

In the Matter of an Appeal pursuant to Section 179 of the *Consumer Protection Act*, RSA 2000, c C-26.3 Arising from a June 25, 2019 Decision of the Director of Fair Trading (as Delegated) to Issue an Administrative Penalty to Financial Debt Recovery Limited

DECISION OF THE APPEAL BOARD

Appeal Board: Christopher Davison (Chair), Bellanne Meltzer Toren, Bill Klasky

Counsel: Andrew Pozzobon: for the Appellant, Financial Debt Recovery Limited (“FDR”)
Allison Scott: for the Respondent, the Director of Fair Trading (as delegated) (“the Director”)

OVERVIEW

1. The facts of this case are agreed to by the Director and FDR. In short, FDR has engaged in debt collection activities outside of the 6 year limitation period required under *Collection and Debt Repayment Practices Regulation*, Alta Reg 194/1999 (“*CDRPR*”) and did not engage in proper due diligence in regards to these debts. FDR has pleaded guilty to a contravention of section 12 (1)(x) of the *CDRPR*, and the parties have jointly submitted that FDR should be fined \$10,000. The parties have also jointly agreed to enter into an undertaking pursuant to s. 152 of the *Consumer Protection Act*, RSA 2000, c C-26.3 (“*CPA*”).

DECISION

2. For the following reasons, the Appeal Board accepts the guilty plea and sanction proposed, and makes the order requested.

JURISDICTION

3. On June 25, 2019, the Director issued an administrative penalty of \$17,000 to FDR. The administrative penalty found that FDR committed breaches of s. 12 (1)(i), s. 12 (1)(k)(i), s. 12 (1)(k)(ii), s. 12 (1)(x) and s. 23.2 of the *CDRPR*.
4. On July 24, 2019, FDR appealed the administrative penalty pursuant to s. 179 of the *CPA*.

5. On August 20, 2019, the Appeal Board was appointed and given jurisdiction over this appeal, pursuant to s. 179(4) of the *CPA* and s. 3 of the *Appeal Board Regulation, Alta Reg 195/1999 ("ABR")*.
6. Upon appeal, the findings described on the Administrative Penalty became allegations for the Appeal Board to determine in the context of a new trial (s. 179(8) of the *CPA*). A trial date was set for May 4 and 5, 2020.
7. Prior to the trial date, the parties indicated they would like to proceed by way of joint submission. The trial dates were vacated.
8. The Director provided to the Appeal Board an unsigned joint submission on May 7, 2020. FDR verified that they were in agreement with the joint submission on May 9, 2020.
9. This matter is therefore proceeding in writing, without the need for a trial, pursuant to s. 13 of the *ABR*.

FACTS

10. The joint submission contains the following agreed facts:
 - a. FDR is a licensed collection agency (#300871) under the *CPA* and *CDRPR*.
 - b. FDR has operated in Canada for over 25 years.
 - c. FDR purchases debt accounts from various companies. FDR has due diligence processes in place that are used to review any debt accounts purchased by FDR.
 - d. From February 1, 2017 to April 27, 2017, Ian Kinney received calls from FDR on FDR file P2125023.
 - e. On February 2, 2017, Ian Kinney indicated to FDR collector Matthew Seng that he believed the debt was over 20 years old, was not aware it was outstanding, and that he did not believe that the debt was owed. FDR continued to engage in collection activity on the debt.
 - f. After receiving calls from FDR in April, 2017, Ian Kinney agreed to enter into a settlement agreement for \$500 to resolve the debt.

- g. After entering into the settlement agreement with FDR, Ian Kinney determined that the *CPA* and *CDRPR* prohibit collection activity on debts outside the 6 year limitation period.
- h. Ian Kinney contacted FDR on August 2, 2017 to pursue the matter. FDR collector Achala Fernando confirmed that the debt was from 2000, it was sold to FDR, and that FDR had the right to collect.
- i. FDR's due diligence processes did not identify the Ian Kinney account as uncollectable or outside the 6 year limitation period.
- j. FDR has been previously sanctioned for similar contraventions of the *CDRPR*, including:
 - i. In 2015, FDR was the subject to a \$2,750 administrative penalty for breaches of s. 12 (1)(i) (harassment), s. 12 (1)(k)(i) (not the debtor), s. 12 (1)(x) (six year limitation), s. 23.2 (complete accounting), and s. 23.3 (records);
 - ii. In 2014, FDR entered into an Undertaking with respect to breaches of s. 12 (1)(k)(i) and s. 12 (1)(x); and
 - iii. In 2013, FDR plead guilty to one count of a breach of s. 12 (1)(x) and was fined \$2,500.
- k. The Undertaking is drafted to remain in effect for two years, during which time, in the event of a complaint, evidence that FDR failed to adopt the additional due diligence processes would represent a contravention of the Undertaking and be separate to additional sanction.
- l. The Director engaged in additional review of the contravention of s. 12(1)(x) by FDR and the outcomes that can arise from contravention of that section. That review has confirmed that the direct impact on the consumer of ongoing collection activity on a debt that the consumer may have little to no recollection or records of, the potential impact on their finances if they choose to settle to make the collection activity stop, and the potential for a negative impact on credit reports represents a serious contravention of the *CDRPR*.

THE GUILTY PLEA IS ACCEPTED

11. The joint submission states the following:

“12. The Director and FDR have agreed to the following settlement proposal:

- a. FDR will plead guilty (but somewhat under duress) to section 12(1)(x) of the Consumer Protection Act and will pay a fine or administrative penalty in the amount of \$10,000 for that contravention;
- b. FDR will agree to an Undertaking...”

12. Based on the totality of the joint submission, it is clear that the reference to the “Consumer Protection Act” in the above quotation was a typo – their intent was clearly to plead guilty to s. 12(1)(x) of the *CDRPR*.

13. The above quotation also states the guilty plea is made “somewhat under duress.” The Appeal Board takes this to mean not under duress in any the legal or contractual sense. Were this joint submission agreed to under actual duress, the Appeal Board would have expected that FDR would not have agreed to the word “somewhat”. Moreover, that they agreed to any part of this joint submission under actual duress makes no sense given they are represented by competent counsel, given they had months to negotiate and craft this joint submission, and given they have separately verified to the Appeal Board they are making this submission jointly. Nothing prevented FDR from running the trial on the booked dates, and they were certainly free to do so. Rather than running a trial, however, they have decided to enter into this joint submission.

14. Section 12(1)(x) of the *CDRPR* states “No collection agency or collector may...pursue a non-judgment debt where the last payment or written acknowledgement by the debtor is more than 6 years previous.”

15. The Appeal Board finds that the agreed facts show that FDR has committed the essential elements of this offence. The guilty plea to s. 12(1)(x) of the *CDRPR* is accepted.

16. The *CPA* and *CDRPR* are clearly created for the purpose of protecting the public and creating a balanced marketplace where consumers are fairly treated (See the Preamble of the *CPA*). The offences contained therein are public welfare offences. As such, *prima facie* they are

offences of strict liability (*R. v. Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299 (“SSM”) at p. 1326) to which a defence based upon proof that all reasonable steps in the performance of due diligence to avoid the offence were taken by FDR would be available to FDR in defending against alleged breaches.

17. In accepting this guilty plea, the Appeal Board finds that the diligence processes adopted by FDR in an attempt to avoid a breach of s. 12(1)(x) of the *CDRPR* were insufficient to meet the reasonable care threshold of “due diligence” as defined by the Supreme Court in *SSM* at p. 1326.
18. The Appeal Board accordingly also dismisses the allegations that FDR breached s. 12 (1)(i), s. 12 (1)(k)(i), s. 12 (1)(k)(ii), and s. 23.2 of the *CDRPR* as the factual bases of these offences have not been established.

THE PROPOSED SANCTION IS ACCEPTED

19. In accepting or rejecting a joint submission on sanction, the only test the Appeal Board must apply is whether the proposed sanction would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This means that we must avoid “rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts” (*R. v. Anthony-Cook*, 2016 SCC 43 (CanLII) at paras. 32, 33 and 34).
20. The Appeal Board finds the joint submission has been made with due consideration to the seriousness of the offence towards the public. The parties have also considered the aggravating nature of FDR’s previous offending, which includes three prior breaches of the same section of the *CDRPR*. The parties have further considered the mitigating nature of the s. 152 of the *CDRPR* undertaking, which puts FDR in the position that if they commit further breaches within the next two years, it may impact their ability to be a licensed debt collection agency (s. 127 (b)(iv) of the *CPA*).
21. While the Appeal Board finds the \$10,000 fine to be low given the circumstances, and perhaps even lower than we would have imposed, we do not find that this joint submission would cause an informed and reasonable public to lose confidence in the institution of the

Consumer Service Appeal Board. We do not find that the joint submission is contrary to the public interest.

22. Accordingly, we accept the sanction as jointly submitted, and impose a \$10,000 fine.

CONCLUSION AND ORDER

23. In accordance with the reasons above, the Appeal Board orders the following sanction against FDR:

- a. FDR is ordered to pay \$10,000 for breach of s. 12 (1)(x) of the *CDRPR*.
- b. The allegations that FDR breached s. 12 (1)(i), s. 12 (1)(k)(i), s. 12 (1)(k)(ii), and s. 23.2 of the *CDRPR* are dismissed.
- c. No decision is made as to costs.

ISSUED AND DATED at the City of Calgary in the Province of Alberta this 29 day of May, 2020



Christopher Davison, Chair

On Behalf of the Appeal Board