CONSUMER PROTECTION BC

DECISION OF THE DIRECTOR

In the Matter of:	*Business Practices and Consumer Protection Act* [SBC 2004] c. 2, and *Disclosure of the Cost of Consumer Credit Regulation*
Respondent:	Community Enterprises Corp. also carrying on business as Community Cash Canada
License Number:	71209
Case Number:	30345
Adjudicator:	Robert Penkala
Decision Issued:	August 7, 2020

INTRODUCTION

Consumer Protection BC administers the *Business Practices and Consumer Protection Act* and its associated Regulations. Community Enterprises Corp. also carrying on business as Community Cash Canada (respondent, licensee, or "Community Cash") is a licensed payday lender operating in British Columbia. On February 6, 2020 Consumer Protection BC conducted an inspection of its location in Vancouver, BC. On May 25, 2020 an inspector issued a Report to the Director alleging that the respondent had on multiple occasions failed to ensure that payday loan agreements disclosed the correct loan term and the correct annual percentage interest rate (APR) for the loans, in contravention of section 112.06 (2).

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 May 28th I sent the respondent notice of this hearing, giving it until June 15th 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.

On June 12th Community Cash responded in this hearing by email, attaching a letter addressing the Report. Its CEO, Mr Balzer, indicated he had not received a complete physical copy of the Report. After ensuring delivery of the materials, on June 17th I extended an opportunity for the respondent to add to its earlier submission by June 24th. On June 24th Mr Balzer provided an amended response letter. These events lead me to conclude an appropriate opportunity to be heard has been provided to the respondent.

ALLEGED CONTRAVENTIONS

The Report alleges that the respondent contravened the Act when it failed, between December 11, 2019 and February 5, 2020, to state correctly in payday loan agreements:

- the loan terms (10 instances);
- the annual percentage rates for the cost of borrowing applicable to the loans (13 instances).

Though there are two components to the contraventions, corresponding to distinct aspects of payday loan agreements (set out below), the Report frames both as breaches of section 112.06 (2) of the Act rather than two specific allegations, i.e., breach of section 112.06 (2)(g) and breach of section 112.06 (2)(k). In fact, if a loan term is calculated incorrectly, inevitably the APR will be misstated. In that sense the components are overlapping to some degree. Because the Report does not expressly treat the two breaches as separate allegations or recommend that sanctions be compounded by the dual nature of the violations, I will approach the matter as a unitary allegation involving two aspects of section 112.06 (2) and multiple occurrences of the same contravention.

LEGISLATION

Business Practices and Consumer Protection Act

Section 57 (1) In this Part:
"APR" means the annual percentage rate calculated in accordance with the regulations;

Section 112.06 (2) A payday lender must ensure that the loan agreement includes […]

(g) the payday loan term of the payday loan;

(k) the total cost of credit and the APR for the payday loan;

[other sub-sections omitted]

Disclosure of the Cost of Consumer Credit Regulation

Section 4

A disclosed APR is considered to be accurate if it is within 1/8 of 1% of the actual APR for the credit agreement as calculated in accordance with the Act and this regulation.

Section 6

(1) Subject to this Division, unless determined under section 9, the APR for a credit agreement is the amount determined by the following formula:

$$APR = \frac{(100 \times C)}{(T \times P)}$$

where

C = the total cost of credit;

T = the length of the term expressed in years;

P = the average outstanding principal over the term as calculated under subsection (2).

EVIDENCE OF THE INSPECTOR

- The respondent has been licensed as a payday lender since June 2016.
- In January 2017, Consumer Protection BC inspected the business and found that the APRs of certain payday loans could not be determined because the loan agreements had incorrect repayment dates and repayment amounts.
- In March 2017 the inspector issued a post-inspection letter informing the respondent of the apparent contravention.
- In August 2017 Consumer Protection BC again inspected the licensee's business. The inspector concluded that the respondent had again issued loans incorrectly disclosing APRs.
- Following the inspection, the inspector provided the respondent an Excel spreadsheet developed by Consumer Protection BC to calculate APRs of payday loans. The respondent replied in an email stating an intention to follow up with their "programmers" to get the APR calculation corrected immediately.

- The inspector issued a formal "warning letter" to the respondent one day after the inspection. The respondent in reply stated that it expected the APR calculation issue to be addressed by the end of the following day.

- In December 2018 and January 2019 Consumer Protection BC performed two further inspections of the respondent business. Inspectors found payday loan agreements in which the APR disclosures were incorrect.

- By means of post-inspection letter, the respondent was informed of the most recent contraventions in January 2019.

- On February 6, 2020, the inspector attended the respondent business to test for its compliance with provisions of the Act at issue in previous inspections.

- The inspector examined how the respondent uses its software system to generates payday loan agreements.

- An employee demonstrated how a payday loan agreement was generated by executing a mock payday loan. He made manual entries into several fields of the payday loan agreement template, including number of repayments, loan term (number of days) and the loan amount.

- According to the employee, the loan term (number of days) is calculated by counting the number of days from the date of advance to the final repayment date using the computer's calendar. (The inspector notes that the term of a payday loan must be calculated by counting each twenty-four-hour period after the date of advance up to and including the period ending on the repayment date, but not including the first date of advance.)

- The employee stated that when a loan agreement is generated by the software, the APR automatically defaults to a specific value which is then adjusted for the specific payday loan agreement by clicking an "Update Field". The programme then generates the APR value for that payday loan.

- In February the respondent emailed the inspector, stating that the respondent had been working with a software developer for the past 3 months in order to resolve the APR calculation issue.

- The inspector requested that the respondent provide copies of any communication

with the software developer to substantiate the claim that it was actively working to rectify the issue. The respondent said all communication had been verbal and it did not have records of any written communication.

- Table 2 of the Report itemizes 10 payday loans in which the stated loan terms, when recalculated by the inspector, feature discrepancies of one or two days (for six loans) to between 11 to 20 days. In nine cases the stated terms exceed the actual term. Copies of the original loan documents are attached as Exhibits to the Report.

- Table 3 of the Report itemizes 13 payday loans with stated APRs diverging from the inspector's calculation, ostensibly made in accordance with the Regulation. In 11 cases the stated APR is between about 5% and 100% below the recalculated APR. Copies of the original loan documents are attached as Exhibits to the Report.

EVIDENCE OF THE RESPONDENT

The respondent has submitted two statements by Mr Balzer, and no other documentary evidence. The response does not take issue with any factual matters raised in the Report's allegations. In summarized form, the respondent says:

- Mr Balzer was aware since inspections in December 2018 and January 2019 that a software issue was causing APR miscalculations and required attention. "Since then we have been working to fix this issue", including switching software.

- After trying new software in April 2019 that it believed resolved the issue, the respondent found that was not the case and requested a customized programme from a software provider. The new custom software was supposed to be implemented by March 2020.

- In the interim period before the new software became available the respondent did "most of the loan process manually", using the formula from the Regulation as found on Consumer Protection BC's website. Until the inspection in early February 2020, the respondent believed its calculations to be correct.

- After the February inspection the respondent incorporated the Excel spreadsheet (designed by Consumer Protection BC) into its lending practices. It also has added an internal audit of APR and terms for new loans in order to confirm or correct the disclosures within 24 hours.

- Mr Balzer recalls that after receiving post-inspection correspondence in 2017 highlighting the issues he instructed the operations manager to make the needed changes. However, additional relevant information about the compliance issues was not conveyed to him

between in the period up to March 2018 due to the "severe" insubordination of the then operations manager. He says that due to "legal issues" he was unable to access "any of this person's work".

- In addition to "working towards ensuring our office is run according to CPBC standards", the respondent on its own initiative is reviewing loan documents from the last two years and determining costs of borrowing to be refunded or credited to affected borrowers.

ANALYSIS

Community Cash refers to deficiencies in its software system to explain the missing or incorrect APRs and inaccurate loan terms, it introduces no further evidence in relation to any of the assertions or analysis in the Report. In that sense, the relevant factual basis, or particulars, of the Report are uncontested. However, I must also assess the evidence in the Report before drawing any final conclusions about the allegations.

Failure to include the actual payday loan term in loan agreements

After reviewing the Exhibits in Table 2 it is apparent that the agreements cited by the inspector contain discrepancies of various magnitude between the actual and stated number of days in the loan term. I note, however, that in all cases the agreements indicate repayment dates that I assume are intended to define the actual loan term (with one exception, perhaps: a loan appears to be issued and repayable on the same day, suggesting errors in respect of both the stated term – 14 days – and the actual repayment date). As the agreements appear generally to clearly present the loan repayment dates, the miscalculation of the length of terms (which are in all cases but one overstated) would not be enforceable against the borrower in any case. In six cases out of ten the discrepancy is one or two days. However, in four cases the variance is much greater.

The Exhibit evidence demonstrates that the respondent's agreements failed to specify the actual length of the term of the loans in relation to the stated repayment dates, contrary to section 112.06 (2)(g) of the Act. I find that this aspect of the contravention is proven. Although 10 breaches are demonstrated, I consider these as part of a pattern of non-conformity with respect to section 112.06 (2) rather than separate contraventions.

Failure to state APR in payday loan agreements

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 by 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 the case of one of the loan agreements both "by hand", following the prescribed formula (found in Appendix B of the Report), and by entering the loan information in the customized Excel spread sheet used by Consumer Protection BC (and shared with licensees). The resulting APR is consistent considering both methods. (I note that in previous adjudications

on this issue I have applied the "section 6" formula to verify APR calculations in the process of confirming that both the inspectors' application of the formula and reliance on "the spreadsheet" as set out in Reports are in fact accurate. In previous decisions I verified by comparison of both methods that the spreadsheet as applied by the inspectors is indeed a reliable APR calculator for payday loans.)

Regarding the 13 loans in Table 3 whose APRs are allegedly non-conforming, I assess the 11 agreements in which the issue is unequivocal (in two cases it may be that loans were not extended long enough to make an APR feasible). I have determined that:

- the agreement in Exhibit 10 incorrectly states the APR recalculated in Exhibit 37
- the agreement in Exhibit 12 incorrectly states the APR recalculated in Exhibit 38
- the agreement in Exhibit 14 incorrectly states the APR recalculated in Exhibit 39
- the agreement in Exhibit 16 incorrectly states the APR recalculated in Exhibit 40
- the agreement in Exhibit 18 incorrectly states the APR recalculated in Exhibit 41
- the agreement in Exhibit 22 incorrectly states the APR recalculated in Exhibit 43
- the agreement in Exhibit 24 incorrectly states the APR recalculated in Exhibit 44
- the agreement in Exhibit 26 incorrectly states the APR recalculated in Exhibit 45
- the agreement in Exhibit 28 incorrectly states the APR recalculated in Exhibit 46
- the agreement in Exhibit 30 incorrectly states the APR recalculated in Exhibit 47
- the agreement in Exhibit 32 incorrectly states the APR recalculated in Exhibit 48

According to the Act APRs are determined and stated in a "prescribed" manner. The Report's allegation that the respondent's failure to do so is equivalent to non-disclosure of *the APR* is based on sound reasoning. There is no fundamental difference between stating an APR not in accordance with the prescribed calculation and failing to disclose the APR. The respondent has therefore contravened section 112.06 (2)(k) of the Act as alleged.

DUE DILIGENCE

The respondent is entitled to a complete defence against the allegation if it shows that it took all reasonable steps to prevent the contraventions. In its submission Community Cash In the matter of non-disclosure of APRs (or attempted but invalid disclosures), Community Cash refers to continuous difficulties with its payday lending software generating accurate APRs for a period of over two years. Even if I accept that the CEO, Mr Balzer, did not have the benefit of being informed at all times of his manager's interactions with various inspectors on this matter, the respondent was aware that the APR issue still required attention at least from January 2019. The deficiencies of APR calculation going back to early 2019 (or to 2017) could have been discovered with diligence. That is so even if they had not been highlighted several times by the inspector. There is no real evidence that Community Cash took steps that a highly diligent payday lender would have, by way of self-audit, technical testing and troubleshooting, or the like. 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) is prescribed for the purpose of administrative penalty ("AMP") 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 AMP will be imposed, as explained below.

Compliance Order

Having found the respondent responsible for contravention of section 112.06 (2), I have authority per section 155 (4)(d) of the Act to compel the respondent to remediate the irregularities cited in the Report, providing proof by September 15th of having consistently correct term and APR calculations for new or recent payday loans (precise terms are set out in the Order issued with this decision). The respondent must also reimburse Consumer Protection BC for costs in the amount of **$750** for the inspection relating to the contravention and preparation of the Report.

Administrative penalty

In the context of the factors under section 164 (2) of the Act (below), I have decided that an AMP is warranted for the contravention cited above. The purpose is to effect deterrence and increase the likelihood of compliance, which is appropriate here due to the dual-aspects of the loan agreement deficiencies, their recurrence documented over two months and several loan transactions, and the respondent's inspection history involving similar issues unresolved over time.

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. 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.

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 focussed on the Policy.

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) of the Act is a Type B contravention under the Policy (Appendix A, page 12, line 90). 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 $3,500 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 statutory enforcement actions by Consumer Protection BC against Community Cash noted in the Report.
2. Gravity and magnitude of the contravention	**0**	The licensee's failure to correctly fulfil this basic requirement is serious enough to justify sanction. The disclosure of APR required by the Act relates to borrowers' awareness of the high costs of payday loans in comparison to non-payday credit instruments. It is in the borrowers' interests to have an accurate disclosure (the Act also requires the lender to review the APR with borrowers). However, the contravention was discovered during inspections and not in relation to complaints or other indications that borrowers may have been harmed and I do not believe the circumstances merit an increase to the basic penalty.
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 13 payday loans over a period of about two months. In 11 of those cases the APR is confirmed to be incorrect (in two cases the loan terms did not permit the APR calculation). There are several occurrences of the

		contravention, however the Report presents relatively modest evidence of repeat violations and does not prove they were occurring "continuously". In my view this level off repetition is not a significantly aggravating factor.
5. Whether the contravention was deliberate	**0**	The contraventions appear to relate to the licensee's lack of diligence and an inability to conquer certain technical obstacles in a timely way. I doubt the presence of intent to circumvent the Act.
6. Economic benefit derived by the person from the contraventions	**0**	I am unaware of any evidence the respondent derived economic benefit specific to the contravening loans, as compared to other payday lending. I do not believe the misstated APRs induced borrowers who would otherwise not have entered the agreements.
7. Whether the person made reasonable efforts to mitigate or reverse the contravention's effects	**0**	There is no evidence or suggestion concerning the effects of the contraventions, therefore I am unable to do assess whether mitigation or reversal are relevant. This factor is neutral. (I note the respondent's statement that it will review loans over the last two years to distribute borrowing fee refunds – but do not know if this initiative is in fact occurring.)
8. The person's efforts to correct the contraventions & prevent recurrence	**-1**	The respondent states it is currently using the Consumer Protection BC spreadsheet application for APR calculation. I believe it intends to implement the custom software it ordered once available. While there is no concrete evidence of remediation of the violations, I accept the respondent's intention to avoid repetition of the breach. That is a modest 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 August 7, 2020 in Vancouver, BC.

Robert Penkala
Manager of Enforcement Hearings

Encl: Compliance Order / Notice of Penalty