A of the Report); the other, by filling a customized Excel spread sheet used by Consumer Protection BC (and shared with licensees for their use). The two methods are in effect the same (this is verified in the Report by using loan information for one loan in both methods and deriving the same APR). I mention that in a previous adjudication involving the APR issue I tested and compared these methods and was satisfied that the spreadsheet method was reliable with respect to determining payday loan APRs. Regarding the 3 loans in Table 4 whose APRs were found to be non-conforming, I find:

- The loan in Exhibit 13 does not correctly state the APR (as recalculated in Exhibit 14);
- The loan in Exhibit 15 does not correctly state the APR (as recalculated in Exhibit 16); and,
- The loan in Exhibit 23 does not correctly state the APR (as recalculated in Exhibit 24).

The respondent has therefore contravened section 112.06(2)(k) of the Act as alleged in the Report.

Failure to review APR with borrowers & receive their acknowledgment

The inspector alleges that Check Station failed to review loan APRs with borrowers in the 8 agreements identified in Table 4. I have said that 5 of the loans failed to state the APR at all, while 3 misstated it. For that reason I find that the third allegation is not made on a proper footing. If a payday loan agreement does not represent the APR, then the lender's failure to review it should no longer be seen as a separate contravention. The initial failure makes the secondary review of the disclosure pointless (because the thing requiring review is not there). In those circumstances no review in a proper sense, let alone acknowledgment, is possible. In the case of such allegations the impossibility of performing the secondary review inevitably causes the second contravention. The licensee's liability for the primary failure of disclosure, if such an approach is followed, would result in additional liability (or at least adverse findings) for a second contravention that cannot be avoided given the first. Moreover, it is unlikely that the Act presumes a class of violations to follow from the initial failure. Rather, the Act presumes the initial disclosure to have occurred and stipulates additional review of it. The review is sequential in relation to the previously required primary disclosure of the APR.

In the case of the 3 other payday loans, where incorrect APRs are stated, borrower review and acknowledgement are possible. However, once again, the Act presumes that APRs are stated in a technically "correct" manner, and the Report alleges that Check Station's failure to do so is equivalent to not making an APR disclosure. I have already determined that this is a sound approach, as seen in my earlier analysis. For that reason, there is no fundamental difference between failing to enter a value for the APR and stating an APR not in accordance with the prescribed calculation. Consequently, reviewing an incorrect APR (which is not *the* APR for a payday loan), poses the same problem for application of the "review" requirement in section 112.06(4) of the Act as in cases where no APR disclosure is attempted. That is, "the APR" cannot properly be reviewed and acknowledged, and a further secondary breach is unavoidable. In that sense, the idea of second, separate breach in the circumstances duplicates the adverse finding for the initial non-disclosure of the APR. I therefore decide not to go beyond the original finding that no APR was disclosed and treat it as the primary contravention, making further scrutiny unnecessary. The third allegation, then, is dismissed in its entirety.

DUE DILIGENCE

The respondent is entitled to a complete defence of due diligence regarding the allegation if it shows that it took all reasonable steps to prevent the contraventions. In its submission Check Station does not explain how it might have avoided falsely representing loan agreements as payday loans. In the matter of non-disclosure of APRs (or attempted but invalid disclosures), Check Station refers to apparently recurring difficulties in managing its point-of-sale software for the purpose of identifying APRs consistently for the different types of loans it issues (single repayment, two-repayment, and three-repayment). I infer that it was aware of the APR issue before the occurrences cited in the Report, and it was notified of the issue in a previous inspection in October 2018. The deficiency of a completely omitting the APR is certainly one that could have been discovered with diligence. Yet, there is no evidence that Check Station took steps in the way of self-audit, technical

troubleshooting, or development of conforming loan agreements. The defence of "due diligence" has not been established.

ENFORCEMENT ACTION

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

1. Issue a compliance order (under section 155 of the Act), directing the respondent to:
    - stop a specified act 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 (under section 164 of the Act), as the violation of section 112.06(2)(k) 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 determined that a compliance order and imposition of an AMP are warranted.

Compliance Order

Having found the respondent responsible for contravention of sections 5 and 112.06(2), I have authority per section 155 (4)(d) of the Act to compel the respondent to cease certain practices and to verify its remediation of the irregularities cited in the Report. Terms of that nature are set out in the Order issued with this decision. The respondent must also reimburse Consumer Protection BC for partial costs in the amount of **$750** for the inspection relating to the contravention, including preparation of the Report.

Administrative penalty

As per section 164 (1) of the Act, an administrative monetary penalty ("AMP") may be imposed where a person contravenes a prescribed provision of the Act. Section 5 is designated by the Act as a provision whose contravention may be subject of an AMP. Section 112.06 (2)(k) is prescribed by the *Business Practices and Consumer Protection Regulation*, therefore an AMP may be applied as well.

I have considered whether an AMP is warranted in respect of section 5(1) in this case. To my mind, it is not. The nature of the violation is factually a matter of loan losing its status as a "payday loan" under the Act, due to two loans being extended by one day beyond the statutorily defined limit on the length of a payday loan. The extension of the loans by one day did, in very limited sense, put the licensee in the position of providing a high-interest non-payday loan while purporting to issue

the loan as a licensed payday lender. This conduct could in principle be seen as a serious irregularity for the licensee, were it to be a pattern or involve more than one-day term deviations. However, in this case the evidence does not persuade me that this breach merits a penalty on the magnitude of $5,000 (the "base" penalty in Consumer Protection BC policy, before adjusting for mitigating or aggravating factors). I have already said there is no evidence of a deliberate attempt to mislead the borrower, nor is there any evidence that the one-day overextension of the loan caused any financial harm to the borrower (the fees and principal amounts owed by the 63rd day of the loan would not have been any less if due on the 62nd day). Lastly, there is no suggestion that difference between the loan having a 62-day term or one extra day induced the borrower to enter a transaction he might have otherwise avoided. In my discretion, I opt not to impose an AMP for these reasons. However, the infraction is noted in this decision and in the Order, and any future recurrence may be viewed in the light of "previous enforcement" and treated accordingly.

After considering the factors under section 164 (2) of the Act (below), I have decided that an AMP is warranted for the contravention cited above.

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 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 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 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 Act. 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 Licensee's documented failure to disclose APRs in its payday loan agreements in compliance with the requirements of the Act and regulations. 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.

Breach of section 112.06 (2)(k) of the Act is a Type B contravention under the Policy (page 16. Appendix A, line 90) I agree with this categorization given the circumstances of this violation. It represents an intermediate level of inherent 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 $4,000 for a "business". Depending on "Gravity Level" in the Matrix, the minimum is $2,000 and maximum $10,000.

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 Check Station noted in the Report. The respondent submits that since 2009 it generally has operated within the requirements.
2. Gravity and magnitude of the contravention	**0**	The disclosure of APR required by the Act helps make payday borrowers aware of high-cost borrowing in comparison to more conventional APRs under different credit instruments. The licensee's failure to fulfil this very basic requirement is serious enough to justify sanction. However, the contravention was discovered during inspection and does not relate to any complaint, loss, or actual harm. In 3 out of 8 cases the misstatement of APR overstated the actual APR rather than trying to disguise the high interest aspect of the loan. I do not assign any aggravating degree of gravity in this instance.
3. Extent of the harm to others resulting from the contravention	**0**	There is no evidence of, and no basis to infer, harm to others resulting from the contraventions.
4. Whether the contravention was repeated or continuous	**0**	The Report puts in evidence 8 payday loans from April to December 2019, made out to 2 borrowers. The licensee admits to miscalculating APRs due to software limitations for "very few" customers. There is more than a single contravention at issue, however, the Report presents modest evidence of repeat violations and none to support their being continuous. In my discretion I choose to treat this adjustment factor as neutral rather than amplify the "Type B" penalty.
5. Whether the contravention was deliberate	**0**	The contraventions appear to be related to a lack of diligence or "knowhow" on the part of the licensee. There is no basis to infer intent to circumvent the requirements of the Act.
6. Economic benefit derived by the person from the contraventions	**0**	I have no reason to believe the respondent derived any economic benefit from the contraventions in the context of the loan agreements, as compared to any other payday transaction.

7. Whether the person made reasonable efforts to mitigate or reverse the contravention's effects	**0**	There is no evidence of any effect of the contraventions, or of any efforts to mitigate or reverse any presumed effects, therefore I do not assign any value to this factor.
8. The person's efforts to correct the contraventions & prevent recurrence	**-1**	The respondent states it is aware of limitations in its retail software in relation to certain types of loans, and this "is currently being corrected by our software company." There is little specific evidence of remediation of the violations, but I accept there is *some* evidence of the respondent's intention to avoid repetition of the breach, which allows an element of mitigation under this factor.

Final Calculation of AMP

According to my application of the Policy and its AMP Matrix**,** the overall adjustment for the section 112.06(2) violation involves a "minus one" score for factor #8 (the balance of other factors is neutral).

The Policy determines that a violation of section 112.06(2) is a Type B contravention with a base penalty amount of $3,500. In this case, having found a gravity level of "minus one" after adjustment and following the Matrix, I apply a penalty of **$3,000.** 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 **$3,000.**

RECONSIDERATION OF ORDER AND PENALTY

A compliance order or monetary penalty 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 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, Regulatory Services
200 – 4946 Canada Way, Burnaby, BC V5G 4H7
shahid.noorani@consumerprotectionbc.ca

Decided on May 5, 2020 in Vancouver, BC.

Robert Penkala, Manager of Enforcement Hearings

Encl: Compliance Order / Notice of Penalty