ALBERTA CONSUMER SERVICES APPEAL BOARD

IN THE MATTER OF AN APPEAL BY
CLEARVIEW SERVICES LTD. and KYLE JAMES LUMSDEN
PURSUANT TO SECTION 179(1) OF THE *CONSUMER PROTECTION ACT*, RSA 2000, c.26.3 ("the CPA")

and

IN THE MATTER OF A DIRECTOR'S ORDER AND AN ADMINISTRATIVE PENALTY ISSUED BY THE ALBERTA DIRECTOR OF FAIR TRADING PURSUANT TO SECTIONS 157 AND 158.1(1) OF THE CPA

APPEAL BOARD DECISION

DECISION ISSUED

12 November 2024

APPEAL BOARD

Lorenz Berner (Appeal Board Chair)
Jamie Tiessen (Appeal Board Member)
Bellanne Toren (Appeal Board Member)

PARTIES' REPRESENTATIVES

Appellants (Clearview Services Ltd. and Kyle James Lumsden): Kyle Lumsden

Respondent (Director of Fair Trading): J.D. Crookshanks, Ph.D, Director of Fair Trading, as delegated

SUMMARY

1. The Appellant, Clearview Services Ltd. (**Clearview**), is a Calgary-based plumbing and HVAC company. Kyle James Lumsden is the President and a Director of Clearview.

2. In January 2022, Clearview responded to a homeowner's call regarding a furnace that had failed. The furnace was returned to operation the same day, by means of the replacement of a gas valve. The homeowner paid Clearview a total of $1,676.97 for the cost of the new gas valve and the technician's attendance, diagnosis, and replacement of the gas valve.

3. Subsequently, the homeowner complained to the Fair Trading branch of Service Alberta and Red Tape Reduction (**Service Alberta**) that he had been misled about the cost of the gas valve, and that the total cost of the service was unreasonable and unfair. The Consumer Investigation Unit investigated and provided a report to the Director of Fair Trading (the **Director**). After providing Clearview and Mr. Lumsden an opportunity to present evidence and/or submissions, the Director issued an Order and Notice of Administrative Penalty.

4. The Director determined that Clearview committed several breaches of the Consumer Protection Act and regulations governing Direct Sales Contracts. The Director's Order required Clearview and Mr. Lumsden and any employee, representative, or agent of them to cease committing unfair practices under the *Consumer Protection Act,* and ensure that all future direct sales and prepaid contracts comply with the requirements of the *Consumer Protection Act* and its regulations. The Director's Notice of Administrative Penalty (**Administrative Penalty**) assessed an administrative penalty of $10,000 against Clearview.[1]

5. Clearview and Mr. Lumsden appealed the Director's decisions, and this Appeal Board was appointed to hear and determine the appeal.

6. The Appeal Board affirms most of the findings that Clearview breached the *Consumer Protection Act*, and, with slight variation, affirms the Director's Order to comply. The Appeal Board also reviewed the penalties which were assessed and itemized in the Director's Decision. We re-assess Administrative Penalties against Clearview totaling $8,750.00, with details as set out below.

JURISDICTION, PROCEDURAL MATTERS, AND STANDARD OF REVIEW

7. Both the Order and Administrative Penalty were issued by the Director on December 21, 2023. The Order was issued pursuant to section 157(1) and (2) of the *Consumer Protection Act* (***CPA***)[2], based on findings that Clearview breached the *CPA* as well as provisions of the *Designation of Trades and Business Regulation[3]* (**DTBR)** and the *Direct Sales Cancellation and*

[1] We note that there appears to be an addition error in this figure, as the individual Administrative Penalties assessed by the Director appear to add up only to $9,500.
[2] RSA 2000, c.C-26.3
[3] Alta Reg 178/1999

Exemption Regulation[4] (***DSCER***). The Administrative Penalty was levied pursuant to section 158.1 of the *CPA*.

8. On January 16, 2024, Clearview and Mr. Lumsden appealed the Director's Order and the Administrative Penalty to the Minister of Service Alberta and Red Tape Reduction, pursuant to section 179(1)(e) of the CPA.

9. The Appeal Board was appointed on February 8, 2024, following the ministry's usual process of confirming that the Appeal Board members had no conflicts of interest.

10. The Appeal Board Chair contacted the parties and arranged for a pre-appeal conference to address procedural, timing and related issues. This was held via a Teams videoconference meeting on May 17, 2024 – with Mr. Lumsden participating on behalf of Clearview and himself, and Dr. Crookshanks appearing as the Director of Fair Trading, as delegated. Although Mr. Lumsden indicated that he had retained or intended to retain legal counsel to represent him and Clearview in the appeal, and although he was reminded of his right to do so as well as encouraged to secure counsel, no legal representative participated in either the pre-appeal conference or any part of the appeal hearing.

11. Mr. Lumsden made clear to the Appeal Board members that he was unhappy with Service Alberta and the Director of Fair Trading. In his view, the process leading up to the Order and Administrative Penalty was unfair, Service Alberta's aggressive use of enforcement and "fines" was disproportionate in view of Clearview's extensive business history and overall track record, and Clearview has consistently been committed to compliance with Service Alberta requirements.[5]

12. Through the pre-appeal conference and subsequent email communications from the Appeal Board Chair, the following timing was settled:

    a. The appeal was scheduled to be heard on September 26, 2024.

    b. The appeal would be heard by way of a digital hearing, via Teams teleconference.

    c. The Director anticipated calling one witness to testify (being the Investigator who investigated the complaint at issue).

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[4] Alta Reg 101/1999

[5] Mr. Lumsden noted his intention to appeal as far as necessary to succeed in having his position upheld. The Appeal Board therefore considers it appropriate to recite relevant pre-appeal and process related facts so as to ensure a fulsome record is created.

d. Mr. Lumsden and Clearview were uncertain whether or how many witnesses may testify on their behalf, but were advised that they may present evidence through witnesses and/or documents.

e. Disclosure of relevant records by the Director would occur on or about June 14, 2024. In the absence of any objection by or on behalf of Mr. Lumsden or Clearview by August 1, 2024, the disclosure package would be made available to the Appeal Board members.

f. The appeal hearing would be a "new trial" relating to the decisions under appeal, as prescribed by section 179(8) of the *CPA*. As such, either party could present evidence to the Appeal Board, whether such evidence had been considered by the Director of Fair Trading or not.

13. On June 13, 2024, Dr. Crookshanks sent an email to Mr. Lumsden (and copied to the Appeal Board Chair) indicating that he was sending the Director's disclosure documents to Mr. Lumsden via a separate email. On August 2, 2024, Dr. Crookshanks emailed the Appeal Board Chair (copying Mr. Lumsden) that he had not received any concerns or objections from Mr. Lumsden since disclosure had been made available to Mr. Lumsden in June. Accordingly, the disclosure was made available to the Appeal Board Chair on August 2, 2024 (and shortly thereafter to the other Appeal Board members).

14. A Notice of Appeal Hearing was issued to the parties by email on August 25, 2024. As Mr. Lumsden and Clearview did not acknowledge receipt via email, physical copies of the Notice of Appeal Hearing were also delivered by Registered Mail.

15. On September 20, 2024, Mr. Lumsden emailed Dr. Crookshanks and indicated he was unable to access the disclosure documents that were made available to him through the file-sharing link on June 13, 2024. Dr. Crookshanks responded that the original file sharing link would have expired, but he would send a new link. Further email dialogue ensued, with the Appeal Board Chair being copied. Eventually, the Appeal Board Chair provided a distinct link to the disclosure package through a different file-sharing platform, and Mr. Lumsden acknowledged receiving the documents in advance of his hearing.

16. As the appeal hearing was to proceed in a digital format via Teams videoconference, the Appeal Board Chair made clear that the parties needed to provide digital copies of documents that they intended to enter as exhibits to the Appeal Board and the opposing party, and would need to be able to display and speak to any such documents over the computer during the appeal hearing.

17. The appeal hearing took place on September 26, 2024.

18. During the Appeal Hearing, one witness testified on behalf of the Director. Seventeen documents were entered as hearing exhibits on behalf of the Director and considered by the Appeal Board.[6] The Director also provided a written "Appeal Brief of the Respondent", outlining his submissions. Mr. Lumsden cross-examined the Director's witness and then testified under oath. He tendered one document as an "Exhibit" – it essentially consisted of the written submissions on behalf of Clearview and the Appeal Board treated it as such. Both the Director and Mr. Lumsden made oral closing submissions, and the Appeal Board considered these together with the evidence and written arguments.

19. Pursuant to section 179(6) of the *Consumer Protection Act*, the Appeal Board has the authority to confirm, vary or quash the order and administrative penalties that are under appeal.

RELEVANT LEGISLATION

20. The following provisions of the *CPA* and of regulations made under the *CPA* are relevant to this appeal:

Consumer Protection Act ("CPA")

6 (2) It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction,

. . .

(c) to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;

(d) to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference;

. . .

24 In this Part,

[6] A list of the exhibits entered during the Appeal Hearing is set out in Appendix A. The Appeal Board confirmed that both the Director's Decision Letter of December 21, 2022 and the Appellant's Notice of Appeal form part of the record for these proceedings, and need not otherwise be entered as hearing exhibits.

. . .

(a.1) “direct sales contract” means a consumer transaction that is a contract, other than a time share contract, in which

(i) the consideration for the goods or services exceeds an amount specified in the regulations, and

(ii) the contract is negotiated or concluded in person at a place other than the supplier’s place of business or at a place other than a market place, auction, trade fair, agricultural fair or exhibition, and includes an offer to buy goods or services or to enter into a contract mentioned in subclause (i) or (ii);

35 A written direct sales contract must include

. . .

(d) the date and place at which the direct sales contract is entered into;

(e) a description of the goods or services, sufficient to identify them;

(f) a statement of cancellation rights that conforms with the requirements set out in the regulations;

(g) the itemized price of the goods or services, or both;

…

(j) in the case of a sales contract for the future delivery of goods, future provision of services or future delivery of goods together with services, the delivery date for the goods or commencement date for the services, or both;

(k) in the case of a sales contract for the future provision of services or the delivery of goods together with services, the completion date for providing the services or the goods together with services;

. . .

(n) the signatures of the consumer and the supplier.

157 (1) If, in the opinion of the Director

(a) a person is contravening or has contravened this Act or the regulations,

(b) a regulated person is using any form, agreement, letter or other document that is misleading or contains a term that misrepresents this Act or the regulations, or

(c) a print, broadcast or electronic publisher, including but not limited to a publisher of telephone directories and Internet listings, is publishing or has published an advertisement that is misleading or contains a term that contravenes this Act or the regulations, the Director may issue an order directed to the person or publisher.

(2) An order may direct the person or publisher

. . .

(a) to stop engaging in anything that is described in the order, subject to any terms or conditions set out in the order, and

(b) to take any measures specified in the order, within the time specified in the order, to ensure that this Act and the regulations are complied with.

158.1 (1) If the Director is of the opinion that a person

. . .

(a) has contravened a provision of this Act or the regulations, or

(b) has failed to comply with a term or condition of a licence issued under this Act or the regulations, the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.

Designation of Trades and Businesses Regulation ("DTBR")

5 (1) Part 10 of the Consumer Protection Act applies to the prepaid contracting business.

(2) In this section,

(a) "construction or maintenance contract" means a contract for the purpose of

(i) constructing, altering, maintaining, repairing, adding to or improving

(A) a building that is used or is to be used by the owner, occupier or person in control of it as the owner's, occupier's or person's own private dwelling,

or

(B) a structure that is to be used in connection with a building referred to in paragraph (A) and that is located on the same parcel as that building,

or

(ii) altering, maintaining or improving real property to be used in connection with a building or structure referred to in subclause (i), but does not include a contract referred to in subsection (3);

(b) "prepaid contract" means a construction or maintenance contract in which all or part of the contract price is to be paid before all the goods or services called for in the contract are provided;

(c) "prepaid contracting business" means the activities of soliciting, negotiating or concluding in person, at any place other than the seller's place of business, a prepaid contract.

Direct Sales Cancellation and Exemption Regulation ("DSCER")

2 The amount for the purpose of section 24(a) of the Act is $25.

3 (1) A statement of cancellation rights must

(a) contain the words set out in either of the options shown in the Schedule,

(b) show the heading in not less than 12-point bold type,

(c) show the statement of 10-day cancellation rights in not less than 12-point type, and

(d) show the remainder of the information in not less than 10-point type.

(2) If the statement of cancellation rights is not printed on the front of the direct sales contract, there is to be a notice printed on the front of the direct sales contract, in not less than 12-point bold type, indicating where on the direct sales contract the statement of cancellation rights is printed.

Prepaid Contracting Business Licensing Regulation ("PCBLR")

1 In this Regulation,

> (a) "Act" means the Consumer Protection Act;
>
> (b) "licence" means a prepaid contracting business licence established by this Regulation;
>
> (c) "prepaid contract" means a prepaid contract as defined in section 5 of the Designation of Trades and Businesses Regulation;
>
> (d) "prepaid contracting business" means the business designated as the prepaid contracting business under the *Designation of Trades and Businesses Regulation*.

. . .

10 (1) This section applies to prepaid contracts in which the value of the goods or services to be provided under the contract is more than $200.

(2) A person who is engaged in the prepaid contracting business must ensure that every prepaid contract that the person enters into

> (a) complies with the requirements of section 35 of the Act, and
>
> (b) sets out quality or types of materials to be used under the contract and the services and work to be carried out under the contract.

(3) A person who is engaged in the prepaid contracting business and who enters into a prepaid contract with a buyer must provide a copy of the signed contract to the buyer

> (a) on or before the date work commences under it, or
>
> (b) within 10 days after the buyer signs the contract,

whichever occurs first.

FINDINGS BY THE DIRECTOR OF FAIR TRADING

21. Following an investigation conducted by a Senior Investigator with Service Alberta, the Director sent a letter to Mr. Lumsden with his proposed factual and legal determinations and invited Mr. Lumsden to provide a response before a final decision would be made.

22. On or about September 7, 2023, Mr. Lumsden provided an 18 page response to the Director. The Director then prepared and issued his final decision on December 21, 2023. In his reasons, the Director addresses areas in which Mr. Lumsden's submissions impacted the Director's final decision. (For example, under item 7 of the Director's "Reasons for Decision" in respect of whether Clearview had breached section 6(4)(a) of the *CPA* by doing or saying anything that might reasonably have deceived or misled the complainant, the Director acknowledged evidentiary weaknesses regarding a possible discussion about the price of the gas valve in question, and refused to make this finding against Clearview.)

23. The Director made the following findings and assessed administrative penalties as follows:

    a. The work that Clearview provided to the Complainant constituted "services" under the *CPA*.

    b. The contract under which Clearview provided the services to the Complainant met the definition of "prepaid contract" under the DTBR.

    c. The contract also met the definition of "direct sales contract" under the *CPA*.

    d. As a prepaid contract and direct sales contract, the Clearview contract with the Complainant had to meet the requirements set out in section 35 of the *CPA*.

    e. Clearview's contract with the Complainant contravened the requirements of section 35 of the *CPA* in the following particulars:

        i. It failed to specify where the contract was signed (s.35(d)) – administrative penalty of $750.

        ii. It failed to describe the goods or services in a manner sufficient to identify them (s. 35(e)) – administrative penalty of $1,500.

iii. It failed to include the required cancellation rights notice in bolded font and in a size not less than 12-point font (s.35(f)) – administrative penalty of $1,000.

iv. It failed to include the itemized price of the goods and/or services to be provided (that is, it did not specify the price of the gas valve and a price for the installation labour) (s.35(g)) – administrative penalty of $1,500.

v. It failed to include the delivery date for the delivery and installation of the gas valve (s.35(j)) – administrative penalty of $500.

vi. It failed to include the completion date for the delivery and installation of the gas valve (s.35(k)) – administrative penalty of $500.

vii. It failed to include the signature of the supplier (that is, a Clearview representative) (s.35n)) – administrative penalty of $750.

f. Clearview committed unfair practices contrary to section 6 of the *CPA* as follows:

i. Using exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction, by failing to provide price itemization and concealing the price of the gas valve (s.6(2)(c)) – administrative penalty of $1,500.

ii. Charging a price for the installation of the gas valve that grossly exceeds the price at which similar goods or services are readily available without informing the Complainant of the difference in price and the reason for the difference (s.6(2)(d)) – administrative penalty of $1,500.

24. In assessing the administrative penalty amounts, the Director took into account factors that he considered mitigating and aggravating. We will address such factors in our own decision regarding penalty below.

25. As noted in the summary above, the Director also issued an order under section 157 of the *CPA*, requiring Clearview, Mr. Lumsden, and “any employee, representative or agent thereof” to cease committing all unfair practices and to ensure that all future direct sales and prepaid contracts comply with the *CPA* and its regulations.

EVIDENCE PRESENTED DURING THE APPEAL HEARING

26. The Director called one witness – RW – to testify at the appeal hearing. RW is the Senior Investigator with Service Alberta who conducted this investigation. RW solemnly swore to testify truthfully, and then provided detailed evidence in response to direct examination by Dr. Crookshanks. Key elements of that evidence can be summarized as follows.

    a. He has been an investigator with the Complaints Investigation Unit (CIU) with Service Alberta since February 2019, following a lengthy career with the Calgary Police Service (most of which as a detective). He has authority as a peace officer and as an investigator or "Inspector" under section 173(2) of the *CPA*.

    b. He received and reviewed the online complaint form and supporting material provided by the Complainant.

    c. The Complainant outlined the events giving rise to the complaint:

        i. On January 14, 2022, the Complainant's furnace stopped working. He contacted Clearview and a technician attended the same afternoon. The technician looked very briefly at the furnace, then said that in order to bring his tools into the house and diagnose the problem they would have to enter into a Diagnostic Contract for a fee of $189 in addition to the $89 dispatch fee.

        ii. The Complainant agreed to this, signed a (digital) Diagnostic Contract on an iPad, and paid the $291.90 fee (including GST) up front.

        iii. The technician assessed the furnace and determined that the gas valve required replacement. He said the cost would be about $1,300.

        iv. The Complainant thought this was high and asked the technician why it was so expensive. According to the Complainant, the technician responded that the gas valve cost was a very expensive part, costing $1,100.

        v. The Complainant had the technician check whether the original gas valve might still be under warranty, and the technician assessed that it was not under warranty.

        vi. The Complainant asked the technician whether he had the part in his truck. He did not.

vii. The Complainant asked the technician to confirm that the part was available. The technician did so and said he could obtain it and return to install the gas valve that same afternoon.

viii. At that point, the technician told the Complainant that in order to proceed, they would have to execute a contract and pay up front.

ix. The Complainant said that based on the technician's statement that the new gas valve cost $1,100 and because it was late afternoon on a Friday, he agreed to the contract and paid $1,385.07 (including GST) up front.

x. The technician left, obtained a replacement gas valve, returned, and installed it (taking roughly 45 minutes to install the gas valve when he returned). The furnace then resumed working.

xi. In the ensuing days, Complainant ascertained that the gas valve in question was available for between $118 (Lennox Parts NE store) and $157.35 (AMRE website).

xii. He first contacted Clearview and complained on January 17, 2022. He sought to get a breakdown of the cost of the gas valve as distinct from the installation/service cost and a partial refund for being misled and overcharged. Despite six calls with Clearview representatives, Clearview refused to make a refund or to provide a price breakdown – maintaining that it was a "packaged price" that he paid. The Complainant advised that he would file a complaint with Service Alberta.

xiii. On January 27, 2022, the CIU advised the Complainant that the complaint had been received, that his case was no. 44695, and that further information would be required for the CIU to complete an assessment.

d. In RW's view, the "bottom line" of the complaint was that the customer felt the price of the goods and services being offered by Clearview was very high, but he was unable to confirm this because the contract did not show a price breakdown of the goods and services, specifically the faulty part – "the gas valve."

e. RW further investigated the Complainant's direct concerns about the pricing and issues relating to the contract used by Clearview. This included verifying what

the Complainant had found to be the cost of the gas valve, analysing the contract that Clearview used with the Complainant for compliance with section 35 of the *CPA*, obtaining quotes for providing and replacing the gas valve from at least six other business (which ranged from approximately $486 to $1,016, averaging $750), and seeking Clearview's (Mr. Lumsden's) response to the complaint and potential breaches via both email and a telephone interview.

f. In response to RW, Clearview (Mr. Lumsden) objected to suggestions of "price gouging" and failure of the contract to comply with the *CPA*. Mr. Lumsden continued to refuse to provide any price break down of the contract for RW and reiterated Clearview's "by the job" pricing.

g. RW also looked into the Clearwater history of claims through the archives of the Service Alberta consumer affairs tracking system ("CATS"), finding at least 12 previous complaints that resulted in 5 warning letters, 4 advisory information responses, and one administrative penalty of $250.

h. In cross-examination, Mr. Lumsden challenged RW on his inquiries and determination regarding what other contractors might have charged for providing the same gas valve and diagnostic and installation service. RW conceded that none of the other contractors attended at the Complainant's home to evaluate what was needed, that he did not compare "Google review" ratings or warranty terms of the other contractors with Clearview's, and he did not investigate the qualifications of the technicians who would have installed the gas valve for these other contractors. He did reiterate that all the comparators were "brick and mortar" businesses like Clearview and had well established reputations in Calgary, and that he was careful, accurate and objective in describing the scenario to the other contractors.

i. In reply to Mr. Lumsden's question as to whether the Complainant had contracted for a new gas valve or for his furnace to be fixed, RW responded that it was first for diagnosis and then for replacement of the gas valve. RW also disagreed with Mr. Lumsden that the Complainant had opportunity to seek alternative pricing while the Clearview technician went to obtain the new gas valve, since the Complainant had not been provided the gas valve details and, in any event, had already paid in full.

j. At one point, Mr. Lumsden was reminded (as he had previously been informed) that he could call witnesses to refute testimony of RW regarding the Complainant's communications with RW, or on any other point in issue.

k. RW disagreed with Mr. Lumsden's suggestion that the Complaint amounted to a case of "buyer's remorse". To RW, the Complaint was solely regarding the contract price based upon "package pricing" and the Complainant was otherwise satisfied with Clearwater's work.

l. With respect to the font size on the Clearwater contract's cancellation rights notice, RW agreed with Mr. Lumsden that he was unaware of any impact that this had on the Complainant's cancellation rights.

27. Following cross-examination of RW, Mr. Lumsden was sworn and testified on behalf of Clearview. He did not call any other witnesses.

28. Mr. Lumsden's "evidence" amounted almost entirely to legal argument and submissions, to the effect that the Director's approach to the CPA is unfair and improper, the Clearview form of contract is focused on "transparency" and clarity, Service Alberta takes an unfair and overzealous enforcement approach instead of education and training businesses such as Clearview, and Clearview has consistently tried to be fully compliant in terms of its form of contract but has met with technological challenges (for example with the signature requirement). [7]

29. Mr. Lumsden stated that Complainant had the right to seek other bids for the services that Clearwater would provide (and that the contract says this expressly), that the Clearwater technicians are not free to discuss the cost of parts, and that Clearwater is a small business provider trying to keep contracting simple despite what Clearwater views as Service Alberta's unreasonable legal requirements for direct sales contracts.

ISSUES FOR DECISION

30. The Notice of Appeal sent by Clearview and Mr. Lumsden stated simply that the "Decision on Dec 21 2023" was being appealed; we will interpret this to mean that each of the findings of CPA breaches, the corresponding Administrative Penalties assessed for those breaches, and the Director's Order (requiring future compliance) are under appeal.

31. With respect to the Administrative Penalties, we will consider the findings and penalty amounts for each of the following determinations made by the Director:

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[7] Recognizing that the distinction between evidence and argument or "submissions" is not always obvious to non-lawyers, we allowed Mr. Lumsden to tender a 36 page document titled "Service Alberta VS Clearview Services Appeal Hearing" as Exhibit 19. However, although we allowed it as an "exhibit", the Appeal Board gives no *evidentiary* weight to this document but rather considered it as written submissions.

Contract Form/Content Breaches

a. *CPA* section 35(d) – failing to specify where the contract was signed.

b. *CPA* section 35(e) – failing to describe the goods and services in a manner sufficient to identify them.

c. *CPA* section 35(f) failure to set out the consumer's cancellation rights in bold text and in the appropriate font size.

d. *CPA* section 35(g) – failure to itemize the prices for provision of the gas valve and (separately) for provision of the installation labour.

e. *CPA* section 35(j) – failure to specify the delivery date for delivery and installation of the gas valve.

f. *CPA* section 35(k) - failure to specify the completion date for the delivery and installation of the gas valve.

g. *CPA* section 35(n) – failure to include the signature of the supplier on the contract.

Substantive "Fair Practice" Breaches

h. *CPA* section 6(2)(c) – using exaggeration, innuendo or ambiguity as to a material fact with respect to a consumer transaction (by failing to itemize and concealing the price of the gas valve).

i. *CPA* section 6(2)(d) – charging a price for the installation of the gas valve that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference and the reason for the difference.

32. With respect to the Director's Order to comply made under section 157 of the *CPA*, although this is independent of the Administrative Penalty decisions, the rationale for such an order largely flows from whether breaches of other provisions of the *CPA* have been established. As such we will address whether this order should be confirmed, varied or quashed in light of our other findings.

SUBMISSIONS

Submissions on behalf of the Director

33. The Director provided the Appeal Board with oral submissions as well as a written brief. He argued that both the evidence before the Appeal Board and the public interest warranted a decision to uphold each of the Director's findings. In his view, it was not our role to determine wither the *CPA* was "good" law, nor should our decision turn on whether the Complainant was or wasn't happy with the quality of service provided by Clearview.

34. The Contract in question was clearly a "Direct Sales Contract" under the *CPA*, insofar as it:

    a. The consideration for the contract exceeded $25; and

    b. was negotiated or concluded in person at the Complainant's home and not Clearview's place of business.[8]

35. As a direct sales contract under the *CPA*, the Contract had to be compliant with section 35 of the *CPA*. In the Director's submission, the Contract was *not* compliant with section 35 in several respects, specifically:

    a. Contrary to section 35(e), it did not describe the goods and services that were to be provided, sufficient to identify them. Simply stating "Replace Gas Valve – Universal" was too general to allow the Complainant to identify the *goods* to be supplied, which in turn meant that the Complainant was unable to obtain comparison prices for such goods.

    b. Contrary to section 35(g), it failed to set out itemized prices for the goods or services *or both,* that were to be provided. The Director submitted that Clearview's approach of bundling pricing and refusing to specify the price of goods such as the gas valve in this instance was indicative of deliberate or intentional non-compliance with this requirement of the *CPA*.

    c. Contrary to section 35(d), the Contract failed to set out where it had been entered into. In addition to being a mandatory requirement under the Act, the Director urged that it should be treated as an important obligation – since the

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[8] See *CPA* sections 24(a.1) and *DSCER* section 2.

location of the contract was relevant to determining the very applicability of the *CPA* requirements.

d. Contrary to section 35(f), the Contract was deficient in setting out the consumer's cancellation rights, in that the font size setting out these rights was substantially smaller than 12 point. The Director noted that Clearview had been warned of this following a previous investigation in 2018, and thus had six years to address any font/typeface challenges arising from the use of digital contracts on a tablet.

e. Contrary to section 35(n), the Contract did not include a signature on behalf of Clearview. The Director submitted that, similar to the font size issue, prior investigations and warnings from Service Alberta staff meant that Clearview had 6 years to ensure that its contracts enabled the Clearview representatives to sign in the same way that the customers were able to sign.

f. Contrary to section 35(j) and (k), the Contract did not set out a commencement/delivery date or a completion date for the contract. The Director conceded that although these were less significant than some of the other breaches, they demonstrated deliberate and persistent non-compliance on Clearview's part.

36. Distinct from these requirements specifically applicable to direct sales contracts, Clearview was also required to comply with the general "fair trading" provisions of the *CPA*. The Director submits that, contrary to section 6(2)(c) of the *CPA*, Clearview used ambiguity as to a material fact with respect to the transaction with the Complainant – namely the model and price of the gas valve that was supplied and installed. The Director notes that the evidence is uncontradicted in this respect – Clearview did not itemize the model or the price of the gas valve, even after the service had been performed and the Complainant was making specific inquiries, and even in response to the Investigator's questions. This is supported by Clearview promotional material, training material and business policies entered into evidence by Clearview. Clearview's unwavering practice is to price "by the job" using "package pricing", effectively preventing consumers from being able to compare pricing by other contractors.

37. The Director also emphasized that a consumer's consent to a price does not create an exemption from these legislative protections. Clearview's long-time approach has been to use ambiguity and avoiding price itemization, creating an unfair advantage over (compliant) competitors and putting consumers at risk of unknowingly paying grossly excessive prices.

38. Finally, the Director submits that Clearview engaged in an unfair practice by charging a grossly excessive price for the installation of the furnace gas valve, contrary to section 6(2)(d) of the *CPA*. He argues that this conclusion is supported by the evidence of both the Complainant and the Investigator RW. The price charged by Clearview was well over two times the average of the estimates obtained by RW for the same work, using the same or comparable parameters, the same goods, and the same call-out scenario that was encountered.

39. The Director submits that although the phrase "grossly exceeds" is not defined in the *CPA*, it can nevertheless be applied by ordinary statutory interpretation principles. Importantly, the *CPA* does not prohibit businesses from charging prices that "grossly exceed" the prices for similar goods or services; it requires that the consumer be *informed* of the difference in price and the reason for such difference. In the circumstances, the Complainant was subject to the vast excess of the Clearview price over other comparable contractors' prices without any reason for this difference being provided.

40. Responding to comments made at various times by Mr. Lumsden, the Director urged the Appeal Board to reject a "caveat emptor" or "buyer beware" approach to this matter, together with Mr. Lumsden's suggestion that a "deal is a deal" with respect to Clearview's contract with the Complainant. The *CPA* is aimed at consumer protection, and it is important to uphold this mandate.

41. The Director also reviewed key aspects of Service Alberta's efforts to educate and communicate with Clearview prior to 2022. He argued that repeated efforts had been made to gain compliance by Clearview in respect of both the requirements for consumer contracts and the rules against price ambiguity and unfair conduct. This history, along with the unfair competitive advantage and future potential harm relating to Clearview's pricing approach, weighs as an aggravating factor for quantifying an administrative penalty.

42. In conclusion, the Director asked that the Appeal Board uphold the Director's decisions and confirm the administrative penalties that were assessed.

Submissions on behalf of Clearview

43. Mr. Lumsden submitted both oral and written representations, much of which conveyed his interpretations regarding the permissible scope of governmental authority in the regulation of business practices and consumer contracts. His submissions included grievances directed towards Service Alberta and its employees. He cited what he said were court decisions in

support his position. He included suggestions that the maxims “caveat emptor” and/or “a deal is a deal” should govern.

44. The Appeal Board will address many of these issues in our analysis below, but at this stage it makes sense to set out Mr. Lumsden’s core arguments regarding the *CPA* findings in his own words (from the summary near the end of his written submissions):

    a. Violation 1: Failure to Specify Date and Place of Contract Signing

       The contract included both the service location and the date, which indicated the place of contract fulfillment. Given that the service was performed at the customer's home and signed there, this omission is minor and did not harm the consumer. The information about the place of signing was readily inferable.

    b. Violation 2: Insufficient Description of Goods/Services

       The service description "Replace Gas Valve - Universal" was sufficient to describe the work. The make and model of the part were available upon request, and the scope of work was fully explained to the customer. There was no ambiguity about the service being provided.

    c. Violation 3: Formatting of Cancellation Rights Statement

       While there may have been a formatting issue, the cancellation rights were clearly stated and present in the contract. The customer did not express confusion over this, and no harm resulted from this technicality.

    d. Violation 4: Failure to Itemize Prices

       Clearview follows a flat-rate pricing model, which simplifies the customer experience. The total price was communicated transparently, and the customer had the option to accept or reject the service. This is a standard practice in our industry, particularly for emergency repair work.

    e. Violation 5: Lack of Delivery or Commencement Date

The service was performed immediately after the contract was signed, making the commencement date the same as the signature date. There was no delay, and the customer was aware of the timing. This is a non-issue in this context.

f. Violation 6: Lack of Completion Date

The service was completed on the same day as the contract signing. The absence of a formal completion date did not cause confusion or harm, as the work was completed promptly.

g. Violation 7: Lack of Clearview Representative's Signature

The omission of a representative's signature was due to an oversight in computer software that has a rigid template- its not flexible. The customer's signature was present, and there was no harm caused by this omission. This has been rectified in our process.

h. Violation 8: Unfair Pricing Practices

The price charged was justified given the urgency of the work, the expertise of the technician, and the cost of parts and labor. Our technicians are highly skilled, and we stand by our pricing model. The customer was informed that they could seek alternative quotes but opted to proceed with Clearview. We believe this satisfies our obligations under the *CPA*.

45. With respect to the section 6(c) allegation that Clearview used "exaggeration, innuendo or ambiguity as to a material fact" in this consumer transaction, Mr. Lumsden argued that the contract clearly and specifically stated the scope of the work to be completed, with "no room for ambiguity". He further submitted that it would be "unworkable" to require contractors to itemize the price for each part to be used in a service/repair contract.

46. In conclusion, Mr. Lumsden acknowledged some "minor technical oversights" in Clearview's contractual form, but sought a reduction in the administrative penalties. He also reiterated his position that Clearview's "flat-rate pricing model is a standard industry practice that simplifies the customer experience" – and as such should be permitted.

ANALYSIS AND REASONS

47. Our decisions and reasoning for each of the Director's findings of *CPA* breaches and corresponding administrative penalties, taking into consideration Mr. Lumsden's testimony and argument, are as follows.

Contractual Requirements for Direct Sales Contracts

Section 35(d): failure to include the date and place the contract was entered into.

48. We agree with the Director that the Contract is deficient in this regard – it does not specify *where* the Contract was entered into. Mr. Lumsden did not seriously dispute this fact, but rather argued that it was "minor" and did not harm the consumer. The breach of section 35(d) is established.

49. With respect to an appropriate administrative penalty, if we look at this case in isolation, we would be inclined to share Mr. Lumsden's perspective. No-one here disputed that the Contract was entered into at the Complainant's home; indeed, this is a key factor in establishing the conditions for this to be a direct sales contract and in turn triggering the application of section 35 of the *CPA*. No-one, in this instance, was misled by the failure to specify the place the contract was entered into.

50. However, as noted in the Director's decision and as argued by the Director during the appeal hearing, specifying the place in which a contract is entered into is important generally, for exactly the reason that it helps determine which provisions of the *CPA* may apply to a transaction. Moreover, the Director has demonstrated that Clearview has a long history of non-compliance with section 35(d) and has received warnings and clear directions respecting this dating back to 2004.

51. Section 2(2) of the *Administrative Penalties (Consumer Protection Act) Regulation*[9] expressly authorizes the Appeal Board to consider "whether or not the person who receives the notice of administrative penalty has a history of non-compliance". Clearview does have a history of non-compliance respecting section 35(d) of the *CPA*, and as of 2022 had not bothered to update its contractual form. What might otherwise be a "minor" breach in an isolated or first-time context is more properly seen to be intentional indifference to consumer protection requirements.

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[9] Alta Reg 135/2013.

52. Mr. Lumsden and Clearview need to understand that the requirements of section 35 are not mere suggestions and do not only apply when a contractor determines they should. We affirm the Director's administrative penalty in the amount of $750 for Clearview's breach of section 35(d) of the *CPA*.

Section 35(e) - failure to include a description of the goods or services sufficient to identify them

53. The Contract here provides a reasonably detailed description of the service that Clearview was to perform, but with respect to the provision of the "goods" in question – the gas valve – it provided only the following description: "Replace Gas Valve – Universal". Interestingly, Mr. Lumsden argued that "the make and model of the part were available upon request". This begs the question of why that information was not set out in the Contract before the Complainant was invited to agree to it and sign. The legislation requires that the goods be described, not that a description be available upon request.

54. Mr. Lumsden also argued that the term "universal" allows Clearview the latitude to use similar valves that may be in stock and available so repairs can be completed without delay. However, the evidence demonstrates that Clearview's technician confirmed that the gas valve was available and that he could obtain it that afternoon – *before* the Complainant signed and paid for the contract. The "universal" explanation does not therefore answer why a description of the goods – the gas valve – was not included in the contract after the technician identified the valve that he was going to pick up.

55. The rationale for requiring direct sales contracts to include a description of goods being provided "sufficient to identify them" is, at least in part, to enable a consumer to conduct what might be called due diligence. Are the goods of an appropriate quality? Are they suitable for the purpose intended? Is the price specified for such goods (as required by section 35(g)) reasonable and comparable with what other contractors may charge for similar goods? Realistically, these types of questions, which can help consumers avoid entering into unfair or exploitive direct sales contracts, can only be asked when the contract spells out a sufficiently detailed description of the goods in question.

56. We therefore agree with the Director's finding that the Contract failed to meet the requirements of section 35(e) of the *CPA*.

57. We also affirm the administrative penalty amount of $1,500 for this breach. The complaint that led to these proceedings arose because a consumer was unable to effectively assess whether the goods and services being offered by Clearview (installation of a new gas valve

to repair a failed furnace) was fair and reasonable. This is a significant breach and warrants a significant administrative penalty.

Section 35(f) – failure to include a statement of cancellation rights that conforms with the requirements set out in the regulations

58. During the appeal hearing, Mr. Lumsden referred to "industry-standard tools", including an HTML converter, in relation to the question of whether the font size of the required cancellation rights statement in the Contract was adequate (i.e. at least 12 point). It was ultimately unclear whether he was suggesting that Clearview had attempted unsuccessfully to ensure the proper font size was used, or rather that the Contract in its original digital format *did* comply with the minimum font size requirement (or something else altogether). However, in his written submissions, Mr. Lumsden appeared to concede "a formatting issue" and that the font size of the cancellation rights notice "may have technically not been compliant". He maintained, in any event, that the cancellation rights were clearly present, and no harm arose from any font size discrepancy. Mr. Lumsden also asserted in argument (without evidence) that this issue has been rectified in Clearview's contracts.

59. The Contract that was entered as evidence in the appeal hearing, originating from the Complainant and tendered through the Investigator RW, is the best evidence of what was actually presented by the Clearview technician to the Complainant for review and signature. We have no evidence before us that the font size could have changed between when the Contract was signed and when the Complainant received a signed copy by email (and forwarded that copy to the Investigator RW).

60. Pursuant to section 3(2) of the *DSCER*, if the full required cancellation rights notice does not appear on the first page of a contract, there must be a notice on the first page directing consumers to where the full notice does appear, and this first-page reference must be in at least 12-point font. In this case, the Contract contains the requisite full cancellation rights notice on the last page, and on the first page includes the following:

    <u>Buyers Right to Cancel</u>
    You may cancel this contract from the day you enter into the contract until 10 days after you receive a copy of the contact [sic]. You do not need a reason to cancel. Please see the last page of the terms and conditions (Terms) for the complete Buyers Right to Cancel Statement.

61. The Investigator RW identified the font size of this first page cancellation notice as being of 7 or 8 point. Mr. Lumsden did not challenge him on this determination.

62. We accept, therefore, that the Contract was not compliant with section 35((f) of the *CPA*. We also accept the Director's submission that this requirement is important to ensure that mandatory cancellation rights notices are not buried in "small print", as well as the evidence that Clearview had been cautioned previously in relation to the size of the cancellation notice dating back to 2004.

63. Nevertheless, in our view the administrative penalty for this breach should be reduced from the Director's assessment of $1,000, to $250. Mr. Lumsden acknowledges that Clearview's contracts must contain compliant versions of this cancelation rights notice, and indicates in his written submissions that they now do so. Although Clearview could and should have been compliant in this respect previously, we do not see here an example of deliberate, ongoing refusal to comply with consumer protection laws.

Section 35(g) – failure to include the itemized price of the goods or services, or both

64. We agree with the Director that Clearview breached this requirement.

65. The evidence supporting this conclusion is unambiguous and undisputed. The Contract included only a single price detail for the task described as "Replace Gas Valve – Universal".

66. For Mr. Lumsden and Clearview, the question is not *whether* the Contract itemized the price of the gas valve (it did not), but rather was the Contract *required* to do so. In other words, Mr. Lumsden challenges the Director's interpretation and application of section 35(g) of the *CPA*. He maintains firmly that "Clearview operates using a flat-rate pricing model", and seeks to justify this approach on the basis that:

    a. It simplifies the transaction for the customer.

    b. Itemizing each part "unnecessarily complicates the process".

    c. It aligns with industry standards for "emergency service work".

    d. Itemizing the cost of goods provided would "create an unworkable burden for businesses like ours".

e. The *Fair Trading Act*[10] "places an emphasis on total price transparency over procedural intricacies like itemization".

f. Section 35(g) of the *CPA* "fails to provide clear guidance on what must be itemized".

67. With respect, Mr. Lumsden's perspective ignores several key points: the *CPA* is *consumer* protection legislation; the *CPA* is required to be interpreted in a manner that supports its core consumer-focused purposes; the goal of enhanced convenience for Clearview does not justify ignoring clear statutory requirements; and price "transparency" is certainly not achieved by withholding pricing details.

68. Section 10 of Alberta's *Interpretation Act*, RSA 2000 c I-8, provides that "[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects." Section 12 adds that "[t]he preamble of an enactment is part of the enactment intended to assist in explaining the enactment."

69. The preamble of the *CPA* is as follows:

> **Preamble**
>
> WHEREAS all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed;
>
> WHEREAS businesses thrive when a balanced marketplace is promoted and when consumers have confidence that they will be treated fairly and ethically by members of an industry;
>
> WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not; and
>
> WHEREAS the Government of Alberta is committed to protecting consumers and businesses from unfair practices to support a prosperous and vibrant economy;

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[10] The *Fair Trading Act* was the predecessor to today's CPA in Alberta. Contrary to Mr. Lumsden's assertion, neither it nor the CPA "prioritize disclosing the total price to ensure consumers are aware of the overall cost before engaging in the transaction".

> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows…

70. The Appeal Board here is required to interpret the relevant provisions of the *CPA* and its supporting regulations in a “fair, large and liberal” manner that “best ensures the attainment of its objects”. In other words, we must interpret provisions such as section 6 and section 35 of the *CPA* in a manner that supports its core purposes of protecting consumers, ensuring consumers are properly informed, and preventing compliant businesses from suffering competitive disadvantage from non-compliant businesses.

71. The requirement in section 35(g) of the *CPA* is for a written direct sales contract to include “the itemized price of the goods or services, or both”. “Goods” is defined in section 1(e) of the *CPA* to mean “any personal property that is used or ordinarily used primarily for personal, family or household purposes”. “Services” is defined as “… any service offered or provided primarily for personal, family or household purposes, including (i) a service offered or provided that involves the addition to or maintenance, repair or alteration of goods or any residential dwelling …”

72. The additional rules applicable to direct sales contracts exist because of the enhanced vulnerability for a consumer interacting with a salesperson in the consumer’s own home. Competitors are absent, and the consumer cannot readily leave the premises to research other sellers or to simply reflect on a potential purchase. These rules increase the contractual obligations on a seller of goods or services, specifically to enhance the protection of fairness for direct sales consumers.

73. There is nothing in section 35 or elsewhere in the *CPA* that supports a narrow or restrictive interpretation of “goods”. To the contrary, the consumer protection focus of the legislation and the plain language of the definition of “goods” suggest that the word applies as much to a furnace gas valve as it would to a vacuum cleaner, cookware, or a recliner.

74. The scenario that occurred in respect of Clearview and the Complainant in this case helps underscore why this interpretation makes sense and is consistent with consumer protection objectives. That is, the Complainant here thought that Clearview’s “flat rate” price for replacement of the gas valve was high, but was unable to verify this and accordingly trusted the Clearview technician. Had the Complainant been able to see from the contract that the gas valve cost less than $200, he could have contacted other contractors, considered his options, and decided whether to proceed to have the gas valve installed by Clearview.

75. The requirement to itemize a price for goods works in conjunction with the section 35(e) obligation to *describe* goods being provided. Even if Clearview, for example, had wanted to charge $500 for the gas valve in question, the Complainant could have sought comparison

prices if (but only if) the gas valve had been described in a manner sufficient to identify it. At that point, he could have made a fair, informed decision respecting the value of the goods and services being offered. He may well have determined that the importance of having his furnace operation restored that afternoon by competent professionals justified the cost of the goods and services – even if either the goods or services (or both) might otherwise have been available for less.

76. Importantly, Clearview or other contractors in similar circumstances are in no way prejudiced by this requirement to itemize both the cost of goods and of services. Clearview could still maintain that it provides service more professionally, more quickly, or in any other way "better" than its competitors. The only "prejudice" to Clearview is removal of a veil of price obscurity that can operate only to the contractor's advantage and a consumer's disadvantage. These provisions of the *CPA* are intended exactly to minimize that kind of disparity between direct sales contractors and consumers.

77. Mr. Lumsden argued that such an interpretation of section 35(g) was unworkable because contractors may need to itemize the price of even "trivial items such as screws, bolts and tape". We disagree. Whereas the cost of uniquely identifiable goods including major parts or components of other household goods must be itemized in a direct sales contract, "shop supplies" such as tape, solder, clamps and screws can be identified and priced collectively as such in the contract.

78. Lastly, we reject Mr. Lumsden's argument that the "emergency" nature of this type of service somehow justifies ignoring the requirement to itemize the price of goods. While emergency service calls may or may not warrant overall pricing that is higher than "regular" pricing, the need to ensure fairness to consumers through upholding *CPA* requirements remains a constant. If anything, the urgency of something like a failed furnace in winter on a Friday afternoon enhances the risk of unfair exploitation of consumers. Nothing prevents a contractor for charging more for urgent or emergency goods or services, but *true* transparency of goods, services, and prices (which is very different from Mr. Lumsden's version of transparency) is essential.

79. For these reasons, we conclude that Clearview breached section 35(g) of the *CPA*.

80. An appeal board may confirm, vary or quash an administrative penalty that is under appeal. Like the Director, an appeal board may consider the following factors in setting the amount of an administrative penalty, under section 2(2) of the *Administrative Penalties (Consumer Protection Act) Regulation*[11]:

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[11] Alta Reg 135/2013.

(a) the seriousness of the contravention or failure to comply;

(b) the degree of wilfulness or negligence in the contravention or failure to comply;

(c) the impact on any person adversely affected by the contravention or failure to comply;

(d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;

(e) whether or not there were any mitigating factors relating to the contravention or failure to comply;

(f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention or failure to comply;

(g) any other factors that, in the opinion of the Director, are relevant.

81. Virtually all of these listed factors weigh in favour of a significant administrative penalty with respect to this section 35(g) breach. For the reasons detailed above, the breach should be considered serious. Clearview has demonstrated wilful non-compliance, maintaining its stand that “flat-rate” pricing is permissible and price itemization is unnecessary. The impact of Clearview’s approach is offensive to the objectives of the *CPA*, opening the door to expose consumers to unfairness and pricing abuse.

82. The case at hand is an example of the risks that Clearview’s stubbornly non-compliant approach presents to consumers. Clearview has a history of non-compliance with this very requirement (and others). Clearview has benefitted economically from its approach of obscuring the price of goods and services by presenting only a single “project” cost; as will be addressed further below, it has been able to charge excessive prices because consumers were unable to practically evaluate the reasonableness of total project costs when goods were not sufficiently identified and their prices were not itemized.

83. In our view, the appropriate administrative penalty for this breach is $3,000.

Section 35(j) – failure to include the (future) date for delivery of goods or commencement for services

84. Section 35(j) of the *CPA* requires that Direct Sales Contracts expressly spell out what date goods will be delivered or services will be commenced, when such goods or services are to be provided some time *after* the contract is executed.

85. The Contract here included the date of the "estimate" as well as a date it was signed by the Complainant (being the same as the estimate date), but no other date. Because the Contract was entered into and paid for before the Clearview technician left to obtain the gas valve, technically the Contract involved "future" performance. As such, technically (and we use this word deliberately), section 35(j) of the *CPA* required that the anticipated date for when the gas valve would be delivered and installed should have been included in the contract.

86. The Contract therefore breached section 35(j) of the *CPA*.

87. We agree with Mr. Lumsden, however, that in this case the breach had absolutely no bearing on anything. The Complainant and the Clearview technician both understood that the furnace gas valve was to be picked up and the installation commenced (and completed) that same day – within roughly an hour or so of the Contract being completed.

88. We do not disagree with the Director that these requirements are important and that the failure by Clearview to include sections in its form of contract to include future delivery/commencement dates is indicative of a "habit" of non-compliance with various section 35 requirements. We also understand the frustration on the part of Service Alberta employees, who over several years communicated repeatedly with Clearview regarding the *CPA* requirements, including, specifically, the obligations prescribed in section 35 of the Act.[12]

89. Despite this, we do not believe that an administrative penalty is an appropriate enforcement response to *this* instance of a section 35(j) breach. We vacate the Director's administrative penalty and instead rely on the Order to Comply (addressed below) to ensure that Clearview ensure that all section 35 requirements are fulfilled in future Direct Sales Contracts.

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[12] To be clear, the Appeal Board categorically rejects Mr. Lumsden's portrayal of Service Alberta employees as being "overzealous", unfair, or inappropriately focused on enforcement over education and compliance. The evidence clearly points the other way: Clearview and Mr. Lumsden have disliked the laws aimed at protecting consumers and have consistently resisted complying with a number of these laws. Mr. Lumsden's uncooperative and at times combative attitude throughout the Appeal process was not helpful.

Section 35(k) - failure to include the (future) completion date for providing the services or goods together with services

90. Our reasoning with respect to this requirement parallels our reasoning relating to section 35(j), above. While a technical breach of this section of the *CPA* is evident on the face of the contract, it had no impact whatsoever in the circumstances. Nor, in this case, is it evident that the omission was deliberate or suggestive of an attitude of rejecting the directives of Service Alberta.

91. We vacate the Director's administrative penalty for this breach of section 35(k).

Section 35(n) - failure to include a signature on behalf of the supplier (Clearview)

92. As noted above, Mr. Lumsden acknowledged that the Contract here did not include a signature of a Clearview representative – although he described it as a "technical oversight" resulting in no harm to the consumer. His written submissions also note that "this has been rectified in our process" (presumably suggesting this has been corrected *after* January, 2022) – although no evidence was provided to indicate this.

93. While we agree with Mr. Lumsden that there was no harm *in this case* to the Complainant from the missing signature, we nonetheless are of the view that an administrative penalty is appropriate. Here, unlike in relation to both the section 35(j) and section 35(k) requirements, there is clear evidence of a history of non-compliance and, if not wilful non-compliance, at least an attitude of indifference. These are factors that we may take into account in determining administrative penalties, and we find that they aggravate what would otherwise be a fairly minor breach.

94. In the circumstances, we assess $250 as an appropriate administrative penalty for Clearview's breach of section 35(n) of the *CPA*.

Section 6(2)(c) – unfair practice through use of exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction

95. The Director's position is that Clearview uses contract and price ambiguity to create an unfair advantage for itself and that amounts to an unfair practice against consumers. He argues that Clearview's policy, practice and business model create intentional ambiguity, by

insisting on pricing "by the job" and refusing to break down prices and provide adequate descriptions of goods supplied.

96. Although we share the Director's concerns about Clearview's deliberate, on-going refusal to provide details and pricing of goods in the direct sales contract context and in the particular circumstances of this case, we are not prepared to interpret section 6(2)(c) of the *CPA* so as to mandate these kinds of breakdowns for *all* consumer contracts.

97. In other words, this is a more general allegation and is distinct from the breaches of section 35(e) and section 35(g) that relate specifically to the direct sales contact context (although there is overlap in terms of the underlying conduct). Section 6(2)(c) of the *CPA* applies to all consumer transactions or proposed consumer transactions. We have already found that Clearview's direct sales contract breached both section 35(e) and section 35(g), in the circumstances that gave rise to the Complaint in this case. But the obligations applicable to direct sales contracts do not necessarily amount to unfair contractual "ambiguity" in the broader overall consumer contract context.

98. We also find that the evidence relating to the Complaint in this case does not clearly support a finding of price "ambiguity". The Complainant's evidence, as captured in Investigator RW's report and oral testimony before us, is essentially that the Clearview technician who attended told him that the gas valve was "expensive", costing $1,100. It was on the basis that the Complainant trusted the Clearview technician (and could not independently verify the cost of the gas valve) that he agreed to proceed with the Contract. This would not constitute a problem of ambiguity, but rather of deception – governed by separate provisions of the *CPA*.

99. A potential breach of section 6(4)(a) of the *CPA* (that is, deceiving or misleading the Complainant) was considered by the Director. However, evidentiary challenges coupled with Clearview pointing to clear policies and manuals prohibiting employees from providing price breakdowns to customers led the Director to conclude that such a violation could not be established.

100. In sum, the evidence here does not support a broader finding that in the context of consumer transactions, Clearview used exaggeration, innuendo or ambiguity as to a material fact and thereby committed an unfair practice. The findings under section 35(e) and section 35(g) adequately address Clearview's non-compliant contracting approach in respect of direct sales contracts.

101. We quash the Director's finding in relation to section 6(2)(c).

Section 6(2)(d) – unfair practice through charging a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference.

102. For the reasons set out below, the Appeal Board agrees with the Director that Clearview breached section 6(2)(d) by charging a "grossly excessive" price without informing the Complainant of the price difference and the reason for the difference.

103. In his evidence, RW described the approach he used to determine a "price at which similar goods or services are readily available", to use for comparing against the Clearview contract price. He began with the information provided by the Complainant, which included pricing information for the gas valve for both retail and commercial/professional purchasers, and telephone quotes for hourly or attendance rates from other plumbing/HVAC companies. RW then supplemented this with inquiries of his own. He testified that he prepared what was in essence a script, summarizing the relevant circumstances faced by the Complainant. This included such facts as the timing of the service call (a Friday afternoon in January), that this was a Calgary residential residence, the time spent by a furnace technician to attend, diagnose, and then carry out the gas valve replacement, identification of the specific type of gas valve that Clearview had installed. He did not mention Clearview in any way.

104. RW then used this scenario script to contact several well-known plumbing and HVAC contractors in Calgary and request estimates of what they would charge to attend, diagnose, and provide and install this type of replacement gas valve. He deliberately avoided seeking estimates from what he called "truck and ladder" contractors – those who may be one-person businesses, who operate from their homes with little overhead. Rather, his comparisons were from businesses similarly situated to Clearview.

105. RW received six estimates, and [13]outlined these in a table (Exhibit 13). All of the estimates were significantly lower than what Clearview charged the Complainant. The average of the six estimates was just under $750 for attendance, diagnosis and replacement of the gas valve. In contrast, Clearview's total charge to the Complainant for this was $1,676.97.

106. Mr. Lumsden challenged the admissibility and the reliability of the comparison estimates provided by RW. With respect to admissibility, section 14(1) of the *Appeal Board Regulation*

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[13] Alta Reg 195/99.

makes clear that appeal boards are not bound by the strict rules of evidence applicable to judicial proceedings. Hearsay evidence, for example, may be admitted where it is relevant to the matters in issue.

107. With respect to reliability, we must certainly be cautious and not blindly accept any and all evidence placed before us. RW's evidence regarding the "price at which similar goods or services are readily available" was gathered in an objective and consistent manner. The scenario script that he provided to other furnace/HVAC contractors gave a neutral and objective description of the situation that Clearview faced[14]. His focus on comparable, established businesses helped ensure that he was comparing "apples to apples". Where necessary, RW clarified issues regarding the estimates (for example, whether initial call-out or attendance fees were included in the estimates.

108. Mr. Lumsden argued that email and telephone estimates were inadequate as comparisons, since they did not account for the on-site context of the job. Specifically, he pointed to the "urgency of the repair, the specialized expertise required, and adherence to safety protocols".

109. We disagree. RW's scenario script outlined all relevant factors, including the Friday afternoon in January context. Otherwise, this was identified as a fairly common, routine type of call, with no specialized expertise or protocols required beyond that of qualified furnace/HVAC technicians. It should also be noted that the Clearview technician diagnosed the issue and came up with an estimate for the Complainant very quickly once he was paid Clearview's diagnostic fee; this corroborates the conclusion that RW's approach in the circumstances resulted in reasonable and reliable comparison figures, without the need for on-site attendance.

110. We also note that Mr. Lumsden and Clearview had every opportunity to present alternative, competing evidence as to what other contractors may have charged for the goods and services supplied in this case. No such evidence was presented either before the Director or to us on appeal.

111. Mr. Lumsden also complained that because there is no definition or established standard for what constitutes the phrase "grossly exceeds" in section 6(2(d), the law is too vague to be enforceable. He referred to *R. v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 in support of this position.[15] However, this case is not helpful to Mr. Lumsden's argument. Just

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[14] As captured in RW's Investigator Notes "CATS" Log, Exhibit 16.

[15] We note that Mr. Lumsden also referred to a number of purposed case authorities in support of various propositions, that unfortunately do not appear to be actual reported court decisions – or at very least the purported case names and citations are wholly inaccurate.

as the Supreme Court in *Nova Scotia Pharmaceutical Society* found the word "unduly" to be capable of interpretation and application, so too the phrase "grossly exceeds" draws meaning from ordinary usage, established legal precedent, and contextual application within the consumer protection focus of the *CPA*.

112. In the present circumstances, we find that the price charged by Clearview to the Complainant – being roughly 2.3 times the average of the comparison estimates – did indeed "grossly exceed" the price at which similar goods or services are readily available". [16] "Grossly" infers an extraordinary or exceptional degree. Simply being a higher price would not be enough. The variance in pricing between what the Complainant was charged and the comparison estimates must be stark in order to qualify as grossly excessive. We find this difference of 2.3 times the average comparison price to be stark.

113. We take into account the overall cost of the goods and services provided (i.e. doubling a $750 charge for goods and services will generally be more likely to be grossly excessive than doubling a $10 charge for goods and services), as well as the fact that the demonstrated cost of the "goods" – the gas valve – was relatively small in proportion to the total price. We also reiterate – and indeed agree with Mr. Lumsden – that context matters. In our view, the urgent, winter, Friday-afternoon-before-suppliers-are-closed context here is exactly the type of situation for which the *CPA* is intended to protect consumers from unfair practices. Urgency and special timing may in some cases justify premium rates, but they must not be seen by contractors as unfettered opportunities to apply abusive, predatory, or unfair prices.

114. We have found that the Clearview pricing did "grossly exceed" the price at which similar goods or services were readily available, but this does not end the inquiry. Section 6(2)(d) of the *CPA* provides that such exceptional pricing amounts to an "unfair practice" only if the consumer is not informed "of the difference in price and the reason for the difference".

115. This qualification is important. If, as Mr. Lumsden vaguely suggested, Clearview technicians are better trained, more professional, better compensated, or otherwise worthy of exceptional rates, or if the goods or the nature of the service that Clearview provided in any way was thought to warrant exceptionally high pricing, all that Clearview had to do in order to avoid committing an unfair practice under section 6(2)(d) of the *CPA*, was to inform its customers of that the price was much higher than others and why this was so.

116. Such an explanation, however, would have to address the "grossly excessive" pricing in a specific, given situation. Section 6(2(d) of the *CPA* refers to "the difference in price", relating

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[16] We do not suggest that there is a one-size-fits-all formula for this determination; for example, a bag of potato chips in a corner convenience store may easily cost more than two or three times what the same bag would cost in a discount supermarket. This would not trigger s.6(2)(d) of the CPA.

back to the words "similar goods or services". This can only be determined in relation to particular scenarios, not generically.

117. In other words, the generic statements that are included on the third page of Clearview's contract – highlighting various aspects of Clearview's overhead promoting its pricing philosophy – are not sufficient for the purposes of section 6(2)(d) of the *CPA*. Particularized explanations that relate to particular instances of "grossly excessive" pricing would need to be provided in order for such pricing to avoid constituting an unfair practice.

118. We find that the total price that Clearview charged the Complainant for the goods and services in this situation grossly exceeded the price at which similar goods or services are readily available. We further find that Clearview did not advise the Complainant of this pricing discrepancy or of any reason for such discrepancy. This is a breach of section 6(2)(d) and amounts to an unfair practice under the *CPA*.

119. The Director imposed an administrative penalty of $1,500 for this breach. In our view, this is too low. The factors set out in the *Administrative Penalties (Consumer Protection Act) Regulation* weigh heavily in favour of a deterrence-focused penalty. The breach is obviously serious, involving unfair pricing practices and going to the heart of what the *CPA* is aimed against. But even more important, in our view, is the combination of Clearview's:

a. wilfulness in insisting on a "right" to charge consumers however it wishes to charge;

b. reliance on maxims such as *caveat emptor* and "a deal is a deal" in order to defend its approach;

c. combined approach of refusing to describe and itemize goods and services distinctly, with charging grossly excessive prices; and

d. substantial history of non-compliance in relation to consumer protection and unfair practice related matters.

120. In the circumstances, we vary the Director's administrative penalty for this breach and set the amount at $3,000.

CONCLUSIONS/SUMMARY

121. With respect to the nine breaches and administrative penalties that were appealed, we make the following determinations:

Direct Sales Contract Breaches

Section 35(d) – finding of breach confirmed – penalty confirmed at $750

Section 35(e) – finding of breach confirmed – penalty confirmed at $1,500

Section 35(f) – finding of breach confirmed – penalty varied to $250

Section 35(g) – finding of breach confirmed – penalty varied to $3,000

Section 35(j) – finding of breach confirmed – penalty varied/quashed (no penalty)

Section 35(k) – finding of breach confirmed – penalty varied/quashed (no penalty)

Section 35(n) – finding of breach confirmed – penalty varied to $250

Unfair Practices

Section 6(2)(c) – finding of breach quashed – penalty varied/quashed (no penalty)

Section 6(2)(d) – finding of breach confirmed – penalty varied to $3,000

(Total of administrative penalties: $8,750)

Compliance Order

122. The appeal by Clearview and Mr. Lumsden included the Order issued by the Director under section 157 of the *CPA*.

123. For the most part, we confirm this order. In view of the findings above, there is a strong basis for an order requiring Clearview to stop breaching provisions of the *CPA* and to comply with the *CPA* going forward.

124. The Director's order, however, also extended to "… Kyle James Lumsden and any employee, representative, or agent" of Clearview. While we presume that the Director's intent behind this addition is purely practical – that is, to ensure that the guiding mind of Clearview and the people carrying out the operations of Clearview fulfil the compliance obligations of Clearview, this clause is both unnecessary and problematic.

125. First, the Director found only that Clearview breached the *CPA* and its regulations. Neither Mr. Lumsden nor anyone else was identified as having personally committed any of

these violations. As we read the provision, an order under section 157 may be made against *the* person found to have contravened the *CPA* or its regulations.

126. Secondly, with respect to the employees, representatives and agents of Clearview, they were not given notice of the Director's consideration of an Order and administrative penalties, nor of this appeal. It is not appropriate that they be named in or bound by an order of the Director without having an opportunity to be heard.

127. Finally, a Director's Order under s.157 of the CPA may ultimately open the door to prosecution for an offence, if the order is breached.[17] Mr. Lumsden, employees, representatives, or agents of Clearview should not be subjected to such a risk if they were not themselves found to have committed breaches of the CPA that resulted in the Director's Order.

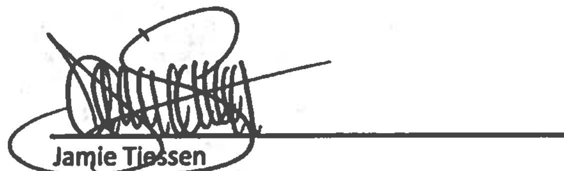
128. Accordingly, the Appeal Board confirms the Director's Order but varies it to apply only to "Clearview Services Ltd".

Costs

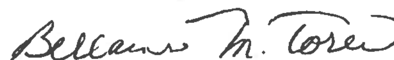
129. We make no order regarding costs of this appeal.

Issued in Alberta this 12th day of November, 2024

Lorenz Berner



Jamie Tiessen



Bellanne Toren

[17] See s.163(a) of the CPA.

APPENDIX A – LIST OF APPEAL HEARING EXHIBITS

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<tr><td>Exhibit 1</td><td>RW Recommendation Memo – November 23, 2022</td></tr>
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<tr><td>Exhibit 3</td><td>CORES Search – Giraffe Corp. – May 31, 2022</td></tr>
<tr><td colspan="2">No Exhibit 4 (Director’s Decision Letter of December 21, 2022 already part of record)</td></tr>
<tr><td>Exhibit 5</td><td>Respondent Representations – September 6, 2023</td></tr>
<tr><td>Exhibit 6</td><td>Online Complaint Submission – January 20, 2022</td></tr>
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<tr><td>Exhibit 17</td><td>Quotations – RW Description of Work – Email May 2, 2022</td></tr>
<tr><td>Exhibit 18</td><td>CORES Search – Clearview Services Ltd. – January 20, 2022</td></tr>
<tr><td>Exhibit 19</td><td>“Service Alberta VS Clearview Services Appeal Hearing” (Clearview Written Submissions)</td></tr>
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