

IN THE MATTER OF AN APPEAL BY EASY LIVING DESIGN LIMITED
PURSUANT TO SECTION 179(1) OF THE *FAIR TRADING ACT*,
BEING CHAPTER F-2 R.S.A. 2000

AND

IN THE MATTER OF THE DIRECTOR'S ORDER
ISSUED BY THE DIRECTOR OF FAIR TRADING
(AS DELEGATED) UNDER THE *FAIR TRADING ACT*
ON JANUARY 12, 2010

DECISION OF THE APPEAL BOARD

INTRODUCTION

[1] On January 12, 2010, pursuant to s. 157 of the *Fair Trading Act* R.S.A. 2000, c. F-2 (the "*FTA*"), the Director of Fair Trading, as delegated (the "Director") issued an order to Kevin Scheiris o/a Easy Living Design Limited or any employee, representative, agent or associate of Kevin Scheiris o/a Easy Living Design Ltd (the "Director's Order").

[2] The Director's Order states that Easy Living Design ("ELD") was licensed with Service Alberta as a Direct Selling Business and further states that information had come to the Director's attention that ELD had solicited, negotiated or concluded renovation contracts at other than the seller's place of business and had required deposits or progress payments to be made before all goods or services under the contracts were provided. The Director's Order states that this activity constituted a Prepaid Contracting Business requiring ELD to be licensed as a Prepaid Contracting Business under s. 104 of the *FTA*. Additionally, the Director's Order states that contracts being negotiated by ELD failed to meet the disclosure requirements of section 35 of the *FTA* relating to either Direct Sales Contracts or Prepaid Contracts.

[3] Specifically, page 2 of the Director's Order reads as follows:

Kevin Scheiris o/a Easy Living Design Ltd. and any individuals who are employed by, representing, acting as agent for or otherwise associated with Kevin Scheiris o/a Easy Living Design must immediately:

- Cease entering into "Prepaid Contracts " (Taking down payments, deposits or progress payments before the work is fully completed) until the Prepaid Contracting Business Licensing requirements have been met

- Serve no role in the construction, alteration, maintenance, repair, addition or improvement of a person's private dwelling or structure/building located on the same property until licensed as a Prepaid Contracting Business.
- Upon issuance of a Prepaid Contracting Business License, ensure all Direct Sales contracts comply with the disclosure requirements of Section 35 of the *Fair Trading Act*.

[4] Pursuant to s. 179(1) of the *FTA*, ELD provided a Notice of Appeal of the Director's Order to Service Alberta on February 2, 2010. The Notice of Appeal sets out ELD's opposition to the Director's Order. It states that ELD assembled and supplied custom-made material to customers that can be used to construct sunrooms, patio covers and screen rooms but that ELD did not construct any such facilities, nor was it involved, directly or indirectly, in the provision or any labour services. The Notice of Appeal further states that while ELD collects a deposit from each of its customers in an amount equal to 50% of the price of the materials, the payment of this deposit was applied solely and directly to the material costs that ELD incurred to complete the customer's order and that the amount of such deposits was not calculated on the basis of any labour services, nor was the deposit amount shared with any third party installer or labourer.

[5] Excluding applications brought by counsel, the Appeal Board heard evidence and argument over a total of 10 days during the time period from October 15, 2012 to April 25, 2013 during which time evidence from a total of 11 witnesses was heard on behalf of ELD and on behalf of the Director.

BACKGROUND

[6] ELD is in the business of the sale of sunrooms, solariums and patio covers. The sunrooms and screen rooms come as kits that are delivered to a consumer's home after which they are installed.

[7] Adam Woytowich and Scott Hood testified to the matter of how the business operations of ELD came to the attention of Service Alberta.

Evidence of Adam Woytowich

[8] In 2008 Inspector Adam Woytowich, a senior investigator with Service Alberta, was asked to investigate complaints regarding ELD. At the time he received the file there was a history of prior complaints against ELD, although he had no prior knowledge of those complaints. He reviewed the information on the file regarding these prior complaints made by consumers by the names of Mary Tourigny, Gordon Hunstad, and Claude Malenfant. The Service Alberta investigation

files regarding those complaints had all been concluded. Mr. Woytowich did not speak with any of those complainants in the course of his investigation but relied on the historical notes taken by the various Service Alberta investigators who had dealt directly with those complaints.

[9] Mr. Woytowich proceeded with his investigation and spoke with five separate consumer complainants: Shirley Waldo, Gordon Marshall, Douglas Thoreson, Eldon Dahl and Nora Schmidt. The files with respect to these complaints were all considered to be open investigation files. He had discussions with Kevin Scheiris, the principal of ELD, as well as Fred and Hugo Hildebrandt of Mopica Construction, both of whom had installed ELD sunrooms.

[10] ELD was licenced under the *FTA* as a Direct Seller. Although the consumer complaints in this case arose out of matters such as deliver delays and complaints over product quality, Mr. Woytowich's primary concern from his review of the closed files and from his investigation with respect to the open investigation files was that ELD was operating as a Prepaid Contractor outside of its licenced authority under the *FTA* as a Direct Seller. He was uncertain as to whether this was being done willfully or because of a lack of understanding of the legislative requirements. He determined that a Director's Order was required so that ELD would clearly understand that they were failing to follow the requirements of the *FTA*.

[11] Mr. Woytowich compiled the results of his investigation. On November 30, 2009 he sent these results to Michael Areshenko (Manager, Investigations, Investigation Services South) and to Scott Hood (Delegate Director of Fair Trading Consumer Services). This investigation binder (the "Woytowich Binder") was entered as Exhibit 18 to the Appeal Hearing. The Woytowich Binder contains materials that Mr. Woytowich determined were relevant for the Director to consider, including certain historical notes from the Service Alberta CATS (Consumer Affairs Tracking System), a memo he prepared summarizing the complaints, and a draft Director's Order that he had prepared.

Evidence of Scott Hood

[12] Scott Hood has been the Statute Administrator for the *FTA* since 2002. Pursuant to a September 27, 2004 Delegation of Authority from Alberta Government Services he is the Director of Fair Trading (as delegated) and is involved with business licensing matters with Service Alberta.

[13] The *FTA* requires the posting of security by certain businesses. For a Direct Sales Licence with sales over \$1,000.00 a bond of \$25,000.00 is required. For a Prepaid Contracting Business Licence the bonding requirement starts at \$25,000.00 and can go up to \$100,000.00. The cost to obtain the actual Prepaid Contracting Licence is \$60.00 per year. The cost is the same for a Direct Selling Licence.

[14] Service Alberta's general practice is that when a consumer complaint comes into Service Alberta it is investigated. At the conclusion of the investigation the case can be closed, a warning letter can be issued, a Director's Order can be issued, or an undertaking may be given by the business whereby the business provides a written admission that it has contravened the act and agrees not to do so again. Consumer complaints can also result in prosecutions under the *FTA*, although those matters are referred to the Crown Prosecutor and not the Director.

[15] Mr. Hood confirmed that he received the Woytowich Binder sometime in December of 2009. (The material therein indicates the bonding requirement for ELD to operate as a Prepaid Contractor had been determined by Service Alberta to be \$50,000.00). He reviewed Mr. Woytowich's draft Director's Order first and then reviewed the remainder of the materials in the binder. He did not have any communication with any of the complainants in the course of his review, nor did he have any discussions with Kevin Scheiris or his lawyer. Any discussion with Adam Woytowich would have been limited to requesting an electronic copy of Mr. Woytowich's draft order. His general impression was that ELD either did not understand the legislative requirements or was simply not complying with those requirements.

[16] Mr. Hood testified that the purpose of a Director's Order is to obtain compliance with the *FTA*. After reviewing the Woytowich Binder he deleted the provision in Mr. Woytowich's draft Director's Order that cancelled the Direct Selling licence of ELD. He did not have a concern with ELD operating as a Direct Seller and was not interested in putting ELD out of business. However, he wanted ELD to comply with the legislation. After making that revision to the draft order he issued the January 12, 2010 Director's Order.

[17] Although Service Alberta has a template on its website to assist businesses with compliance with s. 35 of the *FTA*, and although they do review contracts provided by businesses in order to identify potential s. 35 deficiencies, they do not provide advice to businesses as to how to comply with the *FTA* and if a business asks for legal information they are told to obtain their own legal advice.

ISSUES

[18] The issues in this appeal are:

- a. Did ELD enter into Prepaid Contracts without having a licence to do so?
- b. Did ELD fail to meet the disclosure requirements of s. 35 of the *FTA* relating to either Direct Sales Contracts or Prepaid Contracts?

LEGISLATION

[19] The governing legislation in this matter is the *FTA* and its Regulations.

(a) Jurisdiction of the Appeal Board

[20] The jurisdiction of the Appeal Board is set out at Section 179(6) of the *FTA*:

(6) An appeal board that hears an appeal pursuant to this section may confirm, vary or quash the decision or order that is being appealed.

[21] Section 179(8) of the *FTA* reads as follows:

(8) An appeal under this section is a new trial of the issues that resulted in the decision or order being appealed.

(b) General Principles of the *FTA*

[22] Part 1 of the *FTA* deals with the general principles of the legislation. Pursuant to s. 2(1) the *FTA* prevails in a consumer transaction:

2(1) Any waiver or release by a person of the person's rights, benefits or protections under this Act or the regulations is void.

[23] Section 2.1 of the *FTA* deals with the application of the *FTA* and reads as follows:

2.1 In determining whether this Act applies to an entity or a transaction, a court or an appeal board must consider the real substance of the entity or the transaction and in doing so may disregard the outward form.

(c) Licensing

[24] Section 104(1) of the *FTA* provides as follows:

104(1) No person may engage in a designated business unless the person holds a licence under this Act that authorizes the person to engage in that business.

(d) Prepaid Contracting Business Licence

[25] Sections 2(1) and (2) of the *Prepaid Contracting Business Licensing Regulation* AR 185/99 reads as follows:

2(1) The class of licence to be known as the prepaid contracting business licence is established.

(2) A person who holds a prepaid contracting business licence is authorized to engage in the prepaid contracting business.

[26] Section 5 of the *Prepaid Contracting Business Licensing Regulation* reads as follows:

5(1) No licence may be issued or renewed unless the applicant submits to the Director a security that is in a form and in an amount approved by the Director.

(2) The Director may, if the Director considers it appropriate, increase the amount of the security that is to be provided by a licensee before the terms of the licence expires.

[27] Section 5 of the *Designation of Trades and Businesses Regulation* AR 178/99 deals with the Prepaid Contracting Business. Section 5(2) reads as follows:

5(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.

(e) Direct Seller Business License

[28] The provision of the *Designation of Trades and Businesses Regulation, supra* defining a direct selling business is as follows:

3(2) In this section, “direct selling business” means the activities of soliciting, negotiating or concluding in person, at any place other than the seller’s place of business, sales contracts, including direct sales contracts to which Part 3 of the *Fair Trading Act* applies, for the provision of goods or services where the buyer is a consumer.

(f) Section 35 of the FTA

[29] Section 35 of the *FTA* reads as follows:

35 A written direct sales contract must include

- (a) the consumer’s name and address;
- (b) the supplier’s name, business address, telephone number and, where applicable, fax number;
- (c) where applicable, the salesperson’s name;
- (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;
- (h) the total amount of the direct sales contract;
- (i) the terms of payment;
- (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;

(l) where credit is extended,

- (i) a statement of any security taken for payment, and
- (ii) the disclosure statement required under Part 9;

(m) where there is a trade-in arrangement, a description of and the value of the trade-in;

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

[30] Section 10(1) and (2) of the *Prepaid Contracting Business Licensing Regulation, supra* reads as follows:

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.

LAW

(a) Jurisdiction of the Appeal Board

[31] The nature of the *de novo* hearing in the context of this Appeal Hearing is such that what happened before is essentially irrelevant in the sense that the Appeal Board is to proceed without assessment of, regard for or deference to the record or work product of the Director. This appeal hearing is the first opportunity for ELD to challenge the case adverse to it. While the Director's Order would provide ELD with knowledge of the case it had to meet, ELD had no opportunity to challenge or test that case up to the time of this Appeal Hearing. The Appeal Board is not to defer to

or give any regard to the process leading up to the decision of the Director to issue the Director's Order and the appeal hearing is to proceed solely upon the new record that unfolds before the Appeal Board (*Osteria De Medici Restaurant Ltd. v. Yaworski*, 2009 ABQB 563).

[32] At the same time, a *de novo* hearing does not mean that the Appeal Board is required to hear evidence that is not relevant. During the course of the hearing attempts were made to introduce certain evidence relating to matters that had occurred between the parties subsequent to the issuance of the Director's Order. The Appeal Board generally ruled against hearing this evidence.

[33] To the extent that such evidence was heard, the Appeal Board assigns no weight to it in the context of its decision in this matter. The Director's Order arose out of conduct that occurred prior to the Director's Order. What is relevant to the determination of the issues in this case is evidence of whether ELD, up to the time of the Director's Order, had been operating as a prepaid contractor without being licenced to do so and/or had breached the requirements of s. 35 of the *FTA*. That determination requires an assessment of the evidence of certain events leading up to the Director's Order against the relevant provisions of the *FTA* and its Regulations. Matter regarding discussions between ELD and Service Alberta over ELD's business practices and licensing requirements that occurred subsequent to the Director's Order have no bearing on the issues to be determined in this Appeal Hearing.

(b) Fair Trading Act - General Principles

[34] The general principles of the *FTA* have been determined by the Court in the cases of *R. v. Kreft* 2006 ABPC 258 and *R. v. Schultz* 2003 ABPC 13. In *R. v. Schultz* Jacobson J. held as follows at para. 58:

The Fair Trading Act has as its purpose the regulation of business ethics and consumer protection. It creates positive duties on businesses, as well as both direct and vicarious liability for non-compliance with the Act and its regulations.

[35] And at para. 61:

All of the circumstances must be considered to determine the parties intentions and whether there was a contract. No aspects can be ignored. If there are differences they must be considered and reconciled.

[36] In *R. v. Kreft, supra*, Fradsham, J. held at para. 28 and 29 as follows:

The Legislature's view of the importance to the public of the protection provided by the Act is underscored by section 2(1) of the Act which

states that “[a]ny waiver or release by a person of the person’s rights, benefits or protection under this Act or the regulations is void.”

The *Fair Trading Act, supra*, is regulatory legislation, and as such is designed to protect the public. Cory, J. said in *R. v. Wholesale Travel Group Inc. and Chedore* (1991) 130 N.R. 1 (S.C.C.) at p. 16:

“[24] The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.”

[37] In *Johnson v. World Health Club* 2008 APC 184 the issue determined by the Court related to Unfair Trade Practices under the provisions of the *FTA*. Ingram, J. addressed the scope of the *FTA* and held at para. 11 as follows:

The *Act* is consumer protection legislation and should be given a broad and liberal interpretation so as achieve the object of protecting the unwary. It sets a higher standard than the common law and provides relief of both a legal and equitable nature, both for damages and by way of cancellation, in many detailed circumstances which fall far short of the grounds required under the general law for a remedy. The *Act* defines as “unfair trade practices” a vast litany of specific matters, making them material where they may not otherwise have been so regarded, requires disclosure where none may have been otherwise required, and, in many instances over-rides the express agreements of parties so as to ameliorate the rigors of the robust tradition of the common law.

(c) Prepaid Contracting Business

[38] In *Kreft, supra*, the activity being regulated was the supply of services by those who provided prepaid renovation services to individual homeowners. Fradsham, J. held at para. 31 that the aim of the governing legislation was to protect the consumer by ensuring that the required amount of security be submitted to the Director. That provided some financial protection for the consumer in the event of a

default by the prepaid contractor on his/her obligations. Such a requirement was aimed at reducing the vulnerability of the consumer (para. 32).

EVIDENCE

General Practices of ELD

Evidence of Kevin Scheiris

[39] Kevin Scheiris is the President of ELD, a company he incorporated in 2000. He has been the sole shareholder of this company since 2001 but has been involved in the sunroom industry for 26 years. He testified that it is a cutthroat industry. Prior to starting his own company Mr. Scheiris worked for Sunshine Solariums, a company owned by Danny Fridrich. In the course of his career Mr. Scheiris has done hundreds of sunroom installations.

[40] Initially ELD was a dealer/distributor for a company called Pacific Sunrooms. ELD sold these sunrooms to the public and was also in the business of sunroom installation. In approximately 2003 health issues arose for Mr. Scheiris pursuant to which his physician advised him to stop doing the labour work required to perform sunroom installations. Mr. Scheiris says that from that point onwards ELD has not engaged in any labour services but has only sold sunrooms and solariums to consumers.

[41] One of roles performed by Mr. Scheiris at ELD is that of salesperson. Prior to 2007 he also had a salesperson named Mike Gillespie. After 2007 he retained Danny Fridrich on a commission basis as a salesperson. Mr. Fridrich was not an employee of ELD. Mr. Scheiris acknowledged that Mr. Fridrich, in his role as a salesperson for ELD, was representing ELD and acting as its agent, and that Mr. Fridrich was authorized to enter into contracts on ELD's behalf.

[42] Although ELD has been in operation since 2000 it did not obtain a licence from Service Alberta until 2006. The requirement for a licence was brought to Mr. Scheiris' attention by Service Alberta in 2004 as a result of a consumer complaint received by Service Alberta from Mary Tourigny. By the end of 2005 Mr. Scheiris understood that he needed to have a licence to operate his business. He took steps to get a Direct Sellers licence in place and in 2006 ELD was licenced by Service Alberta to operate as a Direct Seller.

[43] From 2004 onwards ELD developed a practice of using two forms of contracts for consumer transactions. The first is a Supply Only Contract (for the sale to the customer of the sunroom kit or other product and materials). The second is termed a Labour Contract Only (for the installation of the sunroom kit or other product). Both of these contracts are prepared forms designed by ELD containing certain standard terms, although the design and terms of the Supply Only Contract has been revised over the years. As well, they each contain blank spaces for dates,

prices, GST, job address, material delivery date, completion date etc. The Supply Only Contract is a triplicate form containing a provision requiring a 50% down payment. The Labour Contract Only, which is also a triplicate form, contains no provision requiring a prepayment.

[44] From 2004 to 2010 Mr. Scheiris would usually close sales for ELD products such as sunrooms at a customer's home as he had no formal office or show room. He did however have certain of his products erected and attached to his home and used these for display purposes. A customer may have contacted him as a result of seeing his product at a home show or as a result of other means such as seeing his website. Mr. Scheiris would attend at a potential customer's home. He has to make sure that a sunroom can be built where the customer wants it to go. He will explain to the customer how the sunroom product was built. He provides samples of the materials used for the customer to see. He also has numerous photographs of sunrooms as part of his sales kit so he can show a customer what the finished product looks like. If the customer was interested he would take measurements in order to calculate the labour cost to install the product. He provides that labour cost to the consumer on the Labour Contract Only.

[45] During his sales pitch with customers, Mr. Scheiris informs them that he is licenced as a Direct Seller and that he does not do the labour work. He explains that he is only allowed to provide materials. He advises his customers that if they deal directly with the installer for the labour work that this will ensure fewer problems down the line. He shows customers the Labour Contract Only once they have decided whether to go ahead with the sunroom (or other product). He advises customers that the Labour Contract Only is an independent contract pursuant to which he can refer the customer to a tradesperson or pursuant to which he can provide advice about certain tradespeople. Normally Mr. Scheiris provides the names of 3-4 tradespeople for a customer to call. He gives his customers the option of using the Labour Contract Only but also tells them they can make the labour arrangements themselves. He leaves all three copies of the Labour Contract Only with the customer unless ELD is going to arrange the installer in which case he keeps one of the copies after it has been filled out.

[46] The Labour Contract Only contains a place for the customer to sign as "buyer". There is also a signature line under the words "accepted by management". In the upper left hand corner is the word "contractor" with 3 blank lines underneath. Mr. Scheiris does not ask the customer to sign the Labour Contract Only in his presence but says they will normally do that.

[47] Mr. Scheiris' purpose in providing the Labour Contract Only as well as the list of tradespeople referrals is to ensure that the customer is not taken advantage of by a tradesperson who might rip them off or who would not to a proper job. He tells customers that whatever contractor they hire should fill out the Labour Contract Only so that the customer has a warranty on the work performed. Mr. Scheiris says that in his experience installers are very sloppy about entering into written

contracts with customers and that his intent of providing a labour contract is to protect the consumer.

[48] Mr. Scheiris has taken steps to train some tradespeople to install ELD products. He is not compensated for this and says the sunroom kits are not that hard to put together and could in fact be installed by the customer. Some installers would come to him and he would show them how to do the installation and if he happened to be on a job site he would show the installer where the components of the product would go. He did not provide oversight to an installer and if he showed up on a job site it was usually to bring a part, or perhaps take pictures at the end of the installation. To the best of his knowledge the installers to whom he made referrals for the installation of ELD products had their own GST numbers and their own WCB account,

[49] Mr. Scheiris says the normal course of events is that he will call the chosen installer once the materials are in. He does this as a courtesy to the customer. ELD is supplying the materials and therefore Mr. Scheiris is the one who knows when the sunroom kit or other materials have come in. In the event the initial installer chosen by the customer is now too busy to do the job Mr. Scheiris will provide the customer with information about another installer he is aware of that is available to do the job.

[50] In his role as a commissioned salesperson for ELD Danny Fridrich did not call Mr. Scheiris to inquire as to which installer a job might be referred to. Mr. Scheiris says Mr. Fridrich made that decision on his own.

Evidence of Danny Fridrich

[51] Danny Fridrich was called as a witness by ELD. He also explained the two-contract process. Mr. Fridrich testified that he has been in the sunroom business for 25 years and had been the founding president of Sunshine Solariums, which he sold due to ill health. He was a pioneer of the sunroom product, has been involved in both the design and selling of sunrooms, and has sold over 1000 units. Sunshine Solariums provided both materials and labour to customers.

[52] Mr. Fridrich has known Mr. Scheiris for 18 years. Mr. Scheiris originally worked as an installer for Mr. Fridrich and he described him as one of the best ever. Over the course of time they have each made the other a lot of money and during the time that Mr. Fridrich was a salesperson for ELD he sold over 300 deals.

[53] In selling ELD products Mr. Fridrich would attend at a potential customer's home with his samples. He would try to "sell himself" because if the customer liked him then a sale was more likely. His mission was to get a deal. If he did not do a good enough selling job then he expected that another salesman would come along after him and get the deal.

[54] Kevin Scheiris had provided him with blank Supply Only Contracts and blank documents for "labour only". He was given these in order to provide them to customers.

[55] Mr. Fridrich's practice was to show the customer samples of the materials to be used as well as photographs of the finished products. He would make his sales pitch. This included taking measurements at the customer's home in order to figure out what materials were needed and to determine the price to install the materials. Mr. Fridrich's sales pitch included providing the cost of the installation of the sunroom because the customer had to know the amount of money they were looking at spending. Therefore, Mr. Fridrich would provide the cost of the product on the Supply Only Contract and after taking all the necessary measurements he would provide the cost of the installation of that product on the Labour Contract Only. He was able to provide the installation cost because "he wrote the book on it". He utilized a spreadsheet to determine, by a square footage calculation, what each element of the product would cost to install.

[56] Mr. Fridrich would inform the customer as to whom the installer was going to be. While he did not tell the customers that the installer worked for ELD, and while he told the customer that the installer was to be paid directly, he always explained that the installation would be performed by someone trained by ELD. He would tell the customer that Mr. Scheiris had trained crews who would perform the installation and that the customer was to pay the installer directly. Mr. Fridrich never considered whether the customer could hire a person other than the installer he recommended. He did not want the customer to hire someone other than the party he had recommended because these were sensitive jobs and he did not want someone butchering the work.

[57] Mr. Fridrich was not entirely certain what a customer was ultimately to do with the Labour Contract Only, but thought that the customer was supposed to show the contract to the installer, and if the work had been done correctly the customer was to pay the installer directly.

Evidence of Tony De Michele

[58] Tony De Michele was an independent tradesperson who had installed sunrooms and patio covers since 1982. He did this work through his own incorporated company called Kalmar. He had been referred to over 100 customers by ELD. None of those customers were any of the complainants in the Adam Woytowich binder. When he was referred to ELD customers to do installations his work was not supervised or controlled by ELD. He was paid for his work directly by the customer and not by ELD and was only paid on the completion of the work. No part of that payment went back to ELD. He has never been an agent or employee of ELD and there has never been an agreement for the payment of money between the two of them.

[59] In 2009 Mr. De Michele had a discussion with Mr. Scheiris about establishing an industry or going rate that Mr. De Michele would charge for labour work to install products supplied to a consumer by ELD. He provided Mr. Scheiris with his average price per square foot for labour. He was not bound by this, but this average price per square foot would permit Mr. Scheiris to give a customer a quote for the cost of Mr. De Michele's installation of the product supplied by ELD. He authorized ELD to give quotes to customers based on his square footage rates. His understanding was that ELD was giving quotes to customers because the customer not only wanted to know what the supply of the materials would be, but would also want to know what the installation of those materials would cost. Mr. De Michele understood that this would permit a customer to make a comparison to other labour quotes the customer might obtain. Notwithstanding that a labour quote was given to a customer by ELD Mr. De Michele was still entitled, once he went on site, to add extra costs if required. Customers sometimes asked him to do labour work over and above what was on the labour contract and in that case he might prepare an extra written contract for that work. If an ELD customer had a problem with the work that he did it was his responsibility to fix it, not ELDs.

Evidence of Doug McAree

[60] Doug McAree installed sunrooms between 2005 and 2010. He has never been an agent or employee of ELD nor has he ever had an agreement with ELD for the payment of money between the two of them. From time to time ELD referred some of its customers to him. Between 2005 and 2010 he did work for 50-60 ELD customers. None of those customers were any of the complainants in the Adam Woytowich binder. When he received those referrals he considered himself to be working directly for the customer. He was paid for his work directly by the customer and not by ELD. At the end of the job he prepared an invoice for the customer and the customer paid him. No customer paid him a deposit for his labour work.

[61] At the beginning of the time that he started doing installation of ELD products Mr. McAree discussed with Mr. Scheiris how much he would charge per square foot for assembly. This permitted Mr. Scheiris to provide customers with a quote for the installation of the product supplied by ELD. He understood that Mr. Scheiris was giving customers a quote for labour so that the customer would know the cost of the whole job and so that they did not have to run around looking for quotes for the installation, although he understood that the customer was free to do that if they wished.

[62] When it came to installing the ELD product, typically either Mr. Scheiris would call him or the customer would call him. He did not discuss with the customer the price he would charge for installation because the contract had already been prepared by ELD with the price per square foot. He would sign the contract that had been prepared. In the event that a customer asked him to do something over and above what was in the labour contract he would either not

charge for that (if it was just a small thing) or he would tell the customer the cost and would add that to his invoice at the end of the job. Although ELD had nothing to do with any extra work requested he would usually inform Mr. Scheiris about this. If there was a problem with the installation it was his responsibility to make it right.

Evidence of Fred Hildebrandt

[63] Mr. Hildebrandt and his brothers are the principals of Mopica Construction. Mr. Hildebrandt had some involvement with Nora Schmidt, one of the complainants in the Woytowich Binder.

[64] There has never been a legal affiliation between Mopica and ELD or an agreement for the payment of money between the two entities. Mopica is engaged in the business of house framing, but from 2007 to 2010 the company also installed sunrooms and screen rooms between house framing jobs. Mr. Hildebrandt always understood that ELD was in the business of selling sunrooms. Mr. Scheiris had an agreement with Mopica on the price per square foot for installations. Mr. Hildebrandt agreed that ELD needed to be able to provide this price so that potential customers would know the installation cost of the ELD product.

[65] When ELD referred a customer to Mopica most often the customer would then contact Mopica. Mr. Hildebrandt would speak with both Mr. Scheiris and the homeowner to get everything aligned. If everything was clear job wise then Mr. Hildebrandt would sign the labour contract that had been prepared by ELD. Mopica did not write contracts with ELD customers. If the customer requested work additional to that which was on the labour contract then the price on the labour contract might increase over the basic price that had been provided in the labour contract. Mr. Scheiris was not involved in any of those discussions. Mopica might provide an invoice or receipt to the customer at the end of the construction but this did not often occur as the customer was usually just happy to pay. He was paid at the end of the job and none of that money went back to ELD. If an ELD customer had a problem with the installation it was Mopica's responsibility to fix it.

Evidence of Hugo Hildebrandt

[66] Along with his brother Fred, Hugo Hildebrandt is one of the principals of Mopica Construction. Hugo Hildebrandt had some involvement with the complainant Nora Schmidt.

[67] He confirmed that there is no connection between ELD and Mopica in the sense that neither has participated in the other's business activities.

[68] When Mopica installed a screen room or a sunroom for an ELD customer they were working for the customer and not for ELD. Mopica was paid for its work by the customer and not by ELD. At no time did he advise a customer that he was part of an ELD crew. No ELD customer paid Mopica a deposit or a down payment.

He and his brother Fred had a discussion with Mr. Scheiris about what Mopica would charge for labour services to install ELD products on a square foot basis. This was done so that Mr. Scheiris would know what to tell customers in order for them to have an accurate idea of how much it would cost to install a sunroom or other ELD product. Without that information the customer might not make the purchase. Mopica authorized ELD to give its customers the Mopica price per square foot charge. If the customer wanted work done over and above what was in the labour contract then sometimes he would add it to the existing contract and sometimes he would prepare a separate contract. Neither ELD nor Mr. Scheiris had anything to do with that. If there was an installation problem with an ELD product then it was Mopica's responsibility to remedy that and not ELDs.

Evidence of Patricia Scheiris

[69] Patricia Scheiris has been married to Kevin Scheiris for 9 years. She does bookwork for ELD. Since 2004 she has never come across any record showing that ELD has paid any funds to an installer. She is not aware of any instance since 2004 in which ELD has paid funds to an installer or labourer.

Service Alberta and the two-contract process

[70] Mr. Scheiris acknowledged that he had discussions and meetings with Service Alberta over the years about how ELD's business was being conducted. He testified that as a result of these discussions he understood that if ELD was doing the labour component (i.e. installing the product it supplied) that he would have to obtain a prepaid contractor's licence, but that if he was not going to do the labour ELD did not need that type of licence and that a Direct Seller's licence would be sufficient.

[71] Mr. Scheiris had discussions with Service Alberta arising out of the Tourigny complaint. He acknowledged receiving a formal warning letter dated December 7, 2004 from Investigator Potter. In that letter Investigator Potter states his conclusion that the Tourigny complaint indicated that ELD had entered into a prepaid contracting agreement with Mary Tourigny in April of 2004 and that neither ELD nor Kevin Scheiris held a prepaid contractor licence. The letter states that this was a prosecutorial offence under s. 162 of the FTA. The letter goes on to state at page 2 as follows:

Advice and Recommendations:

You may wish to discuss the Fair Trading Act and licensing requirements with legal counsel to fully understand your rights, remedies and obligations as a supplier under the Act and situations that our department may take regulatory action for a breach of the Act. You can purchase the Act and accompanying regulations from the Queen's Printer at the J.J. Bowlen Building at #602, 620 - 7 Ave. SW, Calgary AB., Phone (403)297-6251.

You are advised to obtain a pre-paid contracting license prior to engaging in any future prepaid contracts. As well, the contracts must meet the requirements of section 35 of the Fair Trading Act.

[72] Although this letter makes no mention of going to a library to review the FTA and its regulations, Mr. Scheiris testified that he was told by Service Alberta to go to the library. He says he went to the library and could not find anything. He left it at that and did not purchase the *FTA* or its regulations.

[73] Mr. Scheiris acknowledged that he had a November 14, 2005 phone call with Investigator Martin from Service Alberta regarding the consumer complaint of Gordon Hunstad and that Investigator Martin gave him a broad overview of the *FTA*. In May of 2006 he applied for a pre-paid contractor's licence. He did not proceed with that application because he says when he explained to Service Alberta how he was conducting his business he was told that he was operating as a Direct Seller. He was advised that normally Service Alberta did not give out legal advice and was again told to go to the library. He says he went to the library but found that this was too confusing so he left it at that.

[74] Mr. Scheiris testified that in 2006 he had signed a labour contract on behalf of a supplier named Rescom in the transaction with complainant Claude Malenfant. Service Alberta Investigator Daniel Choy investigated the Malenfant complaint. Mr. Scheiris testified about a meeting that he had in early 2007 with Daniel Choy during which he was told by Investigator Choy that he should not sign a labour contract because this would be misleading to customers. Mr. Scheiris says that immediately after this meeting he phoned Danny Fridrich and told him he could not sign the labour contracts and that he had to let the customer and the installer sign the labour contract.

[75] Mr. Scheiris acknowledges that in 2008 he was told by Inspector Choy that he should not sign or initial a labour contract. Mr. Scheiris acknowledged receiving a June 9, 2008 warning letter from Inspector Choy. Paragraphs 2 and 3 of that letter read as follows:

Your company Easy Living Design Ltd. (Easy Living) is licensed as a direct selling business not a prepaid contracting business. You stated that you only supplied materials and that was the reason why Mr. Malenfant paid Jeff Slawter of Rescom separately for construction. However, on the second part of Easy Living's contract, it states "Installation", you acknowledged that you signed the contract on behalf of Rescom. As I explained to you during our April 3, 2008 meeting this practice must be stopped immediately unless you have a prepaid contracting business licence in place.

Based on the information gathered during my investigation, I have identified two breaches under the Fair Trading Act. They are as follows:

- Section 35 – Failing to meet the requirements of the contents of a sales contract
- Section 104(1) – Operating a prepaid contracting business without a licence.

[76] The letter ends by stating that Investigator Choy had decided to issue the warning letter in order to obtain future compliance from ELD with the legislation and that any future contraventions might result in recommendation for prosecution and/or administrative action against ELD.

[77] Mr. Scheiris says that he understood from this letter that if he signed the labour contract this would make him look like he was a prepaid contractor. However, he also testified that in his numerous conversations and meetings with Service Alberta over the years that he had explained how he was conducting his sales, including the two-contract process. Based on the information he provided to Service Alberta he says he was told that he was operating as a Direct Seller.

Evidence Heard from Complainants to Service Alberta

[78] With respect to the “open investigation” files of Service Alberta, the Director called two witnesses: Gordon Marshall and Nora Schmidt.

The Gordon Marshall Transaction

Evidence of Gordon Marshall

[79] ELD objected to Mr. Marshall being permitted to testify. ELD argued that the Marshall complaint was *res judicata*. It was argued that with respect to the Marshall transaction ELD had been charged under the provisions of the *FTA* as operating as a Prepaid Contractor without a licence and that this charge had been dismissed at Provincial Court in the Winter of 2011. ELD argued that the Appeal Board would therefore be embarking on the same process as the Provincial Court had undertaken should it hear and make a determination based on Mr. Marshall’s evidence.

[80] The Appeal Board was informed by counsel that with respect to the charge against ELD arising from the Marshall transaction the Provincial Court heard no evidence because on the day that the matter came forward for trial Mr. Marshall was out of town and was therefore unable to testify. The charges against ELD were dismissed on that basis and not on the basis of a determination made after hearing evidence.

[81] The Appeal Board determined that it would hear Mr. Marshall’s evidence. Based on the information from counsel it was clear that there had been no judicial

finding by the Provincial Court based on the hearing of evidence. The prepaid contracting issue arising out of the Marshall complaint had not been litigated and ruled upon by the Provincial Court. Hearing Mr. Marshall's evidence in the Appeal Hearing therefore did not amount to an attempt by the Director to re-litigate an issue for which there had been a prior judicial determination.

[82] Gordon Marshall's evidence was as follows. On August 20, 2008 Mr. Marshall wrote to Service Alberta to complain about work that had been done by ELD with respect to a canopy roof over his deck at his home in High River Alberta. He became aware of ELD when Danny Fridrich came to his home on July 17, 2007. This was the day after a hailstorm in High River. Mr. Fridrich was asking if any repair work needed to be done. The hail had damaged some of the acrylic panels in the canopy over Mr. Marshall's deck. Pursuant to discussions with Mr. Fridrich at the Marshall residence in High River on July 17, 2007 Mr. Marshall signed a Supply Only Contract with ELD for the repair of the canopy roof (Exhibit 1).

[83] Mr. Marshall discussed with Mr. Fridrich that the canopy was to be repaired to the state it had been in prior to the hailstorm. He testified that the details of the repair were verbal. He was presented with one contract only by Mr. Fridrich (Exhibit 1). Mr. Marshall signed the Supply Only Contract as the "buyer" and Mr. Fridrich signed on the line "accepted by management".

[84] The Supply Only Contract states the sales contract price was \$4,992.00. With GST of \$299.52 the total contract price was \$5,291.52. The contract also states that there was a down payment of \$2,645.76 and that the balance "on delivery" was \$2,645.76.

[85] Mr. Marshall did not provide any down payment on July 17, 2007. He was making a claim through his insurance company and wanted to have the amount for the repair approved by his insurer. He was concerned because he felt that the quote was very high. After he signed the Supply Only Contract on July 17, 2007 Mr. Marshall made some notes at the very top of the Supply Only Contract with respect to his insurance reference number and the name of an individual to contact at his insurer. The insurance company did approve the amount and on August 27, 2007 Danny Fridrich returned to Mr. Marshall's residence in High River and picked up a cheque written by Mr. Marshall in the amount of \$2,645.76 payable to Easy Living Design Ltd. (Exhibit 2). Mr. Marshall made a note of that date and the cheque number on his copy of the contract. On the "memo" portion of the cheque Mr. Marshall wrote "deposit of 50% for patio cover repair". Mr. Marshall says he understood that he was making a 50% deposit to ELD for his patio cover repair. His bank statement for the period August 1, 2007 to September 30, 2007 shows that the deposit cheque was cashed on September 5, 2007. As of that date no products or services had been provided. Sometime in either late September or early October Mr. Marshall left for Arizona for the winter. As of the date that he left no materials for the canopy repair had been provided.

[86] Mr. Marshall testified that Danny Fridrich never told him that he would have to get his own installer for the canopy repair. He was never given the names of installers or a list of recommended installers. At no time did he hire an installer to do the repair work. Mr. Marshall believed that both the materials and labour were all part of Exhibit 1.

[87] While Mr. Marshall was away, his neighbor Roland Richardson was keeping an eye on the Marshall residence. At some point Mr. Richardson called Mr. Marshall to tell him that nothing had been done. Mr. Richardson told Mr. Marshall that the materials had been dropped off in December. Mr. Marshall phoned ELD and threatened to have the contract voided. He was told that the work would be done within 3 weeks.

[88] The work was performed in December of 2007. Mr. Marshall did not direct the installation and does not know who the installer was. Mr. Marshall was not happy with the work because his neighbor reported to him that an edge trim was cracked and that material was missing from the leading edge of the roof trim. Mr. Marshall did not want to pay the balance of the funds owing under the contract until his concerns had been remedied.

[89] While all of this was going on Mr. Marshall's wife had briefly returned home for a funeral. She reported to him that the wrong colour of acrylic had been used for the canopy panels in that it was too light. Because the acrylic panels were of a lighter tint than the original panels Mr. Marshall felt they would provide little if any sun shade leaving his deck less functional than it had previously been. Mr. Marshall phoned Mr. Scheiris from Arizona and told him that he would pay the balance if ELD replaced the deficient edge and if he replaced the acrylic panels to match the original.

[90] A statement of lien dated February 19, 2008 (Exhibit 4) shows ELD as the lienholder with a claim against Gord Marshall at his High River address. In the section of the Statement of Lien that describes the work or materials supplied the words "replaced patio cover" are written.

[91] Mr. Marshall testified that when he returned from Arizona, an individual came to his door asking for money for the installation. Mr. Marshall did not get this person's name but he told him he would have to take the matter of payment up with ELD. As far as Mr. Marshall was concerned he did not owe any funds to this installer because the contract that he had signed was for the entire job with no separate amount to be paid for labour or installation.

[92] Under cross-examination Mr. Marshall said that he read the contract before he signed it. He says he read the words "Supply Only" on the upper right hand corner of the contract. He was asked about the words in the black box in the upper portion of the contract that say "This is not a contract for installation or any labour it is strictly a material purchase". He thought that he read that. He says he did not

read the words in the box saying "Note: Company does not UNDER ANY CIRCUMSTANCES do any of the installation in whole or in part or supply any labour whatsoever". He also did not read the words in the box "Supply Kits 50% Down Payment 50% on Delivery". He stated that it was explained to him by Danny Fridrich that the contract covered the complete installation of the canopy.

Evidence of Danny Fridrich

[93] Danny Fridrich says that he did not tell Mr. Marshall that ELD would install the patio cover. He was not sure if he told Mr. Marshall that installation would be by a crew arranged by ELD. He knew that Mr. Scheiris had trained crews and always told customers that. Mr. Fridrich stated that he was selling Mr. Marshall a patio cover, that he was making a sales speech, and did not know if he specified to Mr. Marshall that ELD and the installers were separate from each other. He testified that the price on the Marshall contact did not include installation because if it did then he (Mr. Fridrich) would not have made any money. Mr. Fridrich gave no evidence of having any discussions with Gordon Marshall about the colour of the acrylic panels in the new canopy.

Evidence of Kevin Scheiris

[94] Mr. Scheiris says Mr. Marshall asked ELD to arrange the installation of his patio cover because he was going to be out of the country. Mr. Marshall had said that he would leave two cheques with his neighbor - one for the balance on the materials and one for the cost of the labour. Mr. Scheiris says that Mr. Marshall was aware of the tint issue with respect to the acrylic panels and had been told by Danny Fridrich that the new acrylic panels in the patio cover would have a slightly different look from the ones that had been damaged because ELD had a different acrylic supplier than the company that had supplied the original acrylic panels. Mr. Scheiris says he also explained this to Mr. Marshall. Mr. Scheiris noted that the contract signed by Mr. Marshall and Mr. Fridrich was a Supply Only Contract. He testified that he had specifically added the words "Supply Only" at the top of the contract so that the customer would not be confused.

[95] Mr. Scheiris says he contacted an installer by the name of Landon Johnson to install the patio cover. Mr. Scheiris did not have any discussions with Mr. Marshall about who was to pay the installer. He thought that Mr. Marshall already knew he was to pay the installer because he had advised that a cheque for the installer would be left with the neighbor. Landon Johnson was not called to testify at the Appeal Hearing.

[96] Because Mr. Marshall had not paid the balance on the Supply Only Contract, Mr. Scheiris contacted him in the U.S. to request the money remaining owing. He was told by Mr. Marshall that he was not willing to pay the balance at that time because Mr. Scheiris had made him wait for the job to be completed, and therefore he was going to make Mr. Scheiris wait to be paid.

[97] Mr. Scheiris says ELD never paid Landon Johnson. Mr. Scheiris thought that Mr. Johnson would have to file his own lien in order to be paid.

The Nora Schmidt Transaction

Evidence of Nora Schmidt

[98] Service Alberta received a complaint from Nora Schmidt sometime in 2009.

[99] Mrs. Schmidt received a leaflet in her mailbox advertising sunrooms. She had an old sunroom on her home that was in need of repair. Pursuant to the information in the leaflet she made an appointment with Danny Fridrich to come to her home in Cochrane Alberta on July 14, 2009.

[100] Mrs. Schmidt decided to purchase a new sunroom from ELD. It was to be attached to the front of her house and would form the main entrance to her home. The old sunroom had been built on a deck and a new deck was also to be built for the new sunroom. Mr. Fridrich took some measurements on July 14, 2009, and on that date at her Cochrane home Mrs. Schmidt was presented by Mr. Fridrich with a Supply Only Contract (Exhibit 7) and a Labour Contract Only (Exhibit 8). She signed at the "owner" section of the Supply Only Contract and at the "buyer" section of the Labour Contract Only. With the exception of her signature, all of the handwriting on the Supply Only Contract is Mr. Fridrich's. On the Labour Contract Only the name "Fred" next to the Word "Contractor, as well as the phone number below that, are in Mrs. Schmidt's handwriting. She also wrote some notes at the very bottom of that contract regarding conversations with Danny Fridrich on July 16 and July 24th. The remainder of the handwriting on the Labour Contract Only is Danny Fridrich's, including the contract price of \$5,600.00, the GST amount of \$280.00, and the amount to be paid on completion of the contract of \$5,880.00. Mrs. Schmidt says she asked Mr. Fridrich on several occasions what this amount was for but never received an explanation. The job completion date on the Labour Contract Only is stated to be July 31, 2009 (approximately). Mrs. Schmidt had a family reunion planned at her home on August 15, 2009 and she wanted the sunroom ready by then.

[101] The sales contract price on the Supply Only Contract was \$23,496.00 plus GST of \$1,174.80 for a total contract price of \$24,670.80. The Supply Only Contract indicates that the ½ down payment amount was \$12,335.40 and Mrs. Schmidt made a cheque out to Easy Living Design in that amount dated July 15, 2009. Mrs. Schmidt's bank statement shows that this cheque was cashed on July 17, 2009. As of July 17, 2009 Mrs. Schmidt had not received any products or services.

[102] Mrs. Schmidt understood that she was making this down payment for the materials only. However, Mr. Fridrich did not tell her that ELD did not do labour services. The Labour Contract Only was handed to her by Mr. Fridrich 10 minutes

after the Supply Only Contract and she understood that they came together “part and parcel” from ELD. While she never understood from Mr. Fridrich that she was to be making a prepayment for labour services she also believed that there was no difference between the supplier of the material and the supplier of the labour for the sunroom. Mr. Fridrich never told her that she had to arrange her own installer. Mr. Fridrich told her that the “Spanish Boys” were the best installers and she was not given the names of any other installers. It was her understanding therefore that the “Spanish Boys” would perform the installation. (The “Spanish Boys” is a reference to Fred and Hugo Hildebrandt who are from South America).

[103] Fred Hildebrandt delivered the sunroom materials on July 24, 2009. Mrs. Schmidt says that this was the first time that she had ever spoken with Fred. Up to that point she did not have Fred’s name and phone number. She did not sign a contract with Fred Hildebrandt for the installation.

[104] After unloading the materials Fred Hildebrandt informed Mrs. Schmidt that he could not do the job because there were no rafters or beams to attach the sunroom to. Mrs. Schmidt called Danny Fridrich and on roughly July 27, 2009 Danny Fridrich and Kevin Scheiris attended at her home to look at things. At that time Mr. Scheiris asked for the balance for the materials. Mrs. Schmidt provided another cheque but post-dated it to August 12, 2009 as she was apprehensive about whether the sunroom could be completed before the family reunion. Mr. Fridrich assured her that it would not be a problem. The post-dated cheque was cashed on August 6, 2009. When she realized this Mrs. Schmidt called her bank and told them to reverse the funds.

[105] Mrs. Schmidt attempted to get ahold of Fred Hildebrandt who had several reasons why he could not return to do the work. The sunroom was not installed prior to the family reunion. On August 26, 2009 Mrs. Schmidt sent an email to Danny Fridrich advising that the Spanish Boys had told her they had more work than they could handle and could not do the work. Her husband had removed the old sunroom and deck and floorboards and she had hired another company to build the deck that the sunroom was to sit on. On September 30, 2009 Mrs. Schmidt wrote to ELD’s lawyer to cancel the Supply Only Contract and the Labour Contract Only. She did not pay the balance on the Supply Only Contract because nothing had been installed. ELD sued Mr. and Mrs. Schmidt in Provincial Court for the balance. The Schmidts counterclaimed for the deposit they had paid on the basis that the product could not be installed. The parties came to a settlement at Provincial Court. Mrs. Schmidt paid the remaining \$12,335.40. ELD referred an installer to her by the name of Peter Andrew. In April of 2010 Mrs. Schmidt entered into a contract with Peter Andrew for labour to install the sunroom for the total amount of \$4,549.65 to be paid on completion of the project.

Evidence of Danny Fridrich

[106] Mr. Fridrich met with Mrs. Schmidt at her home in Cochrane on July 14, 2009. On the Supply Only Contract he signed on the "seller" line. Mrs. Schmidt also signed the Supply Only Contract. Mr. Fridrich provided Mrs. Schmidt with the Labour Contract Only so that she would know how much the labour was going to cost. At the July 14, 2009 meeting Mrs. Schmidt asked him who the contractor was going to be. He knew that Fred Hildebrandt had the best crew and could get the job done quickly. He thinks that he gave her Fred's name and phone number and that Mrs. Schmidt wrote that information in the upper left hand corner of the Labour Contract Only on July 14, 2009. He was satisfied that Mrs. Schmidt understood what he was saying about Fred being a separate installer. He never told Mrs. Schmidt that Kevin Scheiris or ELD would build the sunroom.

[107] Mr. Fridrich testified that in a weak moment he printed his name at the "Accepted by Management" line of the Labour Contract Only. He said that Mrs. Schmidt was a kind of suspicious person and she wanted him to sign the Labour Contract Only. He stated that he did not usually sign the labour contracts and did not intend to bind ELD. Mr. Fridrich says that Mr. Scheiris had previously told him that if possible he should not sign the Labour Contract Only and that if he could get away with not signing it he was to try to do this. He was not sure if he ever told Mr. Scheiris that he had signed the Schmidt Labour Contract Only or if he ever gave him a copy of that contract. Mr. Scheiris never reprimanded him for signing the Labour Contract Only. He was not docked any of his commission pay nor told to go back and see Mrs. Schmidt and explain that he should not have signed the contract.

[108] Because the Schmidt sunroom has a lot of glass the deck underneath it had to be built to perfection and as far as Mr. Fridrich was concerned it had to be built by "his people" or "people he knew" with no exceptions.

Evidence of Fred Hildebrandt

[109] Mr. Hildebrandt understood that he was to install a sunroom for Mrs. Schmidt and this was on the basis of the referral from ELD. He first spoke with Mrs. Schmidt by phone when she called him and asked him to do the installation of her sunroom. He testified that she hired him to do the job. Mrs. Schmidt asked him to deliver the materials. He did so but only as a favour to Mr. Scheiris who could not do it at that time due to a health matter. Mrs. Schmidt wanted the job done quickly and Fred agreed to help Mr. Scheiris out by delivering the material. When he delivered the materials he noted that there were people working on Mrs. Schmidt's roof and determined that he could not start the sunroom installation for 3-4 days until the roofers were finished. Shortly thereafter Mr. Hildebrandt became aware of the Service Alberta investigation of ELD. He was frightened by this investigation and the discussion that he had with Adam Woytowich as part of Mr. Woytowich's investigation. He did not really understand what was going on. He decided that he did not want to do the work for Mrs. Schmidt. In addition, the delay in installation

caused by the roofers meant that Mopica could not do the job because they had other jobs to attend to.

[110] Mr. Hildebrandt did not know who drafted the Labour Contract Only signed by Mrs. Schmidt but stated that it was not a document prepared by Mopica. He confirmed that when he met with Mrs. Schmidt she had a copy of the Labour Contract Only and that she already had the price for the installation of the sunroom. Under cross-examination Mr. Hildebrandt stated that when he first met with Mrs. Schmidt he also had a copy of the Labour Contract Only (Exhibit 8) that he had received from Mr. Scheiris. Under re-direct examination he said he was not certain if he had received this from Mr. Scheiris or from Mrs. Schmidt.

[111] Mr. Hildebrandt did not negotiate or fill out the Labour Contract Only. He believed that it was Mr. Fridrich who wrote the amount of \$5,800.00 on the Labour Contract Only and although the labour charge per square footage was not written on this contract he thought that Mr. Fridrich likely arrived at that amount using a price per square footage. He did not discuss the job completion date of July 31, 2009 (approximately) with Mrs. Schmidt and thought that Mr. Fridrich would have written that on the Labour Contract Only. No one from Mopica explained the provisions of the Labour Contract Only to Mrs. Schmidt. There was no signed contract between Mopica or Mr. Hildebrand and Mrs. Schmidt for the installation of the sunroom at her home and the words "Fred" and the phone number in the "Contractor" section of the Labour Contract Only are not in his handwriting.

Evidence of Hugo Hildebrandt

[112] Mr. Hildebrandt stated that Mrs. Schmidt and her husband were upset because Mopica could not do the installation. He understood that Mrs. Schmidt called Mr. Scheiris about this and that Mr. Scheiris referred other installers to her but that Mrs. Schmidt wanted Mopica to do the job and was upset about this. Fred did not want to do the job because of the Service Alberta investigation, which freaked him out, and because of the delay in the job start time caused by the roofers.

Evidence of Kevin Scheiris

[113] Mr. Scheiris tried to accommodate Mrs. Schmidt's request for a specific material delivery date due to the family reunion she was holding at her home. There were issues with the sunroom door being wide enough for a wheelchair ramp that Mrs. Schmidt had requested. A few days after the materials were delivered he met with Mrs. Schmidt at her home to discuss that matter. Mrs. Schmidt was upset because the job had not started. Mr. Scheiris noted that the roofers had not finished working on the roof. Mrs. Schmidt did not think that the sunroom installation should be delayed because of the roofers and also wanted the Spanish Boys to do the installation because Mr. Fridrich had told her they were the best. Mr. Scheiris told Mrs. Schmidt that he was not in control of the Spanish Boys. He had no idea of their schedule at that time.

[114] At no time did Mrs. Schmidt express to Mr. Scheiris any confusion over what she had signed with respect to the Supply Only Contract and in particular what she was purchasing. He did not authorize Mr. Fridrich to put his name on the Nora Schmidt Labour Contract Only and was not aware that he had done so until he was provided with a copy of that contract in the course of the Service Alberta investigation. Once he became aware of this he stopped using Mr. Fridrich as a salesperson.

[115] Mr. Scheiris was shown a copy of an August 20, 2009 email from Mr. Fridrich to Nora Schmidt that stated that he (Mr. Scheiris) had to approve the contractor. He explained that Mr. Fridrich was warning Mrs. Schmidt not to let any rogue contractors build her deck. He says Mr. Fridrich was trying to warn Mrs. Schmidt that the deck had to be built properly. ELD would not warranty a damaged sunroom that resulted from an improperly built deck.

ANALYSIS – Prepaid Contracting Business

The Gordon Marshall transaction

[116] A Prepaid Contract is a form of a direct sale. Pursuant to s. 3(2) of the *Designation of Trades and Businesses Regulation, supra*, a business licensed as a Direct Seller can take a prepayment from a consumer as long as there is no construction or maintenance involved in the contract. If the contract is for construction or maintenance the business can take a prepayment only if they have a Prepaid Contracting License.

[117] In order to determine whether ELD was acting as a prepaid contractor in the transaction with Gordon Marshall the provisions of s. 5(2) of the *Designation of Trades and Businesses Regulation* must be satisfied.

[118] Section 5(2)(c) of that Regulation requires that it be established that there was solicitation, negotiation or conclusion in person of a prepaid contract at a place other than the seller's place of business. In this case the evidence of both Gordon Marshall and Danny Fridrich establishes that on July 17, 2007 ELD, through its agent and representative, Danny Fridrich, solicited, negotiated and concluded, in person, at a place other than ELD's place of business a contract with Gordon Marshall. Mr. Fridrich came to Mr. Marshall's home in High River looking for business, a price was inserted in the contract, terms were agreed upon, and the contract was signed by both parties.

[119] Was that contract a prepaid contract? To answer that question the evidence must establish that (a) the contract was a construction or maintenance contract, and that (b) all or part of the contract price was to be paid before all the goods or services called for in the contract were provided.

[120] The first matter to be addressed therefore is whether this was a construction or maintenance contract. To qualify as such, section 5(2)(a) of the FTA requires that the evidence establish that the contract was for the purpose of constructing, altering, maintaining, repairing, adding to or improving a building that is used as the person's private dwelling. From his discussions with Danny Fridrich Mr. Marshall believed that this was a contract for the repair of his canopy roof and that his 50% down payment made on August 27, 2007 was towards that patio cover repair. That is supported by the words he wrote on that cheque "deposit of 50% for patio cover repair". There would have been no reason for Mr. Marshall to use the word "repair" if he thought that he was only paying for materials and that payment for labour was to be made to another individual on another date. This is also supported by the words utilized on the lien filed against Mr. Marshall's home by ELD in which it is stated that the lien was filed due to non-payment for a "replaced patio cover".

[121] ELD argues that the fact that there is no second contract (i.e. no Labour Contract Only) in this case establishes that this was a materials purchase only and that this was not a construction or maintenance contract. However, Mr. Fridrich's evidence was that he did not know if he specified to Mr. Marshall that ELD and installers were separate from each other. Mr. Fridrich was making a sales speech and always told customers that ELD had trained crews. Notwithstanding the wording of the Supply Only Contract, some of which Mr. Marshall read and some of which he didn't, Mr. Marshall understood, because of what Danny Fridrich told him, that he had signed an agreement that included the labour to repair his canopy. Mr. Marshall was clear in his evidence that despite an individual showing up at his home sometime down the road requesting payment for labour work that he did not pay that person because it was something to be taken up with ELD and not him.

[122] A copy of any separate agreement between Landon Johnson and Mr. Marshall pursuant to which Mr. Marshall was responsible to make a separate payment for labour was not introduced into evidence. No evidence was given as to what the amount of any separate labour charge was to be or how Mr. Marshall became aware of that such he could have left a cheque with his neighbor prior to departing for Arizona. Mr. Marshall's evidence was that he wrote an August 20, 2008 letter of complaint to Service Alberta (Exhibit 5). He testified that the letter was truthful. The letter states at page 3 that Mr. Marshall had made no arrangement to leave a cheque for the remaining 50% with his neighbor as the funds were to come from his insurance company once the work had been satisfactorily completed.

[123] Mr. Scheiris testified that he expected that Landon Johnson would have had to place a lien on Mr. Marshall's property but no evidence of any such lien being placed was introduced. Mr. Fridrich's evidence was that he could not recall if he knew a Landon Johnson and did not know if he was on one of Mr. Scheiris' crews.

[124] In the end, the version of events presented by ELD suggests that Landon Johnson attended at Mr. Marshall's residence with no contract or agreement in place

with Mr. Marshall to be paid for his labour, performed the installation anyways, did not get paid, and then apparently walked away from the debt owing to him by Mr. Marshall. That version of events is not plausible.

[125] Although ELD argues that it is clear from the wording of the Supply Only Contract that ELD was only supplying materials for the contract price, it is important to remember that the governing legislation for this Appeal Hearing is consumer protection legislation and as such the guiding principals are the protection of the public and the regulation of business ethics (*R. v. Kreft* and *R. v. Schultz, supra*). That in turn requires an analysis of the true substance of a transaction as opposed to an analysis that is restricted to the outward form of a contract. Section 10 of the *Interpretation Act* RSA 2000, I-8 mandates that an enactment be given the “fair, large and liberal construction and interpretation that best ensures the attainment of its objects”.

[126] The Appeal Board finds that the true substance of the contract between Gordon Marshall and ELD was an agreement for the repair of Mr. Marshall’s sunroom including both materials and labour. Therefore, the Appeal Board finds that notwithstanding its wording, the Supply Only Contract between Gordon Marshall and ELD qualifies as a construction or maintenance contract under s. 5(2)(a) of the *FTA*.

[127] As indicated above, the second step of the analysis requires a determination of whether all of part of the contract price was to be paid before all of the goods or services called for in the contract were provided. In this case there is no dispute that Mr. Marshall made a 50% prepayment to ELD on August 27, 2007, which cheque was cashed by ELD on September 5, 2007. As of that date none of the products or services under the contract had been provided to Mr. Marshall.

[128] Although Mr. Scheiris went through his invoice for the materials for the Marshall contract to show that once ELD’s profit was calculated ELD could not have paid any amount for labour, this evidence is not reliable as the date of the materials invoice was close to 3 years after the Marshall contract. In any event, whether ELD’s profit margins can accommodate labour costs cannot overcome the fact that based on what Mr. Fridrich told Mr. Marshall the agreement was for both materials and labour. Section 5(2)(b) of the *Designation of Trades and Businesses Regulation* does not require that the prepayment be made for or allocated to labour. All that is required is a prepayment made before all of the goods or services called for in the contract are provided.

[129] The Appeal Board finds that in its transaction with Gordon Marshall ELD had engaged in a Prepaid Contracting Business without a licence to do so.

The Nora Schmidt Transaction

[130] ELD argues that the only agreement between ELD and Mrs. Schmidt is the Supply Only Contract and that the only down payment taken by ELD was the 50% amount under that contract which was for materials only and not for any labour. ELD argues that the Labour Contract Only is not a prepaid contract because it does not contain any provision calling for Mrs. Schmidt to make a prepayment to anyone. It is argued that Mrs. Schmidt intended for Fred Hildebrand of Mopica and not ELD to install her sunroom and that this is reflected by her handwritten notation in the top left hand corner of the Labour Contract. ELD also argues that Mr. Fridrich was not authorized to sign the Labour Contract Only. Finally, ELD argues that the Supply Only Contract contains an entire agreement clause.

[131] As described above, in the context of consumer protection legislation, what is required in the determination of whether ELD was acting as a prepaid contractor in its transaction with Nora Schmidt is an analysis of the true substance of this transaction. In that regard, Mr. Fridrich did not give any evidence of having gone through the careful process described by Mr. Scheiris in presenting a Labour Contract Only to a customer. He did not give Mrs. Schmidt the names of 3-4 tradespeople she could call and did not tell her that the use of the Labour Contract Only was optional or that she could make her own installation arrangements. In fact, Mr. Fridrich did just the opposite. He gave Mrs. Schmidt the name of one installer. His approach was "his people" with "no exceptions". There is no evidence that he told Mrs. Schmidt that ELD was only allowed to supply the materials. The best that Mr. Fridrich could say about all of this is that he felt satisfied that Mrs. Schmidt understood what he was saying about the Spanish Boys being a separate installer.

[132] Mrs. Schmidt says she read the Supply Only Contract but that Mr. Fridrich signed both the Supply Only Contract and the Labour Contract Only and assigned the labour crew so she thought they were "part and parcel" together from ELD.

[133] The evidence establishes that notwithstanding the outward form of the two contracts in the Schmidt case the true substance of the transaction was that it was an agreement between ELD and Mrs. Schmidt for both the supply and installation of her sunroom. Mrs. Schmidt was clear in her evidence that the two contracts were "part and parcel" from ELD. She was not swayed from that evidence under cross-examination and explained that there was no difference to her between the supplier of the materials and the supplier of the labour. She was presented with both contracts by Mr. Fridrich and informed by him of only one installer who was to do the job. Mr. Fridrich put the labour price on the contract. This was a firm price with no indication that it was an estimate. There is no signed agreement between Mrs. Schmidt and Mopica for installation. Instead there is a signed agreement between Mrs. Schmidt and ELD for installation. Both parts of the transaction were negotiated and concluded on behalf of ELD by Danny Fridrich. Mrs. Schmidt did intend for Fred

Hildebrandt to install the sunroom because the Spanish Boys was the only name provided to her by Danny Fridrich.

[134] Mr. Scheiris says Mr. Fridrich was not authorized to put his name on the Schmidt Labour Contract Only on the "Accepted by Management" line. However, Mr. Fridrich did not say that he had no authority to sign the Schmidt Labour Contract Only. His evidence was that Mr. Scheiris informed him that he should try not to sign the Labour Contract Only if he could get away with it. He also testified that he did not "usually" sign the labour contracts. This means that sometimes he did. The entirety of Mr. Fridrich's evidence supports the conclusion that he there to make a sale in an industry that Mr. Scheiris termed to be a "cut-throat" industry. Mrs. Schmidt wanted him to sign the Labour Contract Only. He did that and got the sale.

[135] Mr. Scheiris says that he was not provided with a copy of the Schmidt Labour Contract Only showing Mr. Fridrich's name on it until sometime during the course of the Service Alberta investigation. However, Fred Hildebrandt delivered the materials for the Schmidt sunroom to Mrs. Schmidt's home on July 24, 2009. Fred Hildebrandt's initial evidence was that when he delivered those materials he already had a copy of the Schmidt Labour Contract Only that he had received from Mr. Scheiris. His re-direct evidence does not amount to a denial that he received a copy of the Labour Contract Only from Mr. Scheiris.

[136] Mr. Hildebrandt's initial evidence that he had received a copy of the Labour Contract Only from Mr. Scheiris makes the most sense because it fits in with the practice described by Mr. Scheiris of ELD keeping a copy of the Labour Contract Only in cases where ELD was going to arrange the installer. The Appeal Board finds that it was ELD that was going to arrange the installation of the Schmidt sunroom and accepts Mrs. Schmidt's evidence that she did not write Fred's name and phone number on the Labour Contract Only at the time she signed it and that the first time she spoke with Fred Hildebrandt was when he showed up at her home with the sunroom materials. Although Danny Fridrich thinks Mrs. Schmidt wrote Fred's name and phone number on the Labour Contract Only on July 14, 2009, and although Fred Hildebrandt says she called him before he dropped the materials off, this transaction was only one of hundreds for Mr. Fridrich and Mrs. Schmidt was certainly not the only ELD customer Fred Hildebrandt had dealt with over the years. In contrast, this was a single event for Mrs. Schmidt that led her to complain to Service Alberta. For that reason the events in question would have been much more prominent in her mind and her memory of these types of smaller details would be more reliable. (ELD would also have required a copy of the Labour Contract Only to be able to notify the chosen installer (in this case Mopica) when the materials came in).

[137] The Appeal Board finds that Mr. Scheiris had to have known almost from the outset that Mr. Fridrich had signed the Labour Contract Only because the evidence indicates he would have had a copy of that contract. Mr. Fridrich was not reprimanded by Mr. Scheiris for signing the Labour Contract Only, he was not

docked any commission, and he was not told to go back to advise Mrs. Schmidt that he should not have signed the Labour Contract Only.

[138] Additionally, Mr. Scheiris says he was warned by Service Alberta in early 2007 not to sign the Labour Contracts Only and that he immediately told Mr. Fridrich not to sign the labour contracts. He had retained Mr. Fridrich in 2007 as a commissioned salesman. Based on Mr. Scheiris' evidence Mr. Fridrich remained in that position for some 2-3 years (to the time of the Service Alberta investigation), during which time Mr. Fridrich, according to his evidence, sold 300 deals. If he "sometimes" signed the labour contracts for some of these 300 deals then Mr. Scheiris would almost certainly, according to his own evidence, have had a copy of those contracts after the 2007 warning because he testified that he would need a copy of the Labour Contract Only in cases where ELD was going to arrange for the installer. He therefore had to have known that notwithstanding the instructions he says he gave to Mr. Fridrich in 2007 that Mr. Fridrich was continuing to sign some of the Labour Contracts Only.

[139] ELD also argues that the Supply Only Contract contained an entire agreement clause. The clause referred to is found at the first line of the "Final Terms" section of the Supply Only Contract and reads:

The provisions of this Agreement constitute the entire contract between both parties and they acknowledge that they are not relying on any other covenants, agreements or promises, written or oral, that are not expressly set out herein.

[140] This clause does not assist ELD in the context of this Appeal. Pursuant to s. 2(1) of the *FTA* this clause does not preclude the Appeal Board from an assessment of all of the circumstances to determine the true nature of the Schmidt transaction. This clause cannot confine the analysis of the Appeal Board to a consideration of the wording of the Supply Only Contract.

[141] With respect to the analysis required by s. 5(2)(c) of the *Designation of Trades and Businesses Regulation* the evidence of both Nora Schmidt and Danny Fridrich establishes that ELD, through its agent and representative (Danny Fridrich), solicited, negotiated and concluded, in person, at a place other than ELD's place of business a contract with Nora Schmidt. Mr. Fridrich attended at Mrs. Schmidt's residence in Cochrane. They discussed that she wanted a new sunroom, Mr. Fridrich filled in the price on both the Supply Only Contract and the Labour Contract Only, he wrote in other terms, and both parties signed the contracts.

[142] For the reasons set out above, the true substance of the agreement with Mrs. Schmidt was that it was one contract which was a construction or maintenance contract as the purpose of the agreement was the altering, maintaining, adding to or improving Mrs. Schmidt's private residence. The outward form of this contract may have been two pieces of paper but the true nature of the transaction was a single

agreement between Nora Schmidt and ELD for the supply and installation of a new sunroom. While Mopica was not affiliated with ELD, it was never made clear to Mrs. Schmidt by Mr. Fridrich that Fred and the Spanish Boys (i.e. Mopica) were separate from ELD such that it would have been clear that ELD was not the installer and was not associated with the installer. The real substance of this transaction was that Danny Fridrich, acting as agent and representative of ELD, sold a sunroom, including installation of that sunroom, to Nora Schmidt.

[143] The matter of the subsequent civil claim by ELD and Mrs. Schmidt's counterclaim against ELD does not change this conclusion. Nothing in the evidence surrounding the civil claim indicates that the transaction with ELD was anything other than what Mrs. Schmidt described to the Appeal Board.

[144] Although ELD also argued that because ELD itself does not provide construction services (in that neither Mr. Scheiris nor ELD are actually picking up a hammer so as to be constructing, altering, maintaining or repairing anything) such that ELD could not have entered into a construction or maintenance contract with anyone, the legislation does not require that the party entering into the construction or maintenance contract with the consumer be the party picking up the hammer and nail. A number of witnesses gave evidence as to their understanding of the meaning of the words "contractor", "supplier" and "seller". However, all that is required by s. 5(2)(a) of the *Designation of Trades and Businesses Regulation* is that the contract be for the purpose of "constructing, altering, maintaining, repairing, adding to or improving" a person's private dwelling. If the contract is for that purpose, and if a prepayment is paid before all of the goods or services called for in the contract are provided, then a Prepaid Contractor's Licence is required.

[145] The evidence establishes that all or part of the contract price (in this case the down payment amount of \$12,335.40) was paid before all of the goods or services called for in the contract had been provided. As of the date that Mrs. Schmidt wrote her cheque for \$12,335.40, and as of the date it was cashed, all of the goods and services called for had not been provided.

[146] While the evidence does not show that ELD utilized any of the 50% down payment towards the cost of labour in the Schmidt transaction, that is not a necessary factor to satisfy the requirements of s. 5(2)(b), which contains no wording to the effect that the "all of part of the contract price" must have been allocated towards any element of labour. All that is required by the legislation is a prepayment under a construction or maintenance contract. If the legislators had wanted to capture only those prepaid contracts where the prepayment was established to be made for labour, then presumably s. 5(2)(b) would have been drafted differently.

[147] At the Appeal Hearing Mr. Scheiris reviewed copies of the invoices for the Schmidt materials purchase. One invoice was for the manufacturing of the sunroom materials and 3 invoices were from Totem Building supplies for the cost of

additional materials purchased. Mr. Scheiris wanted to demonstrate that the profit margin from this job was such that ELD could not have allocated any amount for labour. This evidence was not reliable as the dates on all of the invoices, including those from Totem, preceded the date of the Schmidt transaction by one month. In any event, whether ELD's profit margins can accommodate labour costs cannot overcome the fact that based on Mr. Fridrich's conduct during the Schmidt transaction the true substance of the agreement between ELD and Mrs. Schmidt was a construction or maintenance contract.

[148] ELD also argued that at the end of the day both Mrs. Schmidt (and Mr. Marshall) got what they wanted (a new sunroom and a new patio cover respectively). However, s. 104 of the FTA does not require that there be evidence of actual harm to a consumer complainant before the Director is able to issue a Director's Order.

[149] The Appeal Board finds that in the Schmidt transaction ELD took a prepayment for a construction or maintenance contract that it solicited, negotiated and concluded in person at a place other than its place of business. The Director has therefore established that ELD entered into a Prepaid Contract with Mrs. Schmidt. The Appeal Board finds that ELD had engaged in a Prepaid Contracting Business without the proper license to do so.

FINDING OF THE APPEAL BOARD – PREPAID CONTRACTING BUSINESS

[150] The Director has proven two separate occasions where ELD was operating as a Prepaid Contracting Business outside of its licensed authority. The FTA does not require a series of breaches of the Act occur in order to justify the issuance of a Director's order. In this case, the evidence arising from either the Marshall transaction or the Schmidt transaction alone was sufficient for the Appeal Board to find a breach under the FTA and its regulations whereby the Director's Order should be confirmed. The Appeal Board therefore confirms all provisions of the Director's Order dealing with ELD engaging in activity constituting a Prepaid Contracting Business.

[151] The Woytowich Binder also contained the other open investigation files regarding Douglas Thoreson, Eldon Dahl, and Shirley Waldo as well as the concluded complaints of Gordon Hunstad, Claude Malenfant and Mary Tourigny. None of these individuals testified at the Appeal Hearing. The Director, having established that the Marshall and Schmidt transactions breached the FTA, was not required to go any further. The evidence that was given at the Appeal Hearing regarding any of these other concluded or open investigations, either hearsay or otherwise, adds nothing to the determination of this matter.

[152] With respect to the open investigation of the Waldo transaction, the Provincial Court trial transcript from *R. v. Kevin Scheiris Easy Living Design Limited* was entered as Exhibit 22. The conviction certificate of ELD in that matter under s.

162 of the FTA was entered as Exhibit 27. Counsel for ELD advised that this conviction remained under appeal. There was apparently an agreement between counsel prior to the commencement of the Appeal Hearing as to how they were going to deal with the Waldo matter and the evidence of that transaction. Each counsel refrained from asking any of the witnesses questions about the facts of the transaction between ELD and Mrs. Waldo so as not to engage on a collateral attack on the judicial findings of the Provincial Court, although counsel ultimately disagreed over whether Exhibit 22 could be relied on for the truth of its contents. Given the *de novo* nature of this Appeal Hearing and the fact that the Waldo matter remains under appeal, the Appeal Board remained puzzled to the end as to what use it could make of this transcript. However, for the reasons stated in the paragraph directly above, a finding on the Waldo transaction is not required.

[153] The Appeal Board wishes to note that the Director's Order does not prohibit ELD from operating as a Direct Seller, nor does it preclude ELD from obtaining a Prepaid Contracting Licence if it meets the requirements of that class of license. The Director's Order is forward looking and seeks to ensure that if ELD wishes to conduct business as a Prepaid Contractor that it meets the necessary licensing requirement so that consumers have the protection they are to be afforded under the *FTA*.

ANALYSIS - FTA - Section 35

[154] Section 35 was dealt with to a much lesser extent during the Appeal Hearing than was the prepaid contracting issue. However, the Director's Order does also state that ELD had failed to meet the disclosure requirements of s. 35 of the *FTA*.

Marshall

[155] By virtue of the words "must include" at the beginning of the list of s. 35 requirements, the requirements of this section are mandatory. The Marshall Supply Only Contract does not contain a description of the goods being provided sufficient to identify them, as required by s. 35(e). The box on the Exhibit 1 Supply Only Contract indicating that a patio cover was being supplied was not checked off. The failure to do this was not explained by Danny Fridrich. There is also no description of any kind of the colour of the acrylic panels, which was a matter important to Mr. Marshall. While Mr. Scheiris testified that Mr. Marshall knew that the acrylic panels would be lighter, this is no answer, given the mandatory requirements of s. 35.

Schmidt

[156] The Labour Contract Only does not contain an itemized price of the services as required by s. 35(g). That was of some importance to Mrs. Schmidt as she testified that she asked Mr. Fridrich on several occasions how the \$5,880.00 was arrived at but was never provided with an explanation. Regardless of the

importance of that explanation to Mrs. Schmidt, an itemized price of the services being provided was required by s. 35(g) of the FTA.

FINDING OF THE APPEAL BOARD – s. 35 of the FTA

[157] There is no requirement under s. 35 that there be a series of deficiencies. One breach of s. 35 is sufficient for the Director to issue a Director's Order. The Appeal Board finds that ELD did not meet the disclosure requirements of s. 35 of the FTA. The Appeal Board confirms all provisions of the Director's Order dealing with ELD's failure to meet the disclosure requirements of s. 35 of the FTA.

COMMENTS BY THE APPEAL BOARD REGARDING SERVICE ALBERTA PROCESSES

[158] Although the Appeal Board has confirmed the Director's Order in its entirety, the evidence of Service Alberta in this Appeal Hearing leaves the Appeal Board somewhat dissatisfied with the processes it appears to utilize to serve businesses. For example, the evidence disclosed that when important correspondence, such as warning letters, are sent to a business they are not sent by a method from which it can later be verified that the correspondence was actually received.

[159] In addition, the material with respect to the various consumer complaints entered by Service Alberta employees in CATS in this matter, as contained in the Woytowich Binder, was not, on its face, entirely clear with respect to dates and page numbering. While the Appeal Board recognizes that this material was specifically compiled by Mr. Woytowich for the Director in this matter, and that it may not contain all of the information that was on the Service Alberta files, it does raise the question of the processes employed by Service Alberta to serve businesses. At the very least file documentation should be complete and important letters should be confirmed as being received or not so that in any discussion with a business it is clear as to what the previous communications were.

[160] Kevin Scheiris testified that up to the point of the investigation by Adam Woytowich the staff he dealt with at Service Alberta were very accommodating and that he had no problem dealing with them. However, it is likely less than helpful to a business to have inquiries answered in the absence of a consideration and review by Service Alberta of previous communications between the business and Service Alberta. A review of the processes utilized by Service Alberta to communicate with businesses, to record those communications, and to review previous communications in responding to new inquiries, may be helpful not only to Service Alberta but to the businesses run by members of the public that Service Alberta is designed to serve.

[161] Although the Appeal Board recognizes that it is incumbent upon those wishing to provide prepaid contracting services to the public to know of the

governing legislation and its provisions (*Kreft, supra*, at paragraph 37), dealing with Service Alberta on matters such as what the governing legislation is should not amount to an exercise in frustration for a business person. Any practice by Service Alberta to not provide copies of legislation to business people who make inquiries about matters governed by the *FTA* is puzzling. At the very least, written instructions on how to access this legislation electronically on the Alberta Queen's Printer website could be provided so that business people can readily review the *FTA* in order to know of its provisions and the potential consequences for breaches of this Act. Again, such a measure seems well within the realm of service of the public.

[162] As a final matter, the Appeal Board wishes to thank both counsel in this appeal for their able submissions and thorough preparedness during the course of the Appeal Hearing.

DECISION DATED June 5, 2013



Lyle Berge (Member, Appeal Board)



William Klasky (Member, Appeal Board)



Louise Redmond (Chair, Appeal Board)