
**APPEAL BOARD DECISION
OF APPEAL BY SUNRAY MANUFACTURING INC.
OF THE DECISION OF THE
DIRECTOR OF FAIR TRADING (AS DELEGATED)
TO CEASE ENGAGING IN UNFAIR TRADE PRACTICES IN CONSUMER
TRANSACTIONS**

This appeal board decision was issued under s. 179 of the *Consumer Protection Act* in response to an appeal by the named party. As allowed by s. 16 of the Appeal Board Regulation, this appeal board decision is part of the public record.

This decision document contains both the Majority and Minority decisions rendered by the Appeal Board. They can be found on these pages:

Majority Decision	Page 1
Minority Decision	Page 69

For more information on the *Consumer Protection Act*, business licensing in Alberta or to search for a licensed business, please click here:

[Search for a Licensed Business, Charity or Fundraiser](#)

IN THE MATTER OF AN APPEAL BY SUNRAY MANUFACTURING INC AND BRAD ROBERTS AND ANY EMPLOYEE, REPRESENTATIVE, AGENT OR ASSOCIATE OF SUNRAY MANUFACTURING INC

APPELLANT

AND

THE DIRECTOR OF FAIR TRADING PURSUANT TO THE CONSUMER PROTECTION ACT, RSA 2000, CHAPTER C-26.3

RESPONDENT

APPEAL BOARD

VIRGINIA MAY THE CHAIR
DR. NICK TYWONIUK BOARD MEMBER
BARBARA MCKINLEY BOARD MEMBER

ORDER APPEALED

DIRECTOR'S ORDER DATED JUNE 10, 2021 FINDING THE APPELLANT IN BREACH OF VARIOUS SECTIONS OF S.6 OF THE CPA

NOTICE OF APPEAL

FROM SUN RAY PRESIDENT BRAD ROBERTS DATED JULY 12, 2021

APPEARANCES IN VIRTUAL HEARING HELD NOVEMBER 3, 2021

DR. TYWONIUK ACCEPTED THE ROLE OF ZOOM HOST FOR THE APPEAL HEARING

FOR THE APPELLANT

C FLODEN AS COUNSEL AND LAUREN GEE ARTICLING STUDENT
BRAD ROBERTS

FOR THE RESPONDENT

JOSEPH O'KURLEY STATUTE ADMINISTRATOR
JULIAN SMITH INVESTIGATOR AND PEACE OFFICER WITH CONSUMER INVESTIGATIONS UNIT (CIU) OF SERVICE ALBERTA

OBSERVER

SCOTT HOOD DIRECTOR OF FAIR TRADING (AS DELEGATED)

DECISIONS OF THE APPEAL BOARD

APPEAL BOARD MAJORITY CHAIR VIRGINIA MAY AND PANEL MEMBER BARBARA MCKINLEY

DUE BY JANUARY 10, 2022

	PAGES
INDEX	2
DIRECTORS ORDER OF JUNE 10, 2021.	3
NOTICE OF APPEAL DATED JULY 12, 2021	6
PRELIMINARY MATTERS	7
JURISDICTION AND PROCEDURAL GUIDELINES	9
SUBSTANTIVE ISSUE TO BE DETERMINED	12
DECISION OF THE APPEAL BOARD MAJORITY	12
DISCUSSION AND REASONING AROUND THE APPEAL BOARD MAJORITY DECISION	12
HEARING OPENING STATEMENTS OF THE APPELLANT AND THE RESPONDENT	18
DOCUMENTARY EVIDENCE PROVIDED TO THE HEARING BY THE PARTIES	19
FINDINGS OF FACT	20
APPEAL BOARD MAJORITY RESPONSE TO THE BRIEF OF ARGUMENT AND REBUTTAL OF THE APPELLANT SUN RAY	37
APPEAL BOARD MAJORITY RESPONSE TO THE BRIEF OF ARGUMENT OF THE RESPONDENT	42
CONCLUSIONS OF FACT AND LAW ARISING FROM THE BRIEFS OF ARGUMENTS	55
SUBSTANTIVE ISSUE TO BE DETERMINED	58
DECISION OF THE APPEAL BOARD MAJORITY	58
SIGNING PAGE	58
APPENDIX	59

**ORDER OF THE DIRECTOR OF FAIR TRADING ISSUED AGAINST SUN RAY MANUFACTURING.
JUNE 10, 2021**

**DIRECTOR'S ORDER UNDER SECTION 157 OF THE
CONSUMER PROTECTION ACT**

TO

SUNRAY MANUFACTURING INC.

AND

**ANY EMPLOYEE, REPRESENTATIVE, AGENT OR ASSOCIATE OF
SUNRAY MANUFACTURING INC.**

Issues

The Consumer Investigations Unit of Service Alberta opened an investigation into the activities of Sunray Manufacturing Inc.

An investigation was opened into a complaint filed with the Consumer Investigations Unit, North, Service Alberta. A resident of Sherwood Park, Alberta submitted the complaint. The allegation was that the consumer was lead to believe that she would receive her custom hot tub within 10 to 12 weeks. Each conversation the consumer had with Sunray Manufacturing was vague and the periods that were provided to her were allusive. At one point, the sales agent stated that her tub was right at the top of the list and they only had a few more hot tubs ahead of hers. Over the months, Sunray Manufacturing had provided multiple dates to the consumer as to when her hot tub would be delivered. Sun Ray Manufacturing exaggerated how quickly they could supply the custom hot tub. A delivery date of 10-12 weeks does not equate to the customer waiting over 21 months to receive the product.

The complainant has been waiting approximately 21 months for her custom hot tub. A reasonable person would conclude that waiting that long is unreasonable and would not enter into such transaction knowing it would take over 21 months to supply a hot tub. Even if there were other factors to explain the delay, the terms make this transaction excessively unfair. The consumer states that she had requested a refund verbally on more than one occasion and was told that the company would not provide a refund because the tub's production had already begun. These terms and conditions make the contract harsh, oppressive, and excessively one sided.

Legislation

Consumer Protection Act

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

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

Section 6(3) It is an unfair practice for a supplier

- (c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;
- (d) to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.

Section 6(4) The following are unfair practices if they are directed at one or more consumers or potential consumers:

- (n) a supplier's representation that goods or services will be supplied within a stated period if the supplier knows or ought to know that they will not;

ORDER

Sunray Manufacturing Inc. and any employee, representative, or agent of Sunray Manufacturing Inc. must immediately:

- cease to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;
- cease to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one sided;
- cease to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.

NON-COMPLIANCE WITH ORDER

ANY PERSON WHO FAILS TO COMPLY WITH AN ORDER OF THE DIRECTOR UNDER SECTION 157 OF THE *CONSUMER PROTECTION ACT* CONTRAVENES THIS ACT AND IS GUILTY OF AN OFFENCE AND MAY BE PROSECUTED PURSUANT TO SECTION 163 OF THE *CONSUMER PROTECTION ACT*.

A handwritten signature in blue ink, appearing to read 'Scott Hood', is written over a horizontal line.

Scott Hood
Director of Fair Trading (as delegated)
June 10, 2021

NOTICE OF APPEAL DATED JULY 12, 2021

7804401598

SR

01:56:52 p.m. 07-13-2021

1 / 1



7509 72A Street
Edmonton, Alberta, Canada
T6B 1Z3
PH +01-780-440-1595 • FX +01-780-440-1598

July 12th, 2021

Minister of Service Alberta
Office of the Minister
Service Alberta
103 Legislature Building
10800 97th ave
Edmonton, Alberta
T5J 4L4

Ph (780) 422-5210 Fx (780) 422-2496

File No. 40836

Attn: Mr. Nate Glubish

Dear Sir:

We received a letter by registered mail from Scott Hood on June 14th 2021 indicating that he issued a Director's order against us under section 157 of the act and that we had 30 days from receiving the letter to appeal his decision.

I would like to appeal this decision and also state that I am extremely disappointed in the way that he has dealt with us and handled this situation. I would like to speak with you about this, so I called in today and was advised that you were not available however it would be possible to schedule a meeting. I hope that since this is our 28th year in business in Edmonton that we should qualify for such a meeting.

Please contact the undersigned if you require any further information and thank you.

Brad Roberts

President
Sun Ray Manufacturing Inc.



By Fax

Page 1 of 1

PRELIMINARY MATTERS

1. Consistency of identifying language used in this Decision by the Appeal Board and as agreed upon by the parties:

- The consumer complainants to CIU, husband Bob Boyechko and wife Rita Sibbio will be collectively known as the “Purchasers”
- The Appellant, Sunray Manufacturing Inc. operating as Sun Ray Spas and represented in this appeal by Brad Roberts will be referred to as “Sun Ray”. Brad Roberts will be Mr. Roberts.
- Mr. Craig Floden of Foldenward, counsel for the Appellant will be referred to as Mr. Floden
- The subject of this Appeal, the June 10, 2021 Director’s Order directed at Sun Ray and issued by Director of Fair Trading, Scott Hood will be referred to as “the Order “
- The May 31, 2018 Sales Agreement between Sun Ray and the Purchasers, also identified as Invoice 20361, document R4 (2) and A2, will be referred to as the “Contract”
- CIU Investigator, Julian Smith will be referred to as Mr. Smith.
- Mr. Joseph O’Kurley, the Statute Administrator for the hearing will be referred to as Mr. O’Kurley
- The Director of Fair Trading will be referred to as the Director.
- The Consumer Protection Act, RSA 2000, cC-26.3 will be referred to as the “CPA”

2. On June 10, 2021 the Director of Fair Trading issued the Order against the Appellant, Sun Ray and any employee, representative, agent or associate of Sunray Manufacturing Inc.

3. On July 12, 2021 the President, the Appellant, Mr. Roberts filed a Notice of Appeal against the Director’s Order. The Appeal notice was received by the Respondent on July 13, 2021.

4. The Order required the Appellant to immediately cease engaging in unfair practices under s.157 of the Consumer Protection Act (CPA). The Order identified specific sections of s.6 of the CPA as involving unfair practices that should be stopped by the Appellant.

5. The Order stated that any person who is found to be in non-compliance of the Order under s.157 contravened the Act and is guilty of an offence and may be prosecuted pursuant to s. 163 of the CPA.

6. The non-compliance portion of the Order was not activated. No penalty was ordered against Sun Ray.

7. Pursuant to s. 179 (1) of the CPA, Mr. Michael Hocken, Acting Deputy Minister of Service Alberta appointed Virginia May as Chair of the Appeal Board to hear the Appellant's Appeal of the Order. He also appointed Ms. Barbara McKinley and Dr. Nick Tywoniuk as Appeal Board Members. The appointments occurred on 30 day of July 2021.

8. The appointment document required the Appeal hearing to conclude within 10 months of appointment that is by May 30, 2022.

9. At the conclusion of the hearing process, the Appeal Board must provide a written Decision within 45 days of the conclusion date that is by January 10, 2022, the concluding date for the final briefs of argument to be filed. This is the decision required by the CPA.

10. A Virtual Appeal Hearing took place on November 3, 2021 by the agreement of all Parties as a result of the prevalence of Covid still in the province. Appeal Board member Dr. Tywoniuk was appointed Zoom host. The hearing lasted from 9am till 2pm and there is an audio video recording of the hearing.

JURISDICTION AND PROCEDURAL GUIDELINES

11. The Jurisdiction for the Director of Fair Trading (as delegated) to make the Order appealed from arises from the CPA and its Regulations.
12. Copies of the statutory documents are available online.
13. Pursuant to Part 15 of the CPA s.173 the Minister may appoint a Director of Fair Trading and that individual may appoint individuals as inspectors.
14. Pursuant to s.174 the Director may delegate any of the Director's powers, duties or functions under the Act and regulations to any person and may authorize that person to further delegate the power or duty.
15. The ability of the Appellant to Appeal an Administrative Order, made under s.157 of the CPA can be found in s.179 (1) (d). A non-compliance finding against the Order by Sun Ray has not been made by the Director to date. The Order, however, states that any such finding under s.157 of the CPA showing contravention of the Act could lead to a finding of guilt and prosecution pursuant to s.163 of the CPA.
16. An Appeal Board such as has been established in this case by the Acting Deputy Minister may vary, quash or confirm the Appealed from Order pursuant to s.179 (6) of the CPA.
17. Pursuant to s 179(8) an Appeal under this section is a new trial of the issues that resulted in the Order under Appeal.
18. Pursuant to s.180 (1) an Appeal under s.179 does not affect the status or enforceability of the Decision or the Order being appealed.
19. Pursuant to s.180 (2) the Appellant can apply to the Chair to stay the Decision or the Order being appealed. The Chair can then delay the Order until the Appeal is heard or withdrawn. No such application was brought by the Appellant.
20. Alberta Board Regulation 195/1999, (ABR), under the CPA governs the rules for Hearings.
21. Under s.9 a person before an Appeal Board may be represented by a lawyer as the Appellant was in this case.

22. Under s.14 (1) and (2) an Appeal Board is not bound by the rules of evidence as found in judicial proceedings. Evidence may be given before an Appeal Board in any manner that the Appeal Board considers appropriate. All witnesses will provide evidence under oath.

23. The Appeal Board's Decision must be in writing and include reasons.

24. On October 22, 2021 the Chair provided written advance guidelines to the Appeal Board Members and Appeal parties.

25. The Chair advised that Dr. Nick Tywoniuk would be the Zoom host for the virtual hearing and that the hearing would be recorded.

26. The Chair advised that Scott Hood had requested to observe the Hearing as a non-participant. No objection was raised.

27. The Chair advised that the Appellant could invite a non-participating observer if he wished. The Chair did not hear of any such person from Mr. Roberts.

28. The commencement time was set as 9 am. Pursuant to s.12 of the ABR, if a party fails to appear electronically or in person within one hour of the time set, the Appeal may be dismissed or the Hearing conducted and completed in that persons absence. All parties were present by 9 am.

29. The Chair advised that pursuant to s.179 (8) this Hearing is a new trial of the issues.

30. The Chair advised Mr. Roberts as Appellant that he or a lawyer retained would be required to make a brief opening statement as to his reasons for appealing the Order and he would be asked to confirm whether or not Mr. Roberts would be giving evidence.

31. Mr. Roberts wrote that he would be attending the hearing in a lawyer's board room.

32. At the hearing Mr. Craig Floden of Flodenward advised that he was acting on behalf of the Appellant. Mr. Floden, his articling student, Lauren Gee and Mr. Roberts attended the hearing together in a boardroom.

33. The Chair advised that no written statements were required for opening statements made by the parties. As requested Mr. Floden made an opening oral statement for the Appellant. As requested Mr. O'Kurley made an opening oral statement for Service Alberta.

34. The Chair advised that she accepted the disclosure documents of Service Alberta as already provided. (See Appendix attached) The Chair tagged the Respondent's documents with an R.

35. Mr. O'Kurley acknowledged that Service Alberta would be calling one witness, Mr. Julian Smith a CIU investigator and peace officer. Mr. Smith's role, as given in evidence (Minute 23.48 of hearing) is to investigate consumer complaints and offences according to the Policies and

Procedures of Service Alberta and further to provide consistent enforcement of legislation and criminal code offences. To fulfill his role Mr. Smith undertook various research, interpreted the legislation, analysed and evaluated the information, conducted interviews and statements and made recommendations to carry out certain enforcement actions.

36. The Appellant disclosed three documents prior to the hearing beginning. The Chair tagged the Appellant's documents with an A. (See Appendix attached)

37. The Chair stated she would call Mr. O'Kurley to introduce Service Alberta's case first so that the Appellant would know the case it had to meet.

38. The Chair affirmed the witness Mr. Smith and advised that the Appellant's lawyer and the Board Members may cross examine Mr. Smith following his direct evidence.

39. The Chair affirmed Mr. Roberts who gave evidence for the Appellant led by his Counsel. Both Mr. O'Kurley and Board Members then cross examined Mr. Roberts.

40. At the conclusion of the evidence portion of the hearing the Chair asked the parties to provide written Briefs of Argument to all Appeal Board Members. The Appellant's Brief arrived November 12, 2021 and the Respondent's was November 19, 2021. Permission to file a rebuttal by November 26, 2021 was provided in advance. A rebuttal was filed by the Appellant on November 26, 2021.

41. The receipt of Briefs of Law extended the concluding date for the hearing to November 26, 2021. A decision therefore must be made by the Appeal Board within 45 days after November 26, 2021, which is January 10, 2022

SUBSTANTIVE ISSUE TO BE DETERMINED BY THE APPEAL BOARD

42. SHOULD THE ORDER OF JUNE 10, 2021 ISSUED AGAINST SUNRAY MANUFACTURING INC AND ANY OF ITS EMPLOYEES , REPRESENTATIVES OR AGENTS BE QUASHED, CONFIRMED OR VARIED PURSUANT TO S.179(6) OF THE CPA

DECISION OF THE APPEAL BOARD MAJORITY

The Board Majority confirms the Director of Fair Trading's Order of June 10, 2021.

DISCUSSION AND REASONING AROUND THE APPEAL BOARD MAJORITY DECISION

43. The Board Majority wants the Director of Fair Trading to remain in control of the issues raised in his Order concerning Sun Rays Unfair Practices and to deal with Sun Ray's response.

44. The Board relies upon:

- a) The accepted evidence available in both oral and written form during the investigation that allowed the Director to reach his conclusion
- b) The internal Complaint investigation process of Service Alberta CIU arising from the Purchasers November 2019 complaint. The investigative process lasted through to June 2021 recorded in date order in document R1, the Activity Notes
- c) The additional oral evidence presented by both parties in the daylong hearing of November 3, 2021
- d) The documentary disclosure provided by both parties for the hearing.
- e) The Opening oral statements of the parties or their representatives

45. The Appeal Board Majority was stunned after the hearing of November 3, 2021 to know that the fully purchased hot tub bought by the Purchasers in May 2018 had still not been delivered by Sun Ray.

46. In addition they learned that Mr. Roberts on behalf of Sun Ray had not yet retrieved the non-working and non-serviced loaner tub provided in November 2018. That was a bad sign because

the loaner is in the back yard where the hot tub is supposed to go. Mr. Roberts said he wanted the loaner back when the hot tub was delivered. The Purchasers had to pay the full price for their undelivered hot tub in November 2018 as a form of security for the loaner. The Purchasers thought it would speed up the delivery of their hot tub. It did not.

47. Mr. Roberts volunteered at the hearing that the Purchasers had sued him and a civil mediated settlement was in place in 2021.

48. The Appeal Board Majority acknowledges in the Conclusion of the Respondents Brief of Argument paragraphs 44 to 48 that the Director had valid jurisdiction to deal with the consumer transaction of the Purchasers under s.157 of the CPA.

49. The Appeal Board Majority acknowledges that evidence obtained by the investigator Mr. Smith demonstrated Sun Ray's unfair practices. In addition, the Board majority finds that the Director used his exercise of discretion under s.157 (1) reasonably based on the evidence.

50. Sun Ray had opportunities to respond to the allegations of the CPA but failed to do so. The Director's process was fair.

51. The Appeal Board Majority completely rejects the arguments of Sun Ray in their Brief of Argument and Rebuttal. (See section following). Sun Ray's arguments seek to take Sun Ray out of the Jurisdiction of the CPA and further suggest Procedural Unfairness in the hearing.

52. Sun Ray's treatment of the Purchasers since May 2018 remains totally unreasonable under any reasonable person's review. The unreasonableness of Sun Ray's failure to deliver becomes more obvious each year that passes by. Currently in December 2021 the Purchasers have been without their purchased custom made hot tub for three and a half years from the purchase date of May 31, 2018.

53. It is difficult to believe that the Purchasers had to sue to obtain some form of redress by 2021.

54. Sun Ray appears to feel its conduct in relation to the Purchasers is justified over three and a half years.

55. The Appeal Board Majority continues to ask Sun Ray to follow the instructions in the Order.

- To cease to use exaggeration, innuendo or ambiguity as to a material fact in relation to a consumer transaction.
- To cease to include in the consumer transaction terms that are harsh, oppressive or excessively one sided
- To cease to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the facts.

56. Sun Ray was not made subject to Penalties in the Order of June 10, 2021.

57. The evidence in the hearing would suggest that Sun Ray has not changed in its behaviour or understanding of the role of the Consumer Protection Act and the reason why its conduct to the Purchasers to date has breached the expected standard.

58. Sun Ray has not changed from feeling itself the victim. Sun Ray is very proud of its longevity as a business in Edmonton and it should be proud. It does appear, however to not consider the position of their Purchasers viewpoint.

59. Sun Ray, through the words of its owner Mr. Roberts appears more concerned with possible tarnishing by the Director's Order of his company's lengthy history in Edmonton than in rectifying any ongoing problem for the Purchasers and in understanding why he is obliged to treat them in a reasonable way.

60. Sun Ray blames unforeseen events such as three forced moves of location between August 2018 and the late spring of 2021 for its failure to deliver and Sun Ray describes the three location moves as unforeseeable and not in any way Sun Ray's fault or in its control. Sun Ray goes into great detail as to the effort involved in the moving and the dismantling the plant. The first two moves do not seem unforeseeable for a careful business man of many years' experience.

61. Mr. Roberts gave evidence in regard to the first move which occurred between the dates of August to November 2018. The landlord / owner of the building served a thirty day vacate notice on Sun Ray. The 99 Street building had been sold. This was a foreseeable event if the landlord / owner needed vacancy. Sun Ray should have known its vulnerability and the existence of a thirty day vacate notice possibility. Mr. Roberts was an experienced business man of many years. Storms and hurricanes may be unforeseeable but not the rental terms that allow you to have a factory operating in your rental location moved in 30 days.

62. Sun Ray still has its obligations to its customers. Hot tubs were built throughout the summer of 2018. The Order of the Purchasers was never filled. Mr. Roberts said he knew that the cabinet and cover of their hot tub was prepared and that is why they could not get their money refunded.

63. What really matters as a result of the moves is the time frame between August 2018 and September 2020 a period of time when the very important Moulder needed for making custom made hot tubs was not in working order. No such hot tubs presumably were made in that period.

64. But some such hot tubs were made between May 31, 2018 and August 2018, but again not the Purchasers. Mr. Roberts estimates 12 to 30 hot tubs a month. Such custom hot tubs were made after September/ November 2020 (the second move) but again not the Purchaser's tub.

65. The second move occurred because the landlord had a new tenant or subtenant ready to pay the going rate for rental. Sun Ray rented the space at a less than market rate, but did have a 90 day clause this time that allowed Sun Ray more time for moving. Mr. Roberts could not consider this notice as unforeseeable because he knew he was underpaying for the value of the space. There was no surprise to him.

No information was available about the reason for the third move this spring 2021, but Mr. Robert suggests in his evidence he doesn't want to be bound to a five year lease and its obligations. Mr. Roberts is the decision maker for the company.

66. It was not until November 2019 that the salesman, Mr. O'Bertos finally answered the Purchasers many initiated calls for a delivery date by telling them he could not give them any possible date for delivery. Up until that time, he would give them reasonable sounding delivery dates, such as the following month. In September 2019 he suggested delivery in October and then again delivery in November 2019.

67. Mr. O'Bertos gave the Purchasers different reasons for the moves than Mr. Roberts had given. Mr. O'Bertos said that the first move occurred because of the patio furniture being sold at Sun Ray. Such furniture had to be stored and took up a lot of space. Sun Ray did not have the space hence the move. Mr. O'Bertos said the second move occurred because of flooding. The employee may not have been fully informed by Mr. Roberts.

68. The first two moves were not unforeseeable events for any careful business man. Mr. Roberts was the owner, sole Director, General Manager and President of Sun Ray. He was the decision maker.

69. The hot tub was purchased in May 2018. As at the date of the hearing and as of the date of the Directors Order, Sun Ray has failed to deliver the fully paid Gateway custom hot tub to the home of the Purchasers.

70. The evidence of the Consumer Investigative Unit (CIU) branch of Service Alberta led the Director to find an unreasonable 21 month waiting period together with breaches of s.6 Unfair Practices and in particular of the following sections.

No consumer would enter into an agreement expecting a wait of 10 to 12 weeks for an item and have to wait unreasonably for 21 months or even longer.

s.6 (2) (c) Exaggeration, innuendo and ambiguity as to a material fact with respect to a consumer transaction.

Sun Ray exaggerated dates when the hot tub would be delivered and was sometimes vague and misleading. In addition, the salesman represented that the Purchasers were at the top or near of the top of the list for delivery.

s.6 (3) (c) Harsh, excessive and excessively one sided and (d) representation on what is involved in a consumer transaction that is different from the facts no recourse for a refund.

The conduct of Sun Ray was unreasonable and unchanging.

s.6 (4) (n) Representation that goods and services will be supplied, knowing they will not be supplied.

71. The Director found examples of s.6 .Unfair Practices. Those examples remain. There has been no acknowledgment by Sun Ray of its Unfair Practices.

72. In its Brief of Argument the Respondent lists additional Unfair Practices by Sun Ray.

73. The Order sets out the background investigative information that the Director of Fair Trading was provided with as a result of a complaint filed with the consumer investigative branch by a resident of Sherwood Park on her behalf and that of her husband, Rita Sibbio and Bob Boyechko. They had purchased a hot tub from Sun Ray at the end of May 2018 with a reasonable belief of an estimated delivery date within 10 to 12 weeks from that date. Over months the purchasers have been provided with a range of excuses and new estimated dates. At the date of the Order almost three years had passed from the initial purchase date.

74. Three and half years later the hot tub bought by the Purchasers has still not been delivered.

75. The CIU investigation showed the Purchasers had a very reasonable expectation that a hot tub would be delivered to them in August 2018. The evidence showed that between May and August 2018 Sun Ray did manufacture hot tubs. Sun Ray had the Moulder working again in September 2020 and hot tubs were made again after that date.

76. Further evidence came out at the hearing that Sun Ray used to have a production process document sent from the plant to the store regularly, to enable salesmen to know the progress on any hot tub. That system was stopped before 2018. Now the only system is for a salesman to ring up the plant foreman to find out the status of a particular order.

77. In order to reach a Decision on this substantive issue the Board Majority reviewed and considered the evidence presented at the Appeal Hearing on November 3, 2021 in both oral and written form and took into account s.179 (8) of the CPA which states that an Appeal is a new hearing on the issues raised in the Director's Order.

78. The new evidence included documentary evidence such as the Sales Agreement / Invoice 20361 for the Purchasers May 31, 2018 purchase of a hot tub with a reasonable delivery date of mid-August 2018.

79. The small print on the Sales Agreement / Invoice worked only for the benefit of Sun Ray to stop the consumer being able to get a refund or cancel the purchase. Mr. Roberts appeared pleased with the language used to protect Sun Ray. There is no evidence that Sun Ray ever considered ceasing its unfair conduct to consumers because it never acknowledged that such conduct existed.

80. The wording of the Sales Agreement says no refunds or cancellations allowed. It allows only for an estimated date of delivery in case Sun Ray has difficulties with suppliers. Sun Ray stays in control. In addition the Sales Agreement requires the Purchaser to sign a small print box agreeing that a hot tub is legally an improvement and therefore a fixture. This was to give Sun Ray the benefit of the Builders Lien Act if consumers owed money. The Purchasers could not buy the hot tub without signing this document and without understanding that they were giving away their rights. The entire sale was negotiated and finalized in the store with the Sun Ray salesman Mr. O'Bertos.

81. Sun Ray's lawyer misspoke in his opening statement when he said Sun Ray GAVE a loaner to the purchasers. This is not true. Mr. Roberts knew that it was a loaner and Mr. Roberts said in evidence he would take the loaner back when the hot tub was delivered. This was in November 2018. Mr. Roberts knew the hot tub had not been delivered.

82. Sun Ray in 2018 insisted the Purchasers pay the balance owing on their purchased hot tub when the loaner arrived. Mr. Roberts said he regarded the money as security for his Albertan model used showroom loaner. The Purchasers regarded the required payment as full payment of their hot tub to speed up the delivery of their purchase. The loaner is not working and remains un-serviced by Sun Ray. Mr. Roberts said that it is a rare thing for him to do to provide a loaner. So no protocol or procedure was in place for such events.

83. The loaner was the idea of Mr. O'Bertos said Mr. Roberts. Mr. O'Bertos knew of the poor BBB review filed by the Purchasers in October 2018.

84. Furthermore the Board reviewed the CIU complaint file materials as set out in R1 Activity Notes, the interview with the Purchaser, transcribed and recorded, R5 and the recommendation for Administrative Action by Mr. Smith R2. All this information added to a clear background of Sun Ray's failure to its consumers in the instance of this case. Finally the evidence of the standard Sales Agreement / Invoice used by Sun Ray in this case leaves open and untouched the unreasonable language of the Document.

85. At the date of writing this Decision the Appeal Board Majority has found no evidence to suggest that Sun Ray has any intention of ceasing its current conduct as requested by the Director's Order.

86. The Director of Fair Trading in the spring of 2021 at the Director's invitation talked with Mr. Roberts. They had an open dialogue according to Sun Ray. The Order went ahead.

87. In light of this, the Board has particularly considered the purpose of the CPA as set out in PART 15.1 GENERAL:

See the Preamble set out below, found at page 10 of the CPA.

PREAMBLE

"WHEREAS all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed;

"WHEREAS businesses thrive when a balanced marketplace is promoted and when consumers have confidence that they will be treated fairly and ethically by members of an industry.

"WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not; and

“WHEAREAS the Government of Alberta is committed to protecting consumers and businesses from unfair practices to support a prosperous and vibrant economy;

“THEREFORE HER MAJESTY by and with the consent of the Legislative Assembly of Alberta, enacts as follows;”

88. The Chair asked both parties at the end of the Appeal on November 3, 2021 to provide written Briefs which include legal theories, related law and the factual basis for their positions on the substantive issue of the Appeal.

89. It was agreed at the hearing that the Respondent would call its evidence first so that the Appellant would know the case it had to meet.

HEARING OPENING STATEMENT OF APPELLANT SUN RAY

90. “Good morning, my name is Craig Floden, and I'm acting for Mr. Roberts and I'm acting for Sun Ray this morning with respect to the appeal under the Consumer Protection Act and um, there are a number of sort of key components of the Consumer Protection Act that Sun Ray and, and Mr. Roberts support. Consumers have the right to be safe from unfair business practices, Sun Ray agrees with that. Businesses thrive when a balanced marketplace is promoted and when consumers have confidence um, that they'll be treated fairly and ethically by members of an industry. And businesses that don't comply with legal reels legal rules should not be disadvantaged by competing against those that do not. So my client doesn't have any problem with, with, with those sort of preamble section set out of the Consumer Protection Act. Um, the crux of these rules is basically that businesses have to do, what they say they're going to do. So Sun Ray agrees with that broad proposition, but submits that when circumstances are beyond a business's control make, um doing this impossible. Unforeseen circumstances have to be taken into account and unfortunately due to lack of communication, um Sun Ray wasn't able to properly communicate um, it's case and I think once this Board sort of understands what happened in this case. There were a number of unfortunate events, unforeseeable events, which prevented Sun Ray from providing a consumer with a hot tub in a timely fashion. There were major shutdowns of Sun Ray's factory that, lead to large delays. Sun Ray stepped up and gave the consumer a loaner hot tub, um, and so the consumer hasn't actually suffered a, a loss. So when, when we gets um, a

little further into my closing, I think it'll be clear that you know, when we looks directly at the allegations and the time that the representations are made, there hasn't been misrepresentations and Sun Ray um, know it's just a business that's, that's suffered a number of unfortunate, unfortunate circumstances. So those are sort of the reasons, the reasons for our Appeal."

HEARING OPENING STATEMENT OF THE RESPONDENT SERVICE ALBERTA

91. "Sure, good morning everyone. So Service Alberta's intent is to demonstrate that the Investigation in um, June 10, 2021, Director's Order were valid and reasonable based on legal authority fact and fair process. Um, and in so doing so, provide justification for the Board confirming the Director's Order. As the Appellant's council has, has stated the Consumer Protection Act establishes, that consumers do have the right to be safe from unfair business practices. Um, parties cannot contract out of rights and obligation set out in the legislation and um, any, any production challenges or difficulties that business's encounter, does not absolve them of their obligation to comply with the legislation. Um, so ultimately, the consumer entered into a contract with the Appellant for product that the consumer paid for and did not receive as of the date of the Director's Order. It is also important to note, that the Appellant, Sunray Manufacturing Incorporated had sufficient opportunity to respond to the complaint made against them and to Mr. Scott's proposed Administrative Action, prior to the issuance of his Director's Order. The Appellant's response as documented in the enclosed Activity Notes and the Appellant's own disclosure was either to ignore or dismiss the matter. Both the Appellants and the Board have been provided with Service Alberta's records, documenting the information gathering and investigation into the Appellant's business activities. Um, the analysis and legislative references are contained within the March 12, 2020 recommendation for Administrative Action and the June 10, 2021 Director's Order and in further evidenced by the Witness should provide more detail as to how the Director's Order was justified and should be upheld, thank you."

DOCUMENTARY EVIDENCE PROVIDED TO THE HEARING BY THE PARTIES

92. Set out below are the supporting documents for the hearing provided by Service Alberta (R1 to R7)

R1 Activity Notes

R2 Mr. Smith letter recommending Administrative Action dated Mar 20, 2020

R3 (3) Screen shot from Sun Ray Spas Website offering a Hot Tub Factory tour

R3 (4) Initial letter from Mr. Smith to Sun Ray, mailed 19/12/19 to attention of Mr. Roberts at Sun Ray.

R3 (5) Tracking document confirming Sun Ray receipt of this 12/19/19 Mr. Smith's letter as of December 23, 2019. It was signed by Jon Schilling. Also entry in R1 Activity notes entry on page 3 at 12/19/19 confirming mailing of the letter on that date.

R4 (1) Corporate record for Sun Ray

R4 (2) Sales Agreement /Invoice 20361 between Purchaser and Sun Ray signed on date of purchase for the custom Gateway hot tub May 31, 2018 showing deposit of \$2500 paid (Contract)

R4 (3) Copy of Mr. Boyechko/Ms. Sibbio bank account record showing \$4220 bank draft to Sun Ray for final payment for the custom Gateway hot tub Nov 29, 2018

R4 (4) Tracking record for Ms. Sibbios' correspondence to Sun Ray delivered Jan 3, 2020 as per the tracking document. The purchaser did not keep a copy of the letter mailed but says the letter was asking to cancel the contract or get a refund.

R5 Transcript of interview by Smith of Purchaser Ms. Sibbio at their home 12/20/19

R6 and R7 Audio recordings of Ms. Sibbio interview R5.

93. Set out below are the supporting documents for the hearing provided by Sun Ray (A1 to A3)

A1 Delivery note for loaner dated November 24th 2018

A2 Sales agreement /invoice no 20361 dated November 29th 2018 showing purchasers completing payment for hot tub on same document as used in May 2018 for the purchase.

A3 April 30th correspondence for Mr. Roberts to Mr. Hood saying he cannot find client called Ms. Sibbio.

FINDINGS OF FACT

94. On 11/26/2019 Ms. Rita Sibbio, wife of Mr. Bob Boyechko "the Purchasers" filed a complaint with Service Alberta Consumer Investigations Unit (CIU) in Edmonton against Sun Ray for failure to deliver a purchased custom new hot tub and for failure to refund the purchase money to the Purchasers or to cancel the Contract.

R1 Activity Notes page 1

95. A file was opened at CIU and numbered #40836.

96. The Purchasers had only one further direct dealing with Sun Ray after filing the complaint. The Purchasers sent a cancellation / refund request letter to Sun Ray via Canada Post, delivery status on January 2, 2020 and delivered on January 3, 2020 when Mr. O'Bertos signed for receipt of the letter.

R4 (4) Tracking record for Ms. Sibbios' letter to Sun Ray delivered Jan 3, 2020 requesting to cancel the Contract or get a refund.

R2 Recommendation letter for Administrative Action page 3

R5 Transcript of Smith / Sibbio Interview 12/20/19

97. The Purchasers did not retain a copy of that letter and the specific wording and content of that letter is not known to the Board.

98. The Board accepts that a letter related to possible refund or cancellation was sent by tracked Canada Mail by the Purchaser and accepted by Sun Ray on January 3, 2020

R4 (4) Tracking record for Ms. Sibbios' letter to Sun Ray delivered Jan 3, 2020

99. Sun Ray did not produce this letter that it signed for as part of its Documentary production

R1 Activity Notes page 1

100. Mr. Smith, CIU Investigator for Service Alberta and Alberta Peace Officer No.8162 was assigned on 12/11/19 to investigate the Purchasers complaint #40836. Mr. Smith remained on the file until 04/09/21 with some periods of time in between when other Administrators determined that it was not a criminal file but an Administrative Action file.

R1 Activity Notes

R2 Recommendation letter for Administrative Action

101. The Purchasers, Mr. Bob Boyechko and Ms. Rita, husband and wife live in Sherwood Park, Edmonton as at 2018.

R1 Activity Notes p 1 to 10

R5 Transcript of Smith / Sibbio Interview 12/20/19

R2 Recommendation letter for Administrative Action

102. The Purchasers bought a custom hot tub from salesman Mr. O'Bertos at Sun Ray on May 31, 2018, with a deposit of \$2500 (the Contract). The Purchasers had selected a particular model in May 2018. It was a Gateway model, colour Ocean Wave with black cabinet, 16 jets, electronic controls and floor lite lighting. The cover was to be grey. The Contract included two man delivery but required three to four people to help at delivery. It included a deluxe water kit and steps.

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment \$4220

R4 (2) Sales Agreement /Invoice 20361 May 31, 2018 showing first deposit of \$2500

103. Mr. O'Bertos was at all times the only sales person the Purchasers dealt with. The Purchaser husband signed the Sales Agreement and initialled the small print Builders Lien Act Section. Mr. O'Bertos signed the Sales Agreement.

R1 Activity Notes

R2 Recommendation letter for Administrative Action

R4 (2) Sales Agreement / Invoice 20361 May 31, 2018 showing first deposit \$2500.

R5 Transcript of Smith / Sibbio Interview 12/20/19

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment \$4220

104. The Purchasers were first time hot tub owners. They bought from Sun Ray because Mr. O'Bertos was very convincing and it was a local company.

R2 Recommendation letter for Administrative Action
R5 Transcript of Smith / Sibbio Interview 12/20/19

105. The Contract was solicited, negotiated and completed in the store.

R1 Activity Notes
R5 Transcript of Smith / Sibbio Interview 12/20/19

106. There was a lot of small print writing on the signed Sales Agreement / Invoice 20361 (the Contract) Printed on the lower left of the Sale Agreement are these words:

*"We are not responsible for replacing lost invoices
No Cancellations permitted and no refunds on deposits or merchandise"*

R4 (2) Sales Agreement / Invoice 20361 May 31, 2018 showing first deposit
A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

107. There is more below the signature line for the Purchaser and the salesman.

The following is written:

"The delivery date is an estimate and does not represent a warranty by the seller .The delivery date is subject to, among other factors the availability of materials and labour and demand upon the manufacturer."

R4 (2) Sales Agreement / Invoice 20361 May 31, 2018 showing first deposit
A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

108. Further on the Sales Agreement / Invoice 20361 on the top right hand side under the words in caps the following words can be found:

"ALL RETURNED CHECKS SUBJECT TO \$50.00 CHARGE"

109. Again in very small print is the following:

"The customer warrants that he is the owner of the property where the goods and services are being delivered and received and agrees that the goods and services are an improvement to the land and are subject to the provisions of the Builders Lien Act of Alberta. The client further agrees that they will pay all costs incurred by the vendor in the event of default of payment, including solicitor and client costs as well as interest on all outstanding balances at a rate of 24% an annum. The Sun Ray representative has not made any representations and promises other than those written on this sales agreement. Out of town warranty travel will be charged at current service rates. I have read and understood Sun Ray's Delivery requirements. I further agree that if I fail to meet these requirements that Sun Ray will reschedule the delivery and additional charges will apply."

R4 (2) Sales Agreement / Invoice 20361 May 31, 2018 showing first deposit
A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

110. The Purchaser Boyechko signed this section upon signing the Sales Agreement on May 31, 2018 with the salesman Mr. O'Bertos in the store.

R4 (2) Sales Agreement /Invoice 20361 signed May 31, 2018 showing first deposit \$2500

111. Following the filing of the complaint in November 2019 the case Assessment team for Service Alberta recommend to Mr. Trevor Addison on 12/06/19 that an investigation be opened. On page 2 of R1 on page 2 of the Case Management group appear concerned over terms in the Sales Agreement that show exaggeration, excessive one sidedness and misrepresentation and the notes reference S 6 Unfair Practices under s 157 of the CPA.

R1 Activity Notes pages 2 and 3

112. Mr. Smith reported to Mr. Addison.

R1 Activity Notes

113. The custom hot tub was expected by the Purchasers to be delivered in mid-August 2018. That was an agreed upon date with Mr. O'Bertos. The Purchasers explained that when they bought the hot tub on May 31, 2018, Mr. O'Bertos had first suggested a shorter delivery date of 8 to 10 weeks. The Purchasers told him they would be away some of the summer and could go with a later date. That is why the date 10 to 12 weeks was agreed upon. The expected date was mid-August. The custom hot tub was not delivered on that date.

114. As of the date of this Hearing on November 3, 2021 the custom ordered hot tub has not been delivered. It is now three and half years from August 18, 2021 date, 40 months and 160 weeks after the Purchasers entered into the Contract.

R1 Activity Notes

R2 Recommendation letter for Administrative Action

R4 (2) Sales Agreement /Invoice 20361 May 31, 2018 showing first deposit of \$2500

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment \$4220

115. As of the date of the hearing the loaner hot tub remained at the Purchaser's house but was not working and was not repaired.

R5 Transcript of Smith / Sibbio Interview 12/20/19

116. On November 29, 2018 the Purchasers completed their payment for their chosen custom hot tub and paid to Sun Ray in full the total \$6720.

R1 Activity Notes

R2 Recommendation letter for Administrative Action

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

117. Mr. Smith gave evidence on behalf of Service Alberta in the hearing of November 3, 2021. This resulted from his assignment to the Purchasers complaint on 12/11/2019 and the Work undertaken by him as reflected in R1.

R1 Activity Notes

R2 Recommendation letter for Administrative Action
H Part 1 audio video of Hearing on November 3, 2021 time 23.11 to 1.21.30

118. Throughout the fall of 2018 and the whole year of 2019 the Purchasers kept calling Sun Ray for a delivery date. They asked for refunds but were told the hot tub had been started and the Invoice said no refunds. They were told by Mr. O'Bertos they were high on the list and only a few others were in front.

R1 Activity Notes
R2 Recommendation letter for Administrative Action
H Evidence at hearing Part 1 time 27.57
R5 Transcript of Smith/Sibbio interview 12/20/19 in her home.
R6 and R7 Audio recordings part 1 & 2 Ms. Sibbio Interview
A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

119. The Purchaser had filed a complaint with the Better Business Bureau (BBB) against Sun Ray in October 2018. It came to Mr. O'Bertos' attention and he initiated a call to the Purchasers about the review a few days later. He said if the Purchasers took down their review he would offer them a loaner hot tub. The Purchasers accepted the delivery of a used show room loaner hot tub into their back yard of the Purchasers on November 24, 2018. They thought it would get them through the Edmonton winter. The loaner hot tub was an Albertan Sahara. This was the first time Sun Ray had offered them a loaner. This was three days before the Purchaser paid up balance owing on the Contract on November 29, 2018.

R1 Activity Notes
R2 Recommendation letter for Administrative Action
R5 Transcript of Smith/Sibbio interview 12/20/19 in her home.
A1 Delivery Document dated Nov 26, 2018 showing Loaner hot tub, the Albertan Sahara delivered to Purchasers' house. Purchaser signed this document

120. The Purchaser Ms. Sibbio in her transcript described how they had to provide another two or three people in addition to the Sun Ray people to bring the loaner hot tub down into their back yard.

121. The loaner hot tub broke down, was fixed, broke down again and the motor remains broken.
R5 Transcript Smith/Sibbio interview 12/20/19 page 7

122. The Purchasers wrote about the loaner hot tub in their complaint to the CIU and about the request of Mr. O'Bertos on behalf of Sun Ray. The following wording formed part of their complaint. It is as follows;

"In October 2018 Ms. Sibbio filed a review with the BBB, a few days later Mr. O'Bertos contacted them and said if they took down the review, he would give them a loaner hot tub. Ms. Sibbio had requested a refund but was told that because the production of the hot tub had started they would not be able to refund them their money. "

R1 Activity Notes page 1 Summary of Purchasers complaint.
R5 Transcript of Smith/Sibbio interview 12/20/19
R2 Recommendation for Administrative Action.

123. This phone call from Mr. O'Bertos to Mr. Boyechko offering a loaner hot tub was the only initiated call made by Mr. O'Bertos to the Purchasers.

124. A show room loaner hot tub was offered by Sun Ray and accepted and delivered to the Purchasers on November 24, 2018, with a completed payment on their Contract for their Gateway hot tub on November 29, 2018.

A1 Delivery Document dated Nov 26, 2018 showing Loaner hot tub, the Albertan Sahara delivered to Purchasers' house.

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment \$4220

125. The Purchaser says she was recommended to CIU by the BBB people.

R5 Transcript of Smith/Sibbio interview

126. CIU, Consumer Investigation Unit is a department within Service Alberta that provides protection to Albertans. Mr. Smith is a CIU Investigator and Alberta Peace Officer. His role is to investigate consumer complaints and offences according to the policy and procedures in the Consumer Protection Act and regulations. He can recognize criminal offences and those requiring Administrative Action.

H Audio Video of Hearing Part 1 time 23.48

127. Mr. Smith's role is to research, interpret the legislation, analyse and evaluate the information, conduct interviews and statements and make recommendations.

H Audio Video of Hearing Part 1 time 23.48 to 24.55

128. Mr. Smith through his training can investigate complaints and transactions related to a bunch of different industries and in this case as to cases of unfair trade practices using s.6 of the CPA, which has bullet points of what an offence might look like.

H Audio Video of Hearing Part 1 time 24.55 to 25.59

129. Mr. Smith says he is familiar with determining what a reasonable product delivery time is in a consumer transaction and what constitutes an unfair practices as based on s.6 of the CPA.

H Audio Video of Hearing Part 1 time 25.59 to 27.41

130. Mr. Smith discussed with Mr. Addison whether an undercover phone call might find more information. Mr. Smith posed as a potential customer and member of the general public in an undercover (covert) cold call with Mr. O'Bertos on February 12, 2020, using the name Jeremy Frederickson.

131. The Purchasers had paid the initial deposit in May 2018. Mr. O'Bertos stated in Smiths covert call that Sun Ray could produce a custom hot tub within two to three months unless it was a moulded one. He also said the plant was not running properly, the moulder was not installed or operating and the business plan was to move as they were experiencing flooding. Sun Ray represented in the call it would take two to three months for a custom tub.

R1 Activity notes (content of call)

H Audio Video of Hearing Part 1 time 27.57 to 29.14

132. Mr. Smith suggested that exaggeration, innuendo or ambiguity as to a material fact occurred when the Purchasers were led to believe they would receive their hot tub within 10 to 12 weeks as stated on their Contract. The salesman's conversations were vague and illusive timelines were offered for delivery. Ms. Sibbio was told on more than one occasion that she was at the top of the list.

H Audio Video of Hearing Part 1 time 29.14 to 30.56

133. Mr. Smith said the exaggeration, innuendo and ambiguity as to a material fact was in relation to the time frame in the contract and the verbal time frame when the product was paid for.

H Audio Video of Hearing Part 1 time 30.22 to 30.56

134. Mr. Smith said an average consumer would consider waiting 21 months for an item with a 10 to 12 weeks selected delivery date to be unreasonable. A reasonable member of the public would expect a reasonable understanding of a delivery date.

H Audio Video of Hearing Part 1 time 32.06 to 32.41

135. By paying the full balance owing to Sun Ray on the Gateway three days after the delivery of the loaner Albertan, the Purchasers and the salesman both understood clearly the Purchasers were still waiting and ready for Sun Ray to deliver their personally selected and purchased hot tub.

R4 (3) Mr. Boyechko/Ms. Sibbio joint bank account draft record showing final payment \$4220 to Sun Ray for Gateway hot tub Nov 29, 2018

A2 Sales Agreement Invoice no 20361, showing \$4220 paid by Bank draft and GST of \$320 paid Nov 29, 2018

A1 Delivery Document dated Nov 26, 2018 showing Loaner hot tub, the Albertan Sahara delivered to Purchasers' house.

136. In August 2018, no new hot tub was delivered. The purchasers phoned constantly through 2018. They were told then in August 2018 there was a problem. The plant had to be moved. The Purchasers took the showroom loaner for the winter having been told that they would get their hot tub in May 2019. They phoned in May 2019 and nothing was happening. The Purchasers learned the Plant had to move again around November 2019. Mr. O'Bertos said the owner was out of town and he did not have anything to tell them.

R5 Transcript of Smith / Sibbio Interview 12/20/19

137. Mr. Boyechko went down to the plant in late 2019 looking for a delivery date. He found Mr. Roberts there. Mr. Roberts was mad at Mr. Boyechko. Mr. Boyechko said, we are the customers, I don't understand why you are arguing with us.

R5 Transcript of Smith / Sibbio Interview 12/20/19

138. In August 2019, the Purchaser spoke to Mr. O'Bertos about a delivery date for their tub. The Purchaser requested a refund but was told the tub had been started and she was directed to the small print on the sales agreement, Mr. O'Bertos told them, Sun Ray was going to have to move again because of flooding. Sun Ray had moved the first time in the fall of 2018.

139. The Purchaser phoned Mr. O’Bertos again on September 14 2019 and was told the hot tub would be ready in October 2019. The Purchaser was told their Hot tub was at the top of the list and there were a few more hot tubs before theirs.

R1 Activity notes

R2 Recommendation for Administrative Action March 12 20

R5 Transcript of Smith/Sibbio interview

140. The Purchaser advised Mr. Smith in her interview on 12/20/19 that she phoned Mr. O’Bertos one more time on November 22, 2019. Mr. O’Bertos told her that her hot tub was not ready and he did not know when it would be ready. He told at that time the Loaner Hot tub was a used unit.

R1 Activity notes page R1

R2 Recommendation for Administrative Action March 12, 2020

R5 Transcript of Smith/Sibbio interview

141. The Purchasers filed their complaint with CIU on November 26th 2019 it was numbered #40836

142. As of the date of the Order dated June 10, 2021 issued by the Director of Fair Trading, Mr. Scott Hood, the number of months that had passed since the contract had been completed between the Purchasers and Sun Ray on May 31, 2018 was more than the figure of 21 months referenced in the Order. As at the date of the Order, the number of months that had actually passed was closer to 36 months (144 weeks) as at June 10, 2021. As of the Appeal date November 3, 2021, it is now 41 months (164 weeks)

R1 Activity Notes

143. Early on in reviews of the complaint by the CIU, 12/11/19 when the case had been assigned to Mr. Smith, the Assessment team reviewed possible breaches of s 6 of the CPA under part 2 Unfair Practices

R1 Activity Notes Page 2

144. 12/19/19 as shown on R1 Activity Notes Mr. Smith sent an introductory letter to Mr. Roberts requesting a response by January 2020. It was Mr. Smith’s first effort to connect to Sun Ray. Mr. Smith mailed this letter 12/19/19 with a tracking number 1814664325878748. The letter was stamped as having been delivered and signed for as at December 23/20/19.

R1 Activity Notes Page 3

R3 (4) Initial contact letter to Mr. Roberts at Sun Ray dated 12/19/19

145. Despite not being responded to and having the wrong typed date on the copy available at the Hearing, the letter was written, sent and signed for as received at Sun Ray.. There was no response. A copy of the 12/19/19 letter produced by Mr. Smith was seen by Mr. O’Kurley to have the wrong date on it. Mr. Smith apologized for the auto correct error, since clearly from the R1 Activity Notes entry and the tracking information the letter was sent on 12/19/19. Mr. Smith did not receive a response from Mr. Roberts by January 24, 2020 or at all.

R1 Activity Notes

146. At the beginning of his assignment to the file Mr. Smith prepared to interview the Purchaser at her home in Sherwood Park on 12/20/19. A transcript of the audio recordings and the audio recordings themselves were available at the hearing.

R5 Transcript of Mr. Smith / Ms. Sibbio interview

R6 and R7 Audio recordings part 1 & 2 Ms. Sibbio Interview

147. The actual recordings from which the transcript was made are available at R6 and R7

148. The content from Mr. Smith covert phone call using name "Jeremy Fredrickson" dated 2/13/2020 to Mr. O'Bertos includes the following:

Mr. O'Bertos explained tours were available when they were at their old location on 99th Street because they had an open plant, but not now. Sun Ray had to move from 99th Street because they outgrew it with all the furniture. They are in an old store space, the plant is somewhere else. Sun Ray hopes to get back to having tours. They are now in an old building of theirs that was too small, also show room was there. He stated the current location was temporary. They were sharing. He said it could be a couple of months before they offer tours again. There was some flooding issue. They would like to get hot tubs up and running. He said from today it would take two to three months to get a tub. They plan to get some space on Argyle road. The Company was growing because of the patio furniture they were now selling. In their current space the latter half of the plant was up and running, but the moulder was not up yet. He said if they have to stay in the current location they can make it work.

He was very proud of the plant and the plant tour and the hard work of his boss Mr. Roberts who hardly ever had a day off.

R1 Activity Notes page 5

149. Mr. Smith prepared the Recommendation for Administrative Action dated March 12, 2020 summarizing his findings and provided them to Mr. Trevor Addison Manager of Investigations. Mr. Smith prepared analysis of the Unfair Practice sections being reviewed.

s6 (4) (k)

s6 (4) (n)

s6 (2) (c)

s6 (3) (d)

s6 (3) (c)

R2 Recommendation for Administrative Action

R1 Activity notes Page 5

150. Mr. Smith was cross examined by Mr. Floden for the Appellant.

151. No further documents were introduced by Mr. Smith.

152. Mr. Floden cross examined Mr. Smith on s.6 and his understanding of the definition of words such as material fact, supplier, goods and personal property as compared to real property.

Mr. Smith confirms the meaning of the words material fact as information that would reasonably be expected to affect the decision of a consumer entering into a transaction.

Mr. Floden asks Mr. Smith to confirm the definition of Supplier as in s.6 and Mr. Smith does.

Mr. Floden then puts various s.6 definition sections to Mr. Smith who agrees with what he says.

Mr. Smith confirms the time frames written on the contract were changed verbally.

153. Mr. Smith points out that the Purchasers signed the small print in Top Square in the Sales Agreement.

154. Mr. Floden talks about s.6 (4) (k) which says if a supplier cannot deliver the goods that's an unfair practice.

155. Mr. Smith says yes. But it depends upon whether it was satisfactory to the consumer or what was entered into the contract.

156. Mr. Floden suggests there was no reason Mr. Roberts would have known about Ms. Sibbio being Mr. Boyechko wife, when the letter of December only talks about Ms. Sibbio. Mr. Smith points out that they both live at the same house, loaner delivered to that address. Both Ms. Sibbio and Mr. Boyechko had been in the store.

157. Mr. Floden takes Mr. Smith through the small print wording on the contract A2

158. Mr. Smith knew that Ms. Sibbio bought a Gateway. He did not know the loaner was an Albertan.

159. Mr. Smith adds some context re s.8 of the CPA. Unfair practice can occur before, during or after a consumer transaction. This was in answer to questions of Mr. O 'Kurley

160. Mr. Smith confirms his view of a loaner that it would be lent as a replacement until repair.

161. Mr. Smith says a representation does not have to be a guarantee.

162. Mr. Smith confirms that business challenges do not absolve suppliers of their obligations

163. Mr. Smith confirms that authority as a peace officer entitled him to perform an undercover investigation.

164. Mr. Smith agrees that Sun Ray gave an estimated date for delivery, not an actual date on document R4 (2)

165. Mr. Smith says he does not know the situation of Sun Ray, confusing information on their status.

H Audio Video of Hearing Part 1 time 54.03

166. Mr. Smith does not agree that a factory move could disrupt Sun Ray.

H Audio Video of Hearing Part 1 time 54.30

167. Mr. Smith has no information that Sun Ray knew they were going to move before the deal with Purchasers.

H Audio Video of Hearing Part 1 time 54.003 to 55.38

H Audio Video of Hearing Part 1 time 53.05

168. The Chair then affirmed Mr. Roberts to give his evidence

169. Mr. Floden acted for Sun Ray and Mr. Roberts and led the evidence of the Appellant.

170. Mr. Roberts is the sole Director and Shareholder of Sun Ray, the company was started in 1993 and registered in 1998.

R2 Corporate registration system

171. Mr. Roberts explained he works in the office above the showroom and does not deal with the public.

H Audio Video of Hearing Part 2 time 3.29

172. Mr. Roberts does work fixing the machinery on the plant floor when required.

R1 Activity Notes page 5, entry summarizing undercover phone call 2/13/20.
Comment of Mr. O'Bertos

173. Mr. Roberts is in charge of relocation after a move

174. Mr. Roberts does a lot of the staff hiring and shares the task with others

175. Mr. Roberts is the sole Owner of Sun Ray. Sun Ray manufactures and sells hot tubs. It also sells patio furniture since at least before the summer 2018. Mr. Roberts is the sole Director and Shareholder of Sun Ray. He is known as the President or the General Manager.

A3 Correspondence from Mr. Roberts to Mr. Scott Hood dated April 30 2021 on
Notice of Appeal

R 4 (1) Cores Corporate search

176. As at April 30, 2021 Mr. Roberts did not know who Ms. Sibbio was. He could not find her in his system. He does know now of her husband Boyechko. The sales agreement (A2 and R 4 (1)) has been brought to his attention. Mr. Roberts was having a stressful time in August 2018 having to move out of his plant facility with people moving in to it and he had to find a new location.

H Audio Video of Hearing Part 2 time 23.29

177. Mr. Roberts reviews Sales Agreement in Doc R4 (2) and A2 and small print box about Builders Lien Act and says "improvement" language necessary so Sun Ray can Lien property in case of nonpayment.

H Audio Video of Hearing Part 2 time 5.48 to 7.55

178. In summer 2018, the 110,000 sq. ft. building that housed Sun Ray for a few years was sold. Sun Ray was given a 30 day vacate notice in August 2018.

H Audio Video of Hearing Part 2 time 7.55 to 10.56

179. Mr. Roberts explains the complicated manufacturing process and the moving problems. In 2018 the move took six weeks to pack everything and three weeks to move everything. It took five months to have the departments online again.

H Audio Video of Hearing Part 2 time 5.48 to 7.55 and 13.29 to 15.23

180. Mr. Roberts explains why he needs Builders Lien language about "improvement" in his Sales Agreement. It protects him if the hot tub is called an "improvement" by the purchaser because he can then put a Lien on for unpaid funds.

H Audio Video of Hearing Part 2 time 5.48

A3 Letter from Mr. Roberts to Mr. Hood

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

181. Mr. Roberts explains why the Sales Agreement lists factors that qualify the agreed upon expected delivery date, because he is at the mercy of many suppliers.

H Audio Video of Hearing Part 2 time 5.48 to 7.55

A3 Apr 30, 2021 Letter from Mr. Roberts to Mr. Hood acknowledging receipt of letter on Apr 9, 2021 Notice of Appeal

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

182. Mr. Roberts explains the manufacturing process in detail. It is like 12 different businesses.

H Audio Video of Hearing Part 2 time 10.36 to 13.59

183. Mr. Roberts says a move is very time consuming to the company. Their first move from the big space, 99th Street took place in 2018 when they moved to Wagner Road. Around September 2020 they moved again from Wagner Road to 17th Street. It takes 6 weeks to pack, three weeks to move and another five months to get the departments on line again.

H Audio Video of Hearing Part 2 time 13.29

184. Mr. Roberts explains they got their 30 day vacate notice in August 2018 from 99 Street and they had moved out by November 2018. But they were not set up until the first part of 2019. Some parts were up and running so they could work on the works in progress, but the moulding machine was not working.

H Audio Video of Hearing Part 2 time 15.23 to 18.15

185. Mr. Floden asked, when did they get the notice to move out of the second building?

186. Mr. Roberts explains it was September 2019. The moulding machine is the last thing they finalize in a move.

H Audio Video of Hearing Part 2 time 15.23 to 21.46

H Audio Video of Hearing Part 2 time 18.15

H Audio Video of Hearing Part 2 time 20.56

187. Ms. McKinley asks Mr. Roberts what stage was the Purchasers hot tub in as at second move in 2019 since it had been started in 2018?

188. Mr. Roberts says back in 2018 Sun Ray had started on Purchasers tub so that meant they could not give money back. The Cabinet and cover were done. Mr. O'Bertos the salesman knew the time frames but he was not in the plant location.

189. In November 2018 Mr. Roberts says O'Bertos collected final sale money from the Purchasers to protect expensive loaner worth \$8000 that was delivered around the same time.

H Audio Video of Hearing Part 2 time 6.31 to 28.19

A2 Sales Agreement / Invoice 20361 November 29, 2018 showing final payment

A1 Delivery Note for loaner dated November 24, 2018

R 4 (3) Bank statement for Boyechko and Sibbio showing \$4220 bank draft to Sun Ray to complete payment of their purchase Gateway hot tub Nov 29, 2018

190. The Chair asked what state the Purchaser's hot tub was in as at November 29, 2018.

191. Ms. McKinley asks why they did not return the deposit money to the Purchasers of \$2500 when they knew they were going to move and the difficulties that would create with the move. Mr. Roberts says that would require hindsight to know what was going to happen.

192. Mr. Roberts states that he does know the real facts of the Purchaser's hot tub because Sun Ray has been sued in a civil suit. (The Chair states that is nothing to do with this Process).

193. Mr. Floden explains that Mr. Roberts means he has taken the time to check into the matter.

H Audio Video of Hearing Part 2 time 29.30 to 30.06

194. Mr. Roberts does not recall seeing a copy of letter dated December 19, 2019 from Mr. Smith

H Audio Video of Hearing Part 2 time 30.29 to 31.40

195. Mr. Roberts agrees with Ms. McKinley that the moulder was off use after first move in August 2018 and not up and running again until September 2020.

H Audio Video of Hearing Part 2 time 31.40 to 33.31

196. Cross examination from Ms. McKinley Board Member on Mr. O'Bertos conversation August 2019 with Purchasers and Mr. O'Bertos telling Purchaser August 12, 2019 that Sun Ray was moving again. Mr. O'Bertos did know of move.

H Audio Video of Hearing Part 2 time 31.40 to 33.31

197. Mr. Roberts accepts that Mr. O'Bertos knew of next move in 2019 and miscommunicated with Purchaser when he said hot tub would be ready in September 2019. Mr. Roberts acknowledges that as at November 22, 2019 Mr. O'Bertos told Purchasers he did not know when their hot tub would be ready. Mr. O'Bertos told Purchasers the loaner was a used tub.

H Audio Video of Hearing Part 2

198. The evidence of the Purchaser of conversations with Mr. O'Bertos in fall 2019 show that Mr. O'Bertos did know about a second move for Sun Ray in the fall of 2019. He still told the Purchasers in September 2019 that their hot tub would be ready in October 2019. Finally in November 2019 Mr. O'Bertos told Purchasers, he did not know when their hot tub would be delivered.

H Audio Video of Hearing Part 2 time 40.36 to 43.16

199. Mr. O'Bertos in the fall of 2019 suggested to the Purchasers in September 2019 their hot tub would be ready in October 2019 without information on the production status of the hot tub shell and production timing difficulties resulting from the first move in 2018.

H Audio Video of Hearing Part 2 time 47.56 to 49.20

200. Sun Ray knew the Purchasers hot tub could not have been moulded in the fall of 2019 because if it had been, it would have been delivered to the Purchasers.

H Audio Video of Hearing Part 2 time 50.12

201. Sun Ray was able to complete approximately 10 to 12 tubs before the second move. That involved Sun Ray keeping work in progress (WIP), one tub in each department before completing the move. The first department was the moulding department.

H Audio Video of Hearing Part 2 time 50.22 to 51.18

202. The Albertan loaner is a Sun Ray model. Mr. Roberts knew it was a demo in the show room. Mr. Roberts did not get that information from Mr. O'Bertos. Mr. O'Bertos did not complete document A1. It was not signed by Mr. O'Bertos.

H Audio Video of Hearing Part 2 time 52.02 to 56.38

A1 Delivery Document dated Nov 26, 2018 showing Loaner hot tub, the Albertan Sahara delivered to Purchasers' house

203. The Albertan sells for at least \$2000 more than the Gateway.

H Audio Video of Hearing Part 2 time 56.38

204. Mr. Roberts says he first heard about the Purchaser's complaint in April 2021 after receiving a letter dated April 9, 2021 from Mr. Scott Hood. Mr. Roberts wrote back to Mr. Hood on April 30, 2021 as Sun Ray's General Manager saying he did not know a customer named Ms. Sibbio. Mr. Hood investigated and found the Sales Agreement /invoice R4 (2) and personally dropped a copy off of the Purchasers receipt to Sun Ray.

205. Mr. Roberts does not acknowledge receiving Ms. Sibbio's letter of January 2020, signed for by Sun Ray in the tracking document. Mr. Roberts also does not acknowledge receipt of Mr. Smith's letter directed to Mr. Roberts dated, received and signed for December 23, 2019.

206. Mr. Hood gave Mr. Roberts a few weeks to respond to his letter of Apr 9, 2021. Mr. Roberts said he needed more time than a few weeks because of the move and losing staff. He did have a good conversation with Mr. Hood.

R3 (5) Tracking document for Mr. Smith letter to Sun Ray 12/19 /19, signed receive

207. Sun Ray had to move again in spring 2021.They were given a 90 days to exit because the landlord had received a better leasing offer for their space and Sun Ray was paying less than market rent.

H Audio Video of Hearing Part 2 time 57.20, 57.58 and 58

208. Sun Ray has been affected negatively by Covid with staff numbers down and staff members stayed at home and saving up extra money in the bank and moved to Montreal. Their normal day to day life would not have let them have so much money.

H Audio Video of Hearing Part 2 time 59.58

209. As a result of Covid Sun Ray had 10 month supply disruption with an order of heaters made December 2020 and delivered fall 2021.

H Audio Video of Hearing Part 2 time 1.00.39

210. Mr. Roberts is the main person leading the relocation in Sun Rays moves because of his experience doing multiple moves. He directs staff members in disassembling equipment and reassembling it.

H Audio Video of Hearing Part 2 time 1.02.06

211. Mr. Roberts, says 15 years ago he had a staff of 55 working at Sun Ray and it consistently produced 5 hot tubs a day. Then six oil price crashes in Alberta in the last six years and such oil price fluctuations have negatively impacted Sun Ray.

H Audio Video of Hearing Part 2 time 1.02.06

212. Mr. Roberts thinks that the Order is not fair to Sun Ray. Sun Ray is an old company and should not have its reputation tarnished after all of the hundreds of thousands of customers. Mr. Roberts thinks what Mr. O'Bertos wrote on the invoice is the problem and that he would have had no idea of what might happen.

H Audio Video of Hearing Part 2 time 1.06.35

213. Mr. Roberts believes there is so much uncertainty in the world that it is difficult to make a five year long term lease plan in case of fluctuation which could mean he cannot make monthly payments and the sheriff comes in and seizes his assets for auction.

H Audio Video of Hearing Part 2 time 1.08.16

214. Mr. Roberts states, back in summer of 2018 before Sun Ray had been told to vacate the premises in 30 days, Sun Ray was fully operational and making tubs and everything was totally fine.

H Audio Video of Hearing Part 2 time 1.09.43

215. In answer to a question from Mr. O’Kurley, Mr. Roberts states that he can estimate that Sun Ray in May of 2018 would have produced between, 10 to 30 hot tubs.

216. Ms. McKinley asked Mr. Roberts to explain the contradictory evidence of Mr. Smith on page 2 of document R2 that in the summer of 2018 the plant was having issues. That evidence was that the Purchaser, when phoning to check up on her hot tub was told by the salesman Mr. O’Bertos at the beginning of August 2018 that it was not ready and that the plant was experiencing “issues”. When the Purchaser phoned again in mid-August she was told the plant continued to experience “issues” and that Sun Ray was moving due to flooding. The hot tub would still be ready in October 2018.

R2 Recommendation letter for Administrative Action page 2

H Audio Video of Hearing Part 2 time 1.11.14

217. Mr. Roberts defines the issues as a surge in demand and possible hiring if they had not moved.

H Audio Video of Hearing Part 2 time 1.11.43

218. Mr. Roberts states that the Purchaser is lying when she says that salesman told her she would get a hot tub if she took down her poor BBB review of Sun Ray. Mr. Roberts says he knows this because he had asked BBB before in the last ten years if they would take some reviews down and BBB said no.

H Audio Video of Hearing Part 2 time 1.12.35 to 1.13.29

219. The Chair asks about the business developing selling outdoor furniture and problems with storing furniture and when Sun Ray started doing this and getting into outdoor furniture.

220. Mr. Roberts states during first year and a half of moving into 99th Street space 4 to 5 years ago.

H Audio Video of Hearing Part 2 time 1.14.19 to 1.16.21

221. Mr. Roberts was responsible for dealing with furniture unloading and storage to ensure no incidents of paying for unloaded containers.

H Audio Video of Hearing Part 2 time 1.18.08

222. In answer to a Board member question as to whether storage needs and loading docks led to the need to move three times Mr. Roberts advises no. The first time the building was sold and the second time the tenant and sub tenant took over. Mr. Roberts confirmed that staff were not taken away from production to do the unloading of furniture.

Audio Video of Hearing Part 2 time 1.22.14 to 1.23.26

223. Mr. Roberts advises that he remembers speaking to the Purchaser husband, Mr. Bob Boyechko on one occasion in his office when he came down to the Office

Audio Video of Hearing Part 2 time 1.29.40 to 1.31.55

224. Mr. Roberts confirms that as of November 22, 2018 the salesman was right when he said he could not return the money because the tub had been started. The cabinet and cover would have been completed.

H Audio Video of Hearing Part 2 time 1.31.55

225. The Chair asked if there is a production flow chart recording the stage of each hot tub's Progress of manufacture?

226. Mr. Roberts stated there was a production schedule that would come over a few times a week. But Sun Ray does not have it since they moved out of 99th Street in 2018. The system has not been re-implemented.

H Audio Video of Hearing Part 2 time 1.33.0 to 1.34.43

227. Mr. Roberts started a new system which involves salesman calling to the plant and checking with the production manager so they can prioritize when the hot tub is created, Mr. Roberts states, "If a person is constantly phoning and they're you know, I guess that, you can tell, they wanna get their hot tub right, we definitely will try and relay that information so that everyone is aware."

H Audio Video of Hearing Part 2 time 1.35.14

228. After the paper production system has gone the salesman has to contact plant foreman and ask for individual status of a hot tub. The Paper system was dropped prior to 2018.

H Audio Video of Hearing Part 2 time 1.36.15 to 1.36.57

229. Mr. Roberts had no production paper to produce by the time the Purchasers hot tub was in the system.

230. Mr. Roberts does not recall seeing a letter from the Purchaser on January 3, 2020 asking to cancel her hot tub. The letter was tracked by Canada Post tracking document, showing that it was delivered and signed for by Mr. O'Bertos on January 3, 2020.

H Audio Video of Hearing Part 2 time 1.40.12

231. The Board members agreed to receive written arguments from the Parties. The Appellant's Written Arguments for Sun Ray is to be deliver by November 12, 2021 and the Respondent's Written Arguments for Service Alberta is to be deliver by November 19, 2021.

H Audio Video of Hearing Part 2 time 11.46.22

232. Mr. O'Kurley asks Mr. Roberts if he can estimate how many hot tubs he sold in May of 2018. Mr. Roberts says he would approximate somewhere between 12 to 30 month.

H Audio Video of Hearing Part 2 time 1.48.36

233. Mr. O'Kurley asks, how Sun Ray deals with loaner tubs, what sort of process exists from beginning to end?

234. Mr. Roberts advises that a loaner tub is s a very rare occurrence. He does not know of any other out in the field. Sun Ray does not have a specific process in place for dealing with them.

H Audio Video of Hearing Part 2 time 1.50.17

235. Mr. Roberts confirms that the loaner was to be removed once the new one is delivered. He comments that she (the Purchaser) is using Sun Ray's motors, heater and all the components of the hot tub. Sun Ray is highly motivated to get that tub back because the Purchaser is wearing out its motors. It will obviously need repair when it comes back.

H Audio Video of Hearing Part 2 time 1.50.44

236. Mr. Roberts says she, (the Purchaser) is getting to use a Cadillac when she ordered Kia.

237. Mr. O'Kurley asks, whether there is any expectation by Sun Ray that the loaner tub will be put into use again by the company?

238. Mr. Roberts says, of course it will not be left behind

H Audio Video of Hearing Part 2 time 1.51.44.

239. Mr. O'Kurley asks Mr. Roberts if, after reading Mr. Smith's letter addressed to himself on 12/19/19, which informed him of the investigation, what actions Sun Ray took?

240. Mr. Roberts is uncertain whether he was aware of the letter, or said to himself, this is not someone in our system, it must be a mistake. He offered to check into the letter and see if he responded. Mr. Roberts says he did not see the letter before today. (Nov 3, 2021)

Mr. Roberts volunteered that he keeps all letters in a file backed up on the computer. Mr. Roberts acknowledged not knowing that Mr. Smith had phoned him and that he clearly had missed a couple of things.

H Audio Video of Hearing Part 2 time 1.53.15

241. Mr. Roberts explains that he did not know there was an investigation until Mr. Hoods letter arrived on April 30 21.

Mr. Roberts explains that he did get to talk to Mr. Hood and try and get more time to talk about his current problems and labour challenges. Mr. Roberts asked for more time but Mr. Hood could not give it. They did have an open dialogue.

H Audio Video of Hearing Part 2 time 1.59.22

242. Dr. Tywoniuk asks, what is the actual day for the new tub's delivery?

243. Mr. Roberts volunteered to the Board that he had attended mediation with the Purchasers as a result of a civil law suit and that it has been ordered that Sun Ray must deliver the hot tub on or before December 31, 2021 or they will receive the money back as judgment against Sun Ray. That is the mediated agreement.

H Audio Video of Hearing Part 2 time 2:01:32

244. Mr. Roberts says he considers the Gateway unit as a lower end unit. People sometimes ask for the cheapest.

Mr. Roberts agrees that a customer has a free choice for color, model and number of jets. .

H Audio Video of Hearing Part 2 time 2.07.09

APPEAL BOARD MAJORITY RESPONSE TO THE BRIEF OF ARGUMENT AND REBUTTAL OF THE APPELLANT SUN RAY

ANALYSIS OF THE APPELLANT'S FACTS SECTION.

245. The BOARD MAJORITY concludes that Sun Ray cannot rely on its Fact paragraphs 6-13 section to avoid the Director's Order.

246. Fact Paragraphs 6, 7 and 8 say that the Purchaser agreed to various items that are in the small print wording of the Contract when purchasing the hot tub. The hot tub could not be purchased without the Purchaser having to accept the language in the Sales Agreement / Invoice which included the small print wording.

Paragraph 7 requires the Purchaser to agree to a legal concept that will benefit Sun Ray and that takes away the rights of the Purchaser. No purchaser should have to sign such a clause to complete a consumer transaction. This is a legal issue of dispute in case law and dependent on the facts and circumstances, that is whether a hot tub is a fixture or a good.

The small print is to benefit Sun Ray. Mr. Roberts explained that the wording in the Sales Agreement helped Sun Ray by giving the company control over an uncertain date of delivery because of all these potential hazards such as delay with supplies and to deal with unpaid damage under the Builders Lien Act. The Purchaser had no remedy left to it to get a refund or cancellation of the sale if Sun Ray failed to deliver the hot tub.

247. Fact Paragraph 9. Sun Ray was compelled to move its Plant in 2018 because its Director / Owner had not protected Sun Ray from a 30 day Vacate notice from the landlord/owner of the property on 99 Street. Mr. Roberts, left Sun Ray vulnerable as a tenant for a 30 day notice to succeed when Sun Ray had to move out of the building 99 street. Sun Ray as a tenant had not protected itself. Mr. Roberts may have a background to why this occurred but he has not offered up such in evidence.

248. Fact Paragraph 10. Sun Ray's business is no more susceptible to economic shocks such as 2018 and the Covid pandemic than any other business in Edmonton at any time. Every business owner has to be prepared for economic downturns and disasters. The more potential dangers

there are the more managers must work and plan. Foreseeability or potential damage control in items such as tenant lease negotiation is a manager's skill. Mr. Roberts knew his market, his customers and his product. Foreseeability of his company's progress in difficult times was Mr. Robert's task.

249. Fact Paragraph 11. Every business must expect to experience delays and unforeseeable events. Foreseeability is a concept businessmen of all kinds have to work around to lessen or manage a potential risk in advance. Mr. Roberts was very experienced managing Sun Ray since at least 1998 if not sooner.

250. Fact Paragraph 12. There were two windows of time for the Purchasers to receive their hot tub. May to August 2018 and September/November 2020 to spring 2021. Those were periods of time between moves when the moulder was working for custom hot tubs to be made. That did not happen for the Purchaser. Sun Ray instead lent a loaner hot tub to the Purchaser on November 24, 2018. Their ordered hot tub had been expected by Mid-August of 2018. The Purchasers had to pay up the full price remaining of \$4220 on their yet to be delivered hot tub. Mr. Roberts regarded this payment as security for the loaner. That was not the view of the Purchasers. The loaner was used and a showroom model. It was an Albertan model. It broke down, was serviced and remains broken in the backyard. It was \$2000 more than the Gateway model. The Purchasers specifically chose their model as first time purchasers of a hot tub relying on the salesman Mr. O'Bertos. Mr. Roberts acknowledged that a Purchaser is free to choose the price range, colour, model and number of jets they wants.

251. Paragraph 13. The complaint filed by the Purchasers in November 2019 led to the Order of the Director of Fair Trading in June 10, 2021 and the Appeal of Sun Ray dated July 2021.

252. Paragraph 16. This is a strange question. It asks "Should the Appeal Board Quash the Order and the matter be reheard by different Panel members forming a new Appeal Board and following proper rules of evidence." This question presupposes that Sun Ray will succeed in its arguments in its Brief on Procedural Unfairness. If the Appeal Board quashes the order then there is no more hearing but success for the party wanting the order quashed.

253. Paragraph 17. Sun Ray states that a hot tub is a fixture and not a good and therefore falls outside the protection of the CPA. The Appeal Board rejects this findings of fact. Please see the arguments below.

THE TWO LEGAL ARGUMENTS OF SUN RAY

254. The Appellant has developed two questions of law with the expected result of invalidating the Hearing and the Appeal Board held on November 3, 2021 and/or quashing the Order of the Director and invalidating the arguments and conclusions of the Respondent, Service Alberta in the hearing.

ARGUMENT 1 JURISDICTION

255. The first argument relates to Sun Ray's argument developed to remove the protection of the CPA from the Purchasers. In paragraph 17 of its FACTS Sun Ray states that a hot tub is a fixture and not goods and therefore falls outside the protection of the Statute. As a result Sun Ray says the Director of Fair Trading, the Respondent and the Appeal Board have no Jurisdiction.

256. There is no argument available to Sun Ray through case law or statutory intent that assists Sun Ray to override the purpose and intent of the Consumer Protection Act to protect Purchasers in an unfair consumer transaction.

The Statute stays in its Preamble

"whereas all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed."

257. The Respondent Service Alberta has responded in full to this argument and the Appeal Board Majority dismiss the JURISDICTIONAL argument of Sun Ray in its entirety.

The Board Majority accepts the clear arguments of the Respondent Service Alberta in its Brief of Argument that the Purchasers are covered by the protection that the statute stands for.

This protection applies whether or not a hot tub is considered a fixture. That issue is a matter of the particular circumstances surrounding the hot tub and its positioning in the home or yard and other such factors including damage caused by the arrival or departure of a hot tub from a property.

258. On the facts of our case the loaner is definitely not a fixture, it is loaned to be taken away again from the backyard by Mr. Roberts. The hot tub that has been purchased has not even arrived at the property of the Purchasers to be labelled anything at all.

See paragraphs 32 to 37 of the Respondents Brief of Argument set out below in full in this Decision.

259. In Paragraph 33 of the Resopondent's Brief, the Respondent points out that the CPA is not limited to transactions involving goods and personal property. The Respondent references the definition of "Consumer transaction" under CPA s1 (1) (c)(i) which includes the supply of "services" by a "supplier" to a consumer as a result of a purchase.

The definition of "Service" under (1)(1)(k) includes any service offered or provided primarily for personal family or household purposes including those involving the addition to or maintenance, repair or alteration of any residential building.

The definition of "supplier" under s 1(1) (k) Includes "services"

260. Paragraph 33 of the Respondents Brief points out the legislative intent of the CPA is to cover a broad range of business activities, including those that involve fixtures. The Respondent states, therefore that the unfair practice provisions referenced in the Order of the Director, s.6 (2)(c), s.6 (3)(c) and (d) and s.6 (4)(n) apply to consumer transactions that involve elements other than just purchasing and selling goods and to Sun Ray.

261. The BOARD MAJORITY including the Chair totally rejects the position of Sun Ray and finds that both the Respondent and the Appeal Board have Jurisdiction to deal with this case under the CPA.

262. The Board Majority rejects Sun Rays claim that the Consumer Protection Act lacks jurisdiction to protect the Purchasers with an administrative remedy in this situation. There is no legal argument that successfully supports the Appellants in such a conclusion.

263. The PREAMBLE to the Consumer Protection Act clearly sets out its purpose.

Preamble

“whereas all consumers have the right to be safe from unfair business practises, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed:”

The Preamble of the CPA statute continues with the same message throughout its entirety. It is Intended to protect all consumers whether a material fact is considered falling under one definition or another.

264. The Board finds that the CPA has JURISDICTION to make the Order and is supported by the Findings of Facts relating to the Purchasers transaction and the wording of the statute.

The Appeal Board rejects the Jurisdiction Argument of Sun Ray.

CONCLUSION ON JURISDICTION ARGUMENT

265. THE APPEAL BOARD MAJORITY FINDS THAT THE DIRECTOR HAD AND HAS THE JURISDICTION TO MAKE THE ORDER.

ARGUMENT 2 PROCEDURAL UNFAIRNESS

266. The Respondent takes no position on this issue except to state that under the Alberta Board reg. Alta reg. 195/1999 the Appeal Board is not bound by rules of evidence in judicial proceedings (s.14.1) and the Board has the authority to conduct the hearing as it sees appropriate. Evidence may be given before an Appeal Board in any manner that the Appeal Board considers appropriate. Therefore the Appellants comments regarding certain minor procedural events differing from judicial trials should be immediately dismissed.

The Appellant deals with this topic in paragraph 47 to 63 in the Appellant’s Brief.

267. There was no unfairness in cross examining on issues where Mr. Roberts was argumentative in his response. Cross examination is a tool to get to the answer when achieving a direct response from a witness becomes argumentative. That is not an issue of fairness.

Ms. McKinley’s questions were to clarify Mr. Roberts’s confusing evidence on the various times and reasons that Sun Ray moved between 2018 and 2021. Mr. Roberts confused the dates. The actual times when the Moulder was working and therefore custom tubs could be made were important dates to clarify.

268. Sun Ray suggests Procedural Unfairness in the Chair's weakened internet connection towards the last part of the day long virtual Zoom hearing. The Chair could not tell when the internet interference occurred until told by Mr. Roberts or Mr. Floden. When it occurred Ms. May immediately restated the question. No questions or answers were lost. No questions or answers were prevented. It occurred more during Mr. Roberts evidence towards the end of a full Day.

269. The Chair could not tell whether the connection cut out for other participants outside the Sun Ray board room and she tried to determine that.

270. At this time of Covid we are all dealing with virtual meetings and hearings. It is not unexpected that at times the internet service might vary in consistency. The Zoom host, Dr. Tywoniuk did not suggest there was any significant technical problem that lasted for any amount of time that required the Zoom host to become involved with.

271. The comments of Sun Ray refer to single moments in a daylong hearing and have no significance for the conduct of the hearing except Covid irritation.

272. Considerable effort was made to accommodate all parties. When Mr. Roberts finished his evidence in chief, the Chair asked if Mr. Roberts and his counsel would like to take some time and see if there was anything they still wanted to put into evidence before moving on to the Respondents cross examination. They took the time and covered another direct topic. Also all requested breaks by Sun Ray and representing council were granted during the hearing.

273. Sun Ray complains that it did not have an opportunity to cross examine Ms. Sibbio on her transcript of evidence. The Respondent has the choice on how to run its own case in the hearing. That is not an issue of Procedural Unfairness. Sun Ray knew in August that the only witness for the Respondent would be Mr. Smith who had been responsible for the Purchaser's complaint from beginning to granting of the Order.

274. The Respondent could, likewise, have argued that the Appellant should have called Mr. O'Bertos, the salesman whom the Purchasers phoned regularly for information regarding delivery of their ordered hot tub. The Respondent did not raise that topic because the Parties can chose the way they want to conduct a hearing.

275. Sun Ray also complains that Mr. Smith the CIU Investigator and Alberta Peace Officer, did not provide his qualifications and CV so that the Appellant could not assess whether he was really an expert.

276. Sun Ray alleges Procedural Unfairness against Mr. O'Kurley in his questioning style which gave a suggestion of opinion giving and leading evidence. The Appeal Board Majority finds no unfairness in such a suggestion.

277. Mr. Smith was introduced as an employee of Service Alberta with a particular investigative role to play. He answered to other Statute Administrators, explained his work as logged on the R1

Activity Notes which documents the series of events and all of his work and involvement from November 19 to May 21.

278. The Board finds it is totally unnecessary for an employee of Service Alberta giving evidence under oath of his qualifications to have to produce documentary evidence to prove his qualifications that give him his job and authority to act in his role.

Nevertheless Service Alberta can make such documentation available if Sun Ray requests through its counsel that Service Alberta produce it.

CONCLUSION OF PROCEDURAL UNFAIRNESS

279. The Board Majority rejects the Appellant conclusions in paragraph 64 & 65 of the Appellant's Brief that there was Procedural Unfairness. The Board rejects generally and specifically each and every allegation of unfairness.

280. The Board concludes there was no Procedural Unfairness at the virtual hearing.

APPEAL BOARD MAJORITY RESPONSE TO THE BRIEF OF ARGUMENT OF THE RESPONDENT SERVICE ALBERTA

281. Service Alberta provided a detailed Brief of Argument as Respondent, responding to Sun Ray's legal arguments about alleged lack of jurisdiction and providing its own opposing view. The Brief is 10 pages long and is included in full on the pages 44 to 55 that follow.

It is included in full because it provides a very clear summary of the facts of the case from its perspective, legal Analysis and the Conclusion to draw from it.

The Appeal Board Majority recognizes in its wording and conclusions the same view of the outcome as it holds. The Decision of the Board Majority is to confirm the Director's Order of June 10, 2021 so that his unfinished work can be continued by helping Sun Ray understand the harm that its attitude to at least one purchasing couple has done to the Purchasers themselves over three and a half years and possibly to Sun Ray itself.

282. Below is a summary of the Respondents Brief.

A. Paragraphs 5 to 30. FACTS

B. Paragraph 31, (a to d) ISSUE OF CREDENTIALS OF MR. SMITH

C. Paragraphs 32 to 35, JURISDICTION does not hinge on a hot tub being a fixture and not a good (personal property). It hinges on the definition of consumer transaction

CPAs 1 (1) (c) (i) and definition of service under s (1) (1) (k), definition of supplier s.1 (1)(l) and legislative intent .

Unfair Practice provisions under s.6 (2) (c), s.6 (3) (c) and s.6 (4) (n) apply to consumer transactions that involve elements other than purchasing and selling goods.

The hot tub is a good for a consumer transaction involving CPA. The installation of the hot tub and its manufacture falls under services. The Purchasers purchased the tub and the services.

D. Paragraph 34, a hot tub is movable property.

E. Paragraph 35, a hot tub is a goods CPA s.2 (1) renders any waiver or release of its protections as void. Parties cannot contract out of statutory provisions.

The CPA is to serve the public interest.

F. Paragraph 36, if the Board finds the hot tub to be a fixture and not a good, Sun Ray would have committed additional unfair practices. List of issues (a to h)

G. Paragraph 37, (a to b) an interaction between Sun Ray and the Purchasers relating to the contract is governed.

H. Paragraph 38, not applicable by the CPA till the Contract is terminated

I. Paragraph 39, (a to d) Unfair Practice s.6 (2) (c) added on

J. Paragraph 40, Unfair Practice s.6 (3) (c)

K. Paragraph 41, Unfair Practice s.6 (3) (d)

L. Paragraph 42 Unfair Practice s.6 (4) (n)

M. Paragraph 43 (f) Director adhered to principles of natural justice prior to issuing the Order. Sun Ray has ignored opportunities to respond to the Director.

CONCLUSION

N. Paragraph 44 TO 48

**BRIEF OF ARGUMENT OF RESPONDENT SERVICE ALBERTA
IN THE MATTER OF AN APPEAL BY
SUNRAY MANUFACTURING INC. PURSUANT TO
SECTION 179 (1) OF THE
CONSUMER PROTECTION
ACTRSA 2000 c. C-26.3**

AND

**IN THE MATTER OF THE DECISION BY THE DIRECTOR OF FAIR TRADING TO ADMINISTER A DIRECTOR'S
ORDER UNDER SECTION 157 OF THE CONSUMER PROTECTION ACT ON JUNE 10, 2021.**

Introduction

1. It is the Director of Fair Trading's position, supported by the evidence presented both at the November 3, 2021 Appeal Hearing and in the documents submitted to the Appeal Board, that the June 10, 2021 Director's Order directed at Sunray Manufacturing Inc. is valid, reasonable, and in compliance with the principles of administrative fairness. The Director of Fair Trading therefore requests that the Appeal Board confirm the June 10, 2021 Director's Order.

2. For abbreviation as well as consistency with the Appellant's submission,
 - a. The consumer complainants Rita Sibbio and Bob Boyechko will be referred to collectively as the "Purchasers";
 - b. The Appellant, Sunray Manufacturing Inc., operating as Sun Ray Spas and as represented by Brad Roberts in this Appeal, will be referred to as "Sun Ray";
 - c. The subject of this Appeal, the June 10, 2021 Director's Order directed at Sun Ray Manufacturing Inc., and issued by delegated Director of Fair Trading Scott Hood, will be referred to as the "Order";
 - d. The May 31, 2018 Sales Agreement between Sun Ray and the Purchasers, also identified as Invoice 20361 (entered by the Director in Document R3, p. 4, and by Sun Ray as Document A2) will be referred to as the "Contract";
 - e. Consumer Investigations Unit Investigator Julian Smith will be referred to as "Mr. Smith";
 - f. The Director of Fair Trading will be referred to as the "Director";
 - g. The *Consumer Protection Act*, RSA 2000, c C-26.3 will be referred to as the "CPA".

3. This submission will refer to the following documents according to the numbers assigned by the Appeal Board at the November 3, 2021 hearing:

- a. Director's (Respondent) Documents:
 - R1. Activity Notes (Excel Spreadsheet)
 - R2. Recommendation for Administrative Action by Julian Smith (March 12, 2020)
 - R3. Attachments (to R2)
 - R4. Supporting Documents (to R2)

Classification: Public

- R5. Transcript of December 20, 2019 Rita SIBBIO Interview
 - R6. Audio Recording of SIBBIO Interview 1
 - R7. Audio Recording of SIBBIO Interview 2

 - b. Sun Ray's (Appellant) Documents:
 - A1. Delivery Sheet - Alberta - Boyechko.pdf (Delivery receipt for loaner hot tub)
 - A2. Inv # 20361 - Boyechko.pdf
 - A3. Letter - Sun Ray - Service Alberta - Apr 30-21.pdf
4. The Director's submissions in this document will only address issues that relate to the validity, reasonableness, and administrative fairness of the Order, and to the jurisdiction of the Director. These submissions will not address issues regarding the enforceability of the Contract (aside from where it is relevant to violations of the CPA), or to the Appeal Board's jurisdiction, procedure, or adherence to the principles of administrative fairness, other than to note that:
 - a. Under CPA s. 179(6), the Appeal Board has the authority and discretion to confirm, vary, or quash the Order; and

- b. Under the Appeal Board Regulation, Alta Reg 195/1999, the Appeal Board is not bound by rules of evidence in judicial proceedings (s. 14(1)), and has the authority and discretion to set its own rules of evidence (s. 14(2)).

Facts

5. The Contract is a transaction between the Purchasers and Sun Ray for a custom hot tub according to the Purchasers' specifications, and includes delivery and installation services at the Purchasers' home.
6. The Contract did not contain an unambiguous statement confirming that the Purchasers would have no approximate expectation as to when Sun Ray would complete its obligations, or that Sun Ray would be entitled to keep the Purchasers' money in perpetuity if Sun Ray experienced operational challenges, including as a result of its own business decisions. The Contract instead included a delivery estimate of 10-12 weeks, which Sun Ray verbally confirmed with the Purchasers.¹ The delivery estimate would place the estimated delivery date between late July and mid-August 2018.
7. The Purchasers paid a total of \$6,720.00 to Sun Ray under the Contract:
 - a. \$2,500.00 paid at the time the Contract was entered into on May 31, 2018; and
 - b. \$4,220.00 paid in late October or November 2018, upon Sun Ray's delivery of a loaner hot tub to the Purchasers' home.²

¹ Document R5 at p. 1; Document R6 at 0:49.

² Document R2 at p. 4; Document R5 at p. 6, 8-9; Document R6 at 13:20, 18:40.

Classification: Public

8. The Purchasers had never owned a hot tub before and were not familiar with most aspects of the installation process.³
9. After the Contract was entered into, Sun Ray represented to the Purchasers on multiple occasions that their product would be delivered soon.⁴
10. Sun Ray delivered a loaner hot tub to the Purchasers' home in November 2018 as an interim measure, which Sun Ray intended to collect at an undetermined date and re-use. Sun Ray has confirmed that the loaned hot tub was a similar product, albeit an upgraded model, compared to the version the Purchasers ordered.⁵
11. No evidence has been submitted indicating that Sun Ray informed the Purchasers that the eventual removal of the loaned hot tub would cause injury to their real property.
12. Sun Ray did not deliver the hot tub the Purchasers ordered in the Contract according to either the delivery estimate in the Contract or the subsequent representations Sun Ray made to the Purchasers. Sun Ray had not delivered the hot tub as of the date of the Order, June 10, 2021, or as of November 3, 2021.⁶
13. Sun Ray has been unable or unwilling to provide the Purchasers with an accurate date as to when Sun Ray will be able to fulfil its obligations under the Contract.
14. Sun Ray had refused to provide a refund to the Purchasers as of the date of the Order.
15. The Purchasers submitted a consumer complaint to Service Alberta in November 2019.
16. On December 11, 2019, the Consumer Investigations Unit opened an investigation into Sun Ray's actions in relation to the Contract. The investigation was assigned to Mr. Smith.⁷
17. Mr. Smith is an investigator with the Consumer Investigations Unit of Service Alberta, authorized to investigate and enforce the CPA. This role and the training required for it both authorizes and qualifies Mr. Smith to conduct investigations into possible violations under the CPA.⁸

³ Document R5 at p. 6; Document R6 at 11:34.

⁴ Document R5 at p. 1, 4; Document R6 at 01:31, 03:25, 08:00.

⁵ Document A1; Oral evidence of Brad Roberts at November 3, 2021 appeal hearing.

⁶ Brad Roberts' oral evidence at the November 3, 2021 appeal hearing included a mention of a civil settlement with the Purchasers that required either the delivery of the hot tub under the Contract or a refund as of a later date, confirming that Sun Ray had not delivered the hot tub the Purchasers ordered as of November 3, 2021.

⁷ Document R1 at Row 79.

⁸ Oral evidence of Mr. Smith at November 3, 2021 hearing; Document R3 at p. 5.

Classification: Public

18. Mr. Smith notified Sun Ray of his investigation in a letter Mr. Smith sent on December 19, 2019. Mr. Smith sent this letter by registered mail, and it was confirmed delivered on December 23, 2019. Sun Ray did not respond to Mr. Smith's letter.⁹
19. As part of his investigation, Mr. Smith conducted an audio interview of Rita Sibbio, one of the Purchasers, on December 20, 2019.¹⁰ The Director provided both the transcript and audio files of this interview to Sun Ray in advance of the November 3, 2021 hearing.
20. Rita Sibbio's statements indicate that she had direct interaction, including in-person, with SunRay employees regarding the sales agreement signed by her husband.¹¹
21. As part of his investigation, Mr. Smith contacted Sun Ray by telephone on February 12, 2020 posing as a potential customer. During this phone call, Sun Ray represented that a custom hot tub could be delivered in 2 to 3 months after a purchase contract was completed. Sun Ray also confirmed to Mr. Smith that it was experiencing production delays, and some of the equipment required to produce a custom hot tub was not operational at that time.¹²
22. Mr. Smith summarized his investigation's findings in a memo dated March 12, 2020 (Document R2), and the matter was forwarded to the Director for possible administrative action.
23. On April 9, 2021, the Director sent a letter to Sun Ray advising of Sun Ray's alleged violations of the CPA, and of the s. 157 order under consideration.¹³
24. Sun Ray acknowledged receipt of the Director's April 9, 2021 letter on April 30, 2021, but dismissed the allegations because Sun Ray allegedly had no record of a customer named "Sibbio".¹⁴
25. The Director sent follow up emails to Sun Ray on May 5 and May 14, 2021 to clarify that the investigation and order under consideration related to the consumer transaction with the Purchasers under the Contract. After receiving no response from Sun Ray, delegated Director of Fair Trading Scott Hood then physically delivered a copy of the Contract to Sun Ray's physical location in Edmonton on May 18, 2021.¹⁵
26. On May 19, 2021, Sun Ray acknowledged receipt of the copy of the Contract and that the matter the Director was referring to involved the Purchasers, who are customers of Sun Ray. Sun Ray requested two weeks to review the matter.¹⁶

⁹ Document R2 at p. 8; Document R3 at pp. 4-9. Oral evidence of Mr. Smith and Brad Roberts at November 3, 2021 hearing.

¹⁰ Document R1 at Row 65; Document R2 at p. 2; Documents R5, R6, R7.

¹¹ Documents R5, R6.

¹² Document R1 at Row 48; Document R2 at p. 3, 5; Oral evidence of Mr. Smith at November 3, 2021 hearing.

¹³ Document R1 at Row 16.

¹⁴ Document A3; Document R1 at Row 12; Oral evidence of Brad Roberts at November 3, 2021 hearing.

¹⁵ Document R1 at Row 9-11.

¹⁶ Document R1 at Row 8; Oral evidence of Brad Roberts at November 3, 2021 hearing.

Classification: Public

27. The Director confirmed on May 20, 2021 that Sun Ray could have two weeks to review.¹⁷ The Director then waited three weeks before issuing the Order on June 10, 2021.
28. The Order was accompanied by an explanation of the Director's opinion that Sun Ray had contravened CPA sections 6(2)(c), 6(3)(c) and (d), and 6(4)(n).
29. Sun Ray has not been subject to any administrative penalty or license cancellation as a result of these events, and the Order does not contain any measures beyond a requirement to comply with the CPA.
30. Sun Ray was notified on August 23, 2021 that the Director would be calling Mr. Smith as a witness, and was provided with a copy of Mr. Smith's Recommendation for Administrative Action, along with other relevant documents from the Director, on September 29, 2021.

Law and Analysis

31. Mr. Smith's oral evidence and the Director's submitted documents confirm that Mr. Smith's investigation into Sun Ray was valid, fair, and appropriate.
 - a. Sun Ray had an opportunity to provide a response, including requesting clarification, to Mr. Smith's investigation in December 2019;
 - b. Mr. Smith's role as an investigator was to collect evidence and identify relevant facts indicative of possible violations of the CPA, then provide a recommendation to the Director or Crown Prosecutor as appropriate. The final analysis, application of law, and exercise of authority when taking administrative action under the CPA was completed by the Director;¹⁸
 - c. Sun Ray claims that Mr. Smith was identified as an "expert witness" and appeared to be unfamiliar with Mr. Smith's direct role in this particular case, despite Mr. Smith's Recommendation Memo having been provided with adequate time for Sun Ray to review, and Mr. Smith providing a description of his role and qualifications at the November 3, 2021 hearing;
 - d. If the Appeal Board wishes to receive further documentation regarding Mr. Smith's qualifications and investigative authority in order to confirm the validity of the evidence produced from his investigation, the Director will provide such documentation upon the Board's request.

¹⁷ Document R1 at Row 4.

¹⁸ Oral evidence of Mr. Smith at November 3, 2021 hearing.

Classification: Public

32. The Director had jurisdiction over this matter.

- a. CPA s. 157 authorizes the Director to issue an order to any person who, in the opinion of the Director, is contravening or has contravened the CPA or its regulations;
- b. The application of this authority is not limited only to those who fall under the definition of “supplier” under the CPA, nor is it limited only to parties supplying goods;
- c. Business difficulties and attempts to mitigate any loss to a consumer may factor into the discretion exercised by the Director on the severity of administrative action, but neither absolve a party of its obligation not to contravene the CPA, nor diminish the Director’s jurisdiction.

33. The CPA applies to the relationship between the Purchasers and Sun Ray under the Contract, and unfair practice provisions under sections 6(2)(c), 6(3)(c) and (d), and 6(4)(n) apply to the transaction under the Contract.

- a. At Paragraph 17 in Sun Ray’s Brief of Argument, Sun Ray claims that:
 - i. the hot tub to be supplied to the Purchasers is a fixture and not a good, and;
 - ii. the CPA does not cover fixtures.
- b. The question over jurisdiction and the applicability of the CPA does not hinge on whether a hot tub is personal property (meaning it would be a “good” under the CPA), or a fixture to real property.
 - i. The application of the CPA is not limited to transactions involving goods or personal property.
 1. The definition of “consumer transaction” under CPA s. 1(1)(c)(i) includes the supply of services by a supplier to a consumer as a result of a purchase or other arrangement;
 2. The CPA definition of “service” under s. (1)(1)(k) includes any service offered or provided primarily for personal, family or household purposes, including those involving the addition to or maintenance, repair or alteration of any residential dwelling;
 3. The CPA definition of “supplier” includes services under s. 1(1)(l);
 4. The legislative intent of the CPA and its regulations is to cover a broad range of business activities, including those that involve fixtures. The CPA’s regulations establish licensing of production of manufactured homes intended for assembly and delivery at a residential sites¹⁹, and of business activities involving the construction, alteration, maintenance, repair, or improvement of real property;²⁰

¹⁹ Retail Home Sales Business Licensing Regulation, Alta Reg 197/1999, s. 1(c).

²⁰ Designation of Trades and Businesses Regulation, Alta Reg 178/1999, s. 5; Prepaid Contracting Business Licensing Regulation, Alta Reg 185/1999.

- ii. Unfair practice provisions under sections 6(2)(c), 6(3)(c) and (d), and 6(4)(n) therefore apply to consumer transactions that involve elements other than purchasing and selling goods.
 - c. The Contract is a consumer transaction for the purposes of the CPA.
 - i. The hot tub the Purchasers ordered in the Contract is a good for the purposes of the CPA (see paragraphs 34 and 35);
 - ii. The manufacture and installation of a hot tub at the Purchasers' residence are services offered or provided primarily for personal, family or household purposes, which meets the definition of "services" under CPA s. 1(1)(k);
 - iii. The Purchasers purchased both a good (the hot tub) and services (the custom manufacture, delivery, and installation of the hot tub) from Sun Ray under the Contract.
34. A hot tub is movable property and not a fixture to a consumer's real property.
- a. At Paragraph 17 in Sun Ray's Brief of Argument, Sun Ray claims that the hot tub to be supplied to the Purchasers is a fixture and not a good.
 - b. The loaned hot tub is an object identical in purpose to the hot tub ordered by the Purchasers;
 - c. Sun Ray confirmed at the November 3 hearing that Sun Ray's intent and expectation was to remove the loaned hot tub and re-use it;²¹
 - d. The very definition of a fixture (confirmed by Sun Ray at paragraph 19 of its Brief of Argument) requires that its removal would cause injury to the land;
 - e. Neither the loaner hot tub delivery sheet (Document A1) nor any of the other evidence, including from Sun Ray or Rita Sibbio, indicated that the loaner tub would cause injury to the Purchasers' land upon removal. There is no evidence to indicate that Sun Ray notified the Purchasers that their real property would be damaged when the loaned hot tub was eventually removed.
35. A hot tub is a "good" under the CPA regardless of Sun Ray's attempts to redefine statutory definitions through contract terms.
- a. CPA s. 2(1) renders any waiver or release by a person of the person's rights, benefits or protections under the CPA or its regulations void;

²¹ Oral evidence of Brad Roberts at November 3, 2021 hearing.

Classification: Public

- b. Parties cannot contract out of statutory provisions enacted in the public interest, especially where a statutory provision exists which voids attempts to waive or contract out of statutory provisions;²²
 - c. The purpose of the CPA, as set out in its preamble, is to serve the public interest.
36. If the Appeal Board finds that the hot tub under the Contract is a fixture and not a good under the CPA, Sun Ray would have committed additional unfair practices under the CPA in addition to those already identified.
- a. It is an unfair practice under CPA s. 6(2)(b) for a supplier to take advantage of a consumer as a result of the consumer's inability to understand the effect of any matter related to the consumer transaction;
 - b. It is an unfair practice under CPA s. 6(4)(a) for a supplier to do or say anything that might reasonably deceive or mislead a consumer;
 - c. The delivery, installation, and eventual removal of the loaned hot tub was a matter related to the Contract;
 - d. Injury to the Purchasers' land as a result of removing the loaned hot tub would be a result of the removal of the loaned hot tub;
 - e. The Purchasers had never owned a hot tub before and were not familiar with most aspects of the installation process;²³
 - f. Sun Ray's concealment of the inevitable injury to the Purchasers' land would constitute an act of deception from which Sun Ray would stand to benefit, since the Purchasers' may not have agreed to accept the loaned hot tub as a mitigation measure, nor agreed to pay the additional \$4,220.00 if they were made aware of the inevitable injury to their land;
 - g. Sun Ray stood to benefit from the Purchasers' acceptance of the loaned hot tub by avoiding the termination of the Contract through frustration, and by incentivizing the collection of an additional \$4,220.00 from the Purchasers;
 - h. Sun Ray's failure to advise the Purchasers of the injury to the Purchasers' land that would necessarily result from the removal of a fixture constitutes a violation of s. 6(2)(b) and s. 6(4)(a), which would authorize a Director's Order under s. 157(1)(a).

²² *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 SCR 202 at 214; *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 SCR 150 at 5; *Royal Trust v. Potash*, 1986 CanLII 34 (SCC), [1986] 2 SCR 351 at 40; *Fleming v. Massey et. Al.* 2016 ONCA 70 (CanLII) at 29-34.

²³ Document R5 at p. 6; Document R6 at 11:34.

37. All interactions between Sun Ray and the Purchasers relating to the Contract were and are governed by the CPA until the conclusion or termination of the Contract.
- a. Under CPA s. 8, unfair practice provisions, unless specified to only apply when parties are entering into a transaction, apply to dealings between a consumer and supplier after a consumer transaction has been entered into or while a transaction is ongoing;
 - b. S. 8 of the CPA is not limited in application only to “material facts” as defined under s. 6.
38. The enforceability of the Contract is a separate issue from whether Sun Ray contravened the CPA, and is outside the scope of this matter. Contract terms and common law principles such as freedom of contract do not supersede legislation in this matter.
39. Regardless of the terms of the Contract, Sun Ray made multiple exaggerated and ambiguous representations as to when that they were able and willing to deliver a completed product and/or service to the Purchasers.
- a. It is an unfair practice under CPA s. 6(2)(c) for a supplier to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;
 - b. The estimated product delivery date of 10-12 weeks, with reasonable allowance for production factors, was a material fact to the transaction since the Purchasers may have chosen not to enter into the Contract if they had been unambiguously informed that they would not even have an approximate expectation as to when Sun Ray would deliver the Purchasers’ hot tub;
 - c. The updates that the Purchaser received from Sun Ray were ambiguous and exaggerated with regard to a delivery timeline, with Sun Ray repeatedly indicating or implying that the consumer did not have much longer to wait;
 - d. It was reasonable for the Director to conclude that Sun Ray committed an unfair practice under CPA s. 6(2) (c).
40. The Contract contains terms that are harsh, oppressive, or one-sided.
- a. It is an unfair practice under CPA s. 6(3)(c) to include in a consumer transaction terms that are harsh, oppressive or excessively one-sided;
 - b. Harsh, oppressive or excessively one-sided terms include those that render a consumer unable to either enforce the obligations of the supplier in the transaction, or terminate the transaction if the supplier is unable or unwilling to fulfil their obligations;

- c. The terms of the transaction under the Contract would allow Sun Ray to keep the Purchasers' money in perpetuity without providing the Purchasers' hot tub if Sun Ray experienced ongoing operational challenges, even as a result of its own business decisions;
 - d. The Contract's open-ended delivery timeline with no possibility of refund, in spite of an misleading but purportedly non-binding delivery estimate, places all risk on the consumer and only benefits the supplier;
 - e. It was therefore reasonable for the Director to conclude that Sun Ray committed an unfair practice under CPA s. 6(3) (c).
41. The Contract contains terms that represent that the consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.
- a. Even if the completion time estimate was not a firmly binding contract term, it was still a representation by Sun Ray of an obligation regarding the approximate delivery timeline, which was different from the contract terms Sun Ray later relied upon;
 - b. Sun Ray argues that the Contract term eliminating the Purchasers' right of a refund is not an unfair practice, yet under both the common law doctrine of frustration and the *Frustrated Contracts Act*, a party to a contract may be entitled to a refund if a contract is frustrated by the inability of the other party to fulfil its obligations;²⁴
 - c. It was therefore reasonable for the Director to conclude that Sun Ray committed an unfair practice under CPA s. 6(3) (d).
42. Sun Ray represented to the Purchasers that goods and/or services would be supplied within a stated period when Sun Ray knew or ought to have known that they wouldn't.
- a. It is an unfair practice under CPA s. 6(4)(n) for a supplier to represent to a consumer that goods or services will be supplied within a stated period if the supplier knows or ought to know that they will not;
 - b. There is no provision in the CPA which absolves a supplier of its obligation to comply with the CPA based on either the length of time a company has been in business, or any operational challenges a business encounters;
 - c. Sun Ray's representations indicated that custom hot tubs could be produced in a time frame that was unrealistic considering Sun Ray's manufacturing plant challenges and inability or unwillingness to deliver the Purchasers' hot tub in over 21 months;

²⁴ *Black's Law Dictionary*, 3rd ed, *sub verbo* "frustration"; *Frustrated Contracts Act*, RSA 2000, c F-27, s. 3.

- d. Sun Ray made these representations to the Purchasers throughout 2018 and 2019, and to Mr. Smith as a potential customer in February 2020;

- e. Mr. Smith's investigation revealed that Sun Ray was aware of its production difficulties while representing to Mr. Smith as a potential consumer an unrealistic timeline for the delivery of a hot tub similar to the one the Purchasers ordered;
 - f. It was therefore reasonable for the Director to conclude that the presentation of a delivery timeline that Sun Ray was either unable or unwilling to adhere to, regardless of it not being a contractual guarantee, was an unfair practice under CPA s. 6(4)(n).
43. The Director adhered to the principles of natural justice and administrative fairness prior to issuing the Order on June 10, 2021.
- a. It is not unfair or a violation of Sun Ray's rights simply to be subject to an administrative process;²⁵
 - b. The participatory rights contained within the duty of procedural fairness includes "an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker";²⁶
 - c. The Director was the decision-maker in the Order;
 - d. Prior to the Order being issued, the Director provided Sun Ray with several opportunities to participate and provide a response to the allegations of CPA violations, but Sun Ray chose to ignore or dismiss the opportunities;
 - e. Sun Ray's April 30th letter (Document A3) is dismissive in tone, and does not request further clarification from the Director;
 - f. Rita Sibbio was known to Sun Ray, and her connection to Bob Boyechko and the Contract could have been determined if Sun Ray had undertaken more than a superficial system search. Regardless of the demands of its business operations, the lack of any response from Sun Ray to Mr. Smith's December 2019 letter and the Director's emails and phone call in May 2021 represent a dismissive and potentially wilfully blind approach on Sun Ray's part;
 - g. Delegated Director of Fair Trading Scott Hood personally delivered relevant documentation to Sun Ray when it became clear that Sun Ray was not responding to clarification via other forms of communication;

b. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307 at 74.

c. *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, [1999] 2 SCR 817 at 22.

Classification: Public

- h. The Director accommodated Sun Ray's request for an extension, even providing an additional week prior to issuing the Order, once it became unavoidably clear to Sun Ray that Ms. Sibbio is Mr. Boyechko's wife, and the matter pertained to the Contract;
- i. The actions of the Purchasers are not relevant when examining administrative fairness, and it is only the actions of the Director that are relevant when determining whether the

administrative process leading to the Order was fair.

- i. Sun Ray submits at paragraph 59 of their Brief of Argument that Sun Ray has suffered a loss of reputation and as a result has incurred “significant financial consequences” “as a result of the Purchaser’s actions”. This is neither relevant nor substantiated, is beyond the scope of this matter, and is something to be addressed in civil proceedings.
- j. .As noted by Sun Ray in its Brief of Argument, the Supreme Court of Canada has found that the more important an administrative decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.²⁷
 - i. Sun Ray has not demonstrated how complying with the CPA as ordered would cause such significant impact on Sun Ray that the several opportunities to respond to the alleged contraventions would have been inadequate.
- k. Failing to respond to allegations in an administrative process does not equate to being denied an opportunity to respond.

Conclusion

- 44. This matter pertains to a consumer transaction, and the Director therefore had valid jurisdiction to issue the Order under CPA s. 157.
- 45. The evidence validly obtained by Mr. Smith demonstrates that Sun Ray contravened the CPA by committing unfair practices before and during its consumer transaction with the Purchasers over a span of nearly two years.
- 46. The Director’s exercise of its discretion under s. 157(1) was reasonable based on the evidence.
- 47. Sun Ray has been provided with multiple opportunities to respond to the allegations of contraventions of the CPA, but failed to respond. The Director’s administrative process leading to the Order was therefore fair.
- 48. The Director therefore requests that the Board exercise its authority under CPA s, 179(6) to confirm the Order.

²⁷ *Ibid.* at 25. Classification: Public

CONCLUSIONS OF FACT AND LAW ARISING FROM THE BRIEFS OF ARGUMENTS

283. The Board rejects the conclusions of fact and law of the Appellant, Sun Ray that the Consumer Protection Act has no jurisdiction over the events relating to the complaint of the Purchasers and that the hearing involved procedural unfairness so that a new hearing is required.

284. In particular the Board rejects Sun Ray's argument that a hot tub is a fixture and therefore falls outside the ambit of the CPA. The CPA has considerable flexibility to accomplish its purposes in its wide ranging sections. Whether or not the hot tub is a fixture does not remove the power of the CPA to issue its order against Sun Ray.

See Paragraph 33 (b) of the Respondent of Brief of Argument:

- b. The question over jurisdiction and the applicability of the CPA does not hinge on whether a hot tub is personal property (meaning it would be a "good" under the CPA), or a fixture to real property.
 - i. The application of the CPA is not limited to transactions involving goods or personal property.
 1. The definition of "consumer transaction" under CPA s. 1(1)(c)(i) includes the supply of services by a supplier to a consumer as a result of a purchase or other arrangement;
 2. The CPA definition of "service" under s. (1)(1)(k) includes any service offered or provided primarily for personal, family or household purposes, including those involving the addition to or maintenance, repair or alteration of any residential dwelling;
 3. The CPA definition of "supplier" includes services under s. 1(1)(l);
 4. The legislative intent of the CPA and its regulations is to cover a broad range of business activities, including those that involve fixtures. The CPA's regulations establish licensing of production of manufactured homes intended for assembly and delivery at a residential sites¹⁹, and of business activities involving the construction, alteration, maintenance, repair, or improvement of real property;²⁰

285. The case law does not assist Sun Ray. Whether a particular hot tub is a fixture or not is case specific. On the particular facts of this case the loaner hot tub cannot be considered an improvement because it is to be removed by Sun Ray when the ordered custom hot tub is delivered. The Purchased hot tub has not been delivered as of the Appeal date.

286. The Board finds an unfair practice of Sun Ray in making its potential Purchasers sign and accept a particular small print section in a box on the agreement relating to legal concepts and the Builders Lien Act. Sun Ray explained the section was to Sun Ray's advantage.

287. The Board accepts the detailed analysis of law and fact of the Respondent in relation to the CPA, its jurisdiction and application to the facts of this case and accepts the findings of Unfair Practice by the Director in its dealings with the Purchasers complaint.

288. The Board finds that the CPA gives it Jurisdiction to hear and decide the issues of this Appeal.

289. The Board rejects the position taken by the Appellant, Sun Ray on the hearing held on November 3, 2021 suggesting allegations of Procedural Unfairness which should lead to a new hearing.

290. The Respondent makes no findings of fact or law in relation to the procedural unfairness argument of Sun Ray, but points out s.14.1 of the Alberta Board reg.195/1999 states that the

Board is not bound by rules of evidence in judicial proceedings and that the Board has the authority to conduct the hearing as it sees appropriate.

291. The Board notes that Sun Ray at the time of the hearing appeared to have no understanding of why the wording in its printed Sales Agreement resulted in a finding of Unfair Practice under s 6.of the CPA.

292. There is no suggestion that Sun Ray considered or may consider changing the content of the standard Sales Agreement / Invoice 20361 or future invoices.

293. The Board finds a delay of three and half years by Sun Ray in its failing to supply a fully paid and purchased hot tub to the consumers totally unreasonable and unacceptable. A three and a half year delay can never be justified to deliver a product.

294. There is no evidence led that Sun Ray ever considered the contents of its Sales Agreement as needing changes despite the wording of the Order.

295. Mr. Roberts considered the Sales Agreement suitable for Sun Ray's purposes.

296. Mr. Roberts worried about the Order tarnishing the relations and opinion of the past customers regarding Sun Ray. Mr. Roberts expressed no concern at the situation of the Purchaser still waiting for their hot tub to be delivered.

297. Despite three moves by Sun Ray of the plant, there were two windows of time in which this hot tub delivery could have been satisfied and was not (May to August 2018 and Nov 2020 to June 2021). However Mr. Roberts confirms that customers who complained about delivery delay were cue jumped to the front of the line in delivery. The Purchasers in this case did not benefit from that action.

298. Sun Ray was very upset with the complaint which led to the Order of the Director of Fair Trading. Mr. Roberts felt that his long history with Sun Ray should entitle him to have an interview with the Director.(see Appeal document)

Mr. Roberts had the opportunity granted by the Director of Fair Trading to discuss the possible Order prior to its filing. Mr. Roberts said they did have an open dialogue.

299. There is no proof or evidence of any kind presented by Sun Ray at the hearing to suggest that the Order has damaged Sun Ray's Company or led to a loss of its reputation.


SUBSTANTIAL ISSUE TO BE DETERMINED

SHOULD THE ORDER OF JUNE 10, 2021 ISSUED AGAINST SUNRAY MANUFACTURING INC AND ANY OF ITS EMPLOYEES, REPRESENTATIVES OR AGENTS BE QUASHED, CONFIRMED OR VARIED PURSUANT TO S.179(6) OF THE CPA

DECISION OF APPEAL BOARD MAJORITY

THE APPEAL BOARD MAJORITY CONFIRMS THE ORDER OF THE DIRECTOR OF FAIR TRADING AGAINST SUN RAY ORIGINALLY GRANTED 10, JUNE 2021.

SIGNATURE PAGES

DocuSigned by:

17E3ED52590C479

Virginia May,
Chair of Appeal Board Majority

January 6, 2022

Dated

DocuSigned by:

9A847E8DB77C446...

Barbara McKinley
Appeal Board Majority

January 6, 2022

Dated

APPENDIX COMPLETE COPIES OF THE FOLLOWING DOCUMENTS AND BRIEFS OF LAW ARE ATTACHED TO BOTH THE PAPER DECISION AND THE EMAIL VERSION

- A. DIRECTORS ORDER DATED JUNE 10TH 21
- B. NOTICE OF APPEAL DATED JULY 12 21
- C. DIRECTOR (RESPONDENT) DOCUMENTS. Exhibits R1 to R7

EXHIBITS R1 ACTIVITY NOTES, dealing with complaint case
No 40836 open from 26/11/2019 until 6/10/21

R2 RECOMMENDATION FOR ADMIN ACTION -
SUNRAY MANUFACTURING INC

FROM JULIAN SMITH TO TREVOR ADDISON,
MANAGER OF INVESTIGATIONS DATED MARCH
12 2020

R3 (ATTACHMENTS TO R2)

R3 (3) SCREENSHOT FROM SUNRAY SPAS WEBSITE
OFFERING A TOUR

R3 (4) INITIAL CONTACT LETTER TO MR Roberts at SUNRAY
DATED 12/19/19

R3 (5) TRACKING DOCUMENT FOR MAILING OF
LETTER SHIPPED 12/19 /19 FROM SMITH TO BRAD
ROBERTS, SIGNED RECEIVED 12/23 /19

R4 (SUPPORTING DOCUMENTS TO R2)

R4 (1) CORP REGISTRATION SYSTEM (CORES) FOR SUNRAY
MANUFACTURING INC, DATED 26/11/19

R4 (2) COPY OF SALES AGREEMENT / INVOICE PROVIDED
TO PURCHASER SIBBIO BY SUNRAY, SIGNED BY DARIEL
O'BERTOS, SALESMAN AND PURCHASER HUSBAND BOB
BOYECHKO

R4 (3) A COPY OF RITA SIBBIO'S BANK STATEMENT WITH
HUSBAND, BOB BOYECHKO SHOWING CURRENCY
TRANSACTION OF \$4220 TO SUNRAY NOVEMBER 29
2018

R4 (4) TRACKING SHEET SHOWING DELIVERED MAIL WITH
SIGNATURE JANUARY 3RD FROM PURCHASER SIBBIO TO
SUNRAY

R5 TRANSCRIPT OF SMITH /SIBBIO INTERVIEW 12/20/19

R6 AUDIO TAPES OF SIBBIO TRANSCRIPT 5 PART 1

R7 AUDIO TAPES OF SIBBIO TRANSCRIPT 5 PART 2

D. APPELLANT DOCUMENTS. Exhibits A1 to A3

EXHIBITS A1 DELIVERY INSPECTION NOTICE OF LOANER HOT TUB,
MODEL ALBERTAN, COLOUR SAHARA TO PURCHASER BOB
BOYECHKO, AND HIS DATED NOV 26 18, SIGNED BY THE
PURCHASER

A2 COPY OF PURCHASER BOYECHKO SALES AGREEMENT/
INVOICE 20361 DATED MAY 31/18 SHOWING FULL
REMAINING PAYMENTS MADE TO SUN RAY ON NOV 29 18
ON GATEWAY MODEL SHOWING

A3 LETTER FROM BRAD ROBERTS AS GENERAL MANAGER
DATED APRIL 30 21 TO SCOTT HOOD ,DIRECTOR
ACKNOWLEDGING RECEIPT OF HIS LETTER DATED APRIL 9,
2021 FROM SCOTT HOOD, SAYING HE COULD NOT FIND
THAT SUN RAY HAD A CUSTOMER NAMED MS SIBBIO.

E BRIEF OF ARGUMENT OF THE APPELLANT
DELIVERED ON NOVEMBER 12 21

F BRIEF OF ARGUMENT OF THE RESPONDENT
DELIVERED ON NOVEMBER 19TH 21

G REBUTTAL ARGUMENT OF THE APPELLANT
DELIVERED ON NOVEMBER 26 21

H MEMORY STICK CONTAINING THE FILES SUN RAY HEARING
146418080 PART 1 AND MP4 FILES AND SUN RAY HEARING VIDEO
1146418080 PART 2 MP4 FILE (Audio Video of Hearing Part 1 & 2)

Service Alberta Appeal Board

Minority Decision of Dr. Nick Tywoniuk, Panel Member

IN THE MATTER OF the Consumer Protection Act, RSA 2000, Chapter C-26.3, to issue an Order regarding unfair practices pursuant to S.6 of the Act. (Respondent).

-and-

IN THE MATTER OF an Appeal filed by Sunray Manufacturing Inc. and Brad Roberts with respect to the Decision of the Director of Fair Trading to issue an Order dated June 10, 2021. (Appellant).

Hearing date: November 3, 2021 (Virtual hearing).

Before:
Virginia May, Chairperson
Barbara McKinley, Board Member
Nick Tywoniuk, Board Member

Appearances for Appellant:

Brad Roberts, Owner and witness
Craig M. Floden, Floden Ward LLP, Counsel
Lauren Gee, Student, Observer

Appearances for Respondent:

Joseph O’Kurley, Statute Administrator
Julian Smith, witness
Scott Hood, Observer

Location: This was a virtual hearing via Zoom platform hosted by Board Member, Nick Tywoniuk.

PRELIMINARY MATTERS

[1] Counsel for the Appellant raised a question of jurisdiction, arguing that neither the Director of Fair Trading nor the Appeal Board created pursuant to the Consumer Protection Act have jurisdiction over this matter; thus, the Order must be quashed. The Director's submissions provided opposing arguments. I am presenting this as a preliminary matter because a decision needs to be made on jurisdiction before any decisions are made on the merits of the Director's Order.

[2] I have reviewed the submissions on this question and have come to the decision that both the Director and the Appeal Board have jurisdiction; this is consistent with the decision of my colleagues on this question. Details of how this decision was reached is outlined in the accompanying majority report; repeating these details in my minority report would not be productive.

INTRODUCTION

[3] This report is my minority decision on an Appeal by Sun Ray, of a June 10, 2021 decision of the Director of Fair Trading to issue an Order to Sun Ray.

[4] The Director of Fair Trading issued an Order to Sun Ray; this Order is dated June 10, 2021. This Order stated:

“Sunray Manufacturing Inc. and any employee, representative, or agent of Sunray Manufacturing Inc. must immediately:

- cease to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;*
- cease to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one sided;*
- cease to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.”*

[5] In making my decision, I considered the Order, the Appeal, submissions of both Parties, the hearings proceedings and the closing remarks and rebuttals. This decision includes a summary of the relevant facts and arguments in the Appeal and the reasons for the decision.

THE DECISION

[6] With regard to the first issue, my Decision is as follows:

- a. With respect to part (a), there was no exaggeration, innuendo or ambiguity with respect to the consumer transaction.
- b. With respect to part (b), the consumer transaction did not have terms and conditions that were harsh, oppressive of excessively one sided.
- c. With respect to 3(c), the Appellants representations regarding rights, remedies or obligations were consistent with the fact.

Having made these decisions on the three sub-issues, my decision is that the provisions of the Fair Trading Act, Sections 6(2), 6(3) and 6(4), were not breached by the Appellant.

[7] With regard to the second issue, my decision is that the Director's Orders that are being appealed be quashed.

BACKGROUND

[8] Sunray Manufacturing Inc. is a registered Alberta corporation with Brad Roberts listed as the director and shareholder of the business. The company manufactures hot tubs; it has been operating since March 1993.

[9] On May 31, 2018, Rita Sibbio and her husband Bob Boyechko (collectively referred to as 'Purchasers'), ordered a 'Gateway Ocean Wave' hot tub. The total price of the hot tub was \$6720.00; a deposit was made in the amount of \$2,500.00. The contract was solicited, negotiated, and concluded in the store. A 10-to-12-week estimated delivery time was noted on the invoice.

[10] On October, 2018, Ms. Sibbio filed a review with the Better Business Bureau. On October 29, 2018, the Parties agreed that an upgraded, loaner hot tub would be provided; the purchasers paid the remaining balance of \$4,220.00. This hot tub was provided in November, 2018.

[11] Ms. Sibbio filed a complaint with Service Alberta in November 2019, that the hot tub originally ordered had not yet been supplied. By letter of February 10, 2020, Sun Ray was advised by the Consumer Investigations Unit that 'we have opened an investigation into the matter.'

[12] On February 12, 2020, Julian Smith, an investigator with Service Alberta, under covert identity as a consumer, visited the Sun Ray manufacturing plant to investigate the company's operations.

[13] The Director of Fair Trading issued an Order to Sun Ray; this Order is dated June 10, 2021.

[14] On July 12, 2021 Sun Ray filed an appeal of the Director's Order.

[15] The Appeal hearing was held, virtually, on November 3, 2021; this was followed by written closing comments a few weeks later.

THE ISSUES

[16] Did the Appellant, Sunray Manufacturing Inc. (Sunray) and Brad Roberts, breach provisions of the Fair Trading Act, Sections 6(2), 6(3) and 6(4)?

a. Did the Appellant use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction?

b. Did the Appellant include, in a consumer transaction, terms or conditions that are harsh, oppressive or excessively one sided?

c. Did the Appellant make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact?

[17] In the circumstances, is it appropriate for this Appeal Board to confirm, vary or quash the Orders that are being appealed?

ANALYSIS AND FINDINGS

[18] The first substantive issue is: Did the Appellant, Sunray Manufacturing Inc. (Sunray) and Brad Roberts, breach provisions of the Fair Trading Act, Sections 6(2), 6(3) and 6(4)? To answer this question, three sub issues need to be resolved first.

a. *Did the Appellant use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction (S 6(2))?*

[19] The Director's witness, Julian Smith, submitted that, on numerous occasions, Ms. Sibbio was provided vague and allusive information regarding the date of delivery of the hot tub; numerous dates had been promised.

[20] Mr. Smith also submitted that Sun Ray exaggerated how quickly they could supply a custom-built hot tub and that this, and the above allusiveness were a violation of s. 6(2)(c) '*to use exaggeration, innuendo, or ambiguity as to a material fact with respect to the consumer transaction.*' The material fact in this case is the delivery time frame; the ambiguity was that the time frame was continually changing and, still, there was no delivery of the product.

[21] In cross examination, Mr. Smith acknowledged that, at purchase time, there was no evidence to show that Sun Ray or its employees knew that they would have to change factories. With respect to assertions that multiple delivery dates were provided to the purchaser, Mr. Smith submitted the multiple dates were not provided at the time the Parties entered into the agreement.

[22] In cross-examination, Mr. Smith clarified that, in regards to Section 8 of the Consumer Protection Act which relates to the time of occurrence of an offence, an unfair practice may occur before, during or after, a consumer transaction and it is an unfair practice for all the purposes in this part, even if no consumer transactions are entered into or concluded.

[23] Mr. Smith submitted that, for the purposes of the Consumer Protection Act, a representation does not have to be a guarantee.

[24] Mr. Smith submitted that business challenges do not absolve suppliers of complying with the Act.

[25] Mr. Roberts, a witness for Sun Ray, submitted that Sun Ray makes all customers aware the delivery dates are subject to factors such as availability of materials, labor and demand upon the manufacturer. This is an essential clause to have in the sales agreement because if they are unable to obtain product (such as a half a dozen pipe couplings), there's no way they can deliver hot tubs.

[26] Mr. Roberts submitted Sun Ray did not have any concerns about being to deliver the hot tub at the time of they entered into this agreement. Then in the summer of 2018, the building they were in (as tenants) was sold and they received a 30-day notice to vacate.

[27] Mr. Roberts submitted that at the time of the notice of first move Sun Ray had already manufactured the cabinet and the cover for the hot tub, this equates to about 40 percent of the work. They would also have ordered the equipment, such as motor, heater and parts. Sun Ray spends a lot of money as soon as an order is signed, that is why a deposit is required.

[28] Mr. Roberts submitted that Sun Ray provided the Purchasers a loaner hot tub because of the production delay resulting from the first move. This was a higher grade hot tub than ordered, an 'Albertan' model which was about \$2000 more in value.

[29] In direct examination, Mr. Roberts explained that the first plant move was to a building about two and half blocks away from the showroom at 75th street. The second move was to Wagner Road, which is about three blocks away from the old plant. The third move, in September 2020, was from Wagner Road to 17th Street.

[30] Mr. Roberts submitted that Sun Ray's business has been affected by the 2018 economic crises (oil and gas sector) and the Covid-19 pandemic, these factors affecting both the materials supply chain and labor availability and causing unforeseeable delays in production.

[31] In its Brief of Argument, Counsel for Sun Ray, Mr. Floden, submitted that Sun Ray provided information to the Purchasers that was accurate at the time the representations were made. No evidence has been led that Sun Ray or its representatives did not believe such representations were true at the time they were made. Circumstances beyond Sun Ray's control led to unforeseen production issues. The representations made by Sun Ray in no way used exaggeration, innuendo or ambiguity.

[32] Mr. Floden further argued that, in Mr. Smith's Memorandum, Ms. Sibbio's complaints pertain to representations made by Sun Ray after the Purchasers entered into the Contract. Since the purported representations made by Sun Ray occurred after the Purchasers had already entered into the consumer transaction, these do not constitute material facts within the meaning of s. 6(1) of the Consumer Protection Act. Therefore, s. 6(2)(c) of the Consumer Protection Act does not apply.

[33] I find that, with respect to s. 6(2) of the Fair Trading Act, there was no exaggeration, innuendo or ambiguity with respect to the consumer transaction, for the following reasons:

- a. Although the delivery dates were not met due to operational problems, delivery dates were not 'mis-represented'. When Sun Ray realized a date could not be met because of a problem, a new delivery date was proposed based on what was believed to be doable at the time.

- b. A loaner hot tub was provided shortly after, about two months after, the first promised delivery date. This was done following an agreement between the Sun Ray and the purchasers. This meant that the purchasers had the use of a hot tub, a superior model from the one ordered, while the Sun Ray plant was being moved to other locations. The Purchasers primary need, the hot tub, was met, by mutual agreement between the Parties.
- c. The sales agreement was specific with regard that the delivery time provided was an estimated time, not a guaranteed time.
- d. Sun Ray sales staff willingly disclosed to the purchasers that the plant was experiencing problems, both at the time of purchase and at subsequent dates when delays were caused by disruptions with relocation of the plant.
- e. Further, with respect to delivery dates, and to Mr. Smith's submissions that the material fact in this case is the delivery time frame and that the ambiguity was that the time frame was continually changing and, still, there was no delivery of the product: these submissions need to be considered in the larger context including economic and social factors and, of course, still focusing on the relevancy of the evidence and argument specific to this file. The unprecedented, social factor is 'covid'; the economic factor is the significant, negative, economic impact on industry resulting from the social response to the covid pandemic. With this context in mind, and in looking at the significance of the three year delay in the delivery of the hot tub (and considering that a loaner hot tub of greater value was provided after only a few months delay), two years of this time frame was within the 'covid era'. Sun Ray's evidence shows that covid caused labor and production disruptions. The Director's evidence does not show if, or how, the Director took the unprecedented covid disruptions into consideration in the issuance of the Order. It is my view that there was no ambiguity with respect to delivery time changes; yes, changes occurred because of plant moves and impacts of dealing with the covid pandemic and, each time, new delivery time estimates were provided to the Purchasers.

b. *Did the Appellant include, in a consumer transaction, terms or conditions that are harsh, oppressive or excessively one sided (s. 6(3))?*

[34] Mr. Smith submitted that the sales agreement stated an estimated delivery date of 10-12 weeks' and that 21 months later the hot tub had not been delivered; a reasonable person would not conclude that this is reasonable.

[35] Mr. Smith submitted that Ms. Sibbio had requested a refund on more than one occasion and was told that a refund could not be provided because production had already started on the hot tub. Sun Ray has not complied with their obligation to provide a refund for a product that was paid for and, therefore, was in violation of s. 6(3)(d) '*to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.*'

[36] On January 6, 2020, Ms. Sibbio sent a cancellation letter requesting a refund; she did not receive a response from Sun Ray.

[37] Mr. Smith submitted that the sales agreement stated, in fine print at the bottom:

- An estimated delivery date of 10 to 12 weeks.
- The delivery date is an estimate and does not represent a warranty by the seller.
- No cancellations permitted and no refunds on deposits or merchandise.
- The delivery date is subject to among other factors the availability of materials and labor and demand upon the manufacturer.

And these terms and conditions are in violation of s. 6(3)(c) ‘*to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one sided.*’.

[38] Mr. Smith submitted that a reasonable member of the public would not find it reasonable to enter into a transaction with no expectation of knowing when the product they purchased would be delivered.

[39] In the Brief of Argument, Mr. O’Kurley argues that the terms of the transaction under the Contract would allow Sun Ray to keep the Purchasers’ money in perpetuity without providing the Purchasers’ hot tub if Sun Ray experienced ongoing operational challenges, even as a result of its own business decisions. The Contract’s open-ended delivery timeline with no possibility of refund, in spite of a misleading but purportedly non-binding delivery estimate, places all risk on the consumer and only benefits the supplier.

[40] Mr. Roberts submitted that, in the sales agreement, the customer warrants that he is the owner of the property where the goods and services are being delivered to and received and agrees that the goods and services are an improvement to the land and they are subject to province of the or provisions of the Builders Lien Act of Alberta. For Sun Ray, this was a necessary clause to insert in to this specific contract because it’s an improvement to the property and gives Sun Ray the ability to Lien the client’s property in the event of non-payment.

[41] Mr. Roberts submitted that Sun Ray’s business has been affected by the 2018 economic crises (oil and gas sector) and the Covid-19 pandemic, these factors affecting both the materials supply chain and labor availability and causing unforeseeable delays in production.

[42] In its closing submission, Sun Ray’s Counsel argued that manufacturing inherently carries uncertainties. To say that businesses with such uncertainties cannot tell their customers about these uncertainties in the Contract seems to defeat freedom of contract.

[43] With regard to the sales agreement stating that no refunds are permitted on deposits or merchandise, Mr. Floden argues that it is the nature of custom-built products, such as the hot tub ordered by the Purchasers, that suppliers do not accept refunds because it is ordered and manufactured to the specifications requested by a particular consumer.

[44] I find that, with respect to s 6(3) of the Fair Trading Act, the consumer transaction did not have terms and conditions that were harsh, oppressive of excessively one sided, for the following reasons:

- a. The Purchasers first visited the Sun Ray manufacturing plant on May 21, 2018, then again on May 31 at which time they purchased the hot tub; the Purchasers had 10 days to contemplate the purchase and any terms and conditions that they may have been aware of.
- b. I do not agree with Mr. Smith's submission (noted above) which infers that the Purchasers had no expectation of knowing when the product they purchased would be delivered; the expected delivery time was shown on the purchase agreement to be 10-12 weeks. Mr. Smith's own evidence confirmed that the purchase agreement delivery time is an estimate and is not a warranty. When unforeseen delays occurred (the requirement to move the plant), the Purchasers were provided new estimates of delivery times.
- c. Mr. Smith also asserted that, given that the Purchaser was given an estimated delivery date 10-12 weeks and that 21 months later the hot tub had not been delivered, a reasonable person would not conclude that this is reasonable. I find this to be somewhat without full context: within this time frame, five months after the sales agreement was signed, and by mutual agreement, the Purchaser was provided a higher-value, loaner hot tub. It follows that a reasonable purchaser would have found this to be a reasonable accommodation under the circumstances. This must have been so, given that the Purchasers agreed to this arrangement and paid the balance owing pursuant to the sales agreement.
- d. Mr. Smith's evidence indicates that Ms. Sibbio had requested a refund on more than one occasion and was refused because production had already started, and that this was a violation of s 6(3) of the Act. There is no evidence as to the dates and nature of these requests (the exception is that the evidence indicates the cancellation letter was dated January 6, 2020, the content is not known as it was not included in the submissions). I am not convinced, that while it is reasonable to make requests for refunds, that the requests themselves were reasonable. I am not convinced that these requests took into account the specific conditions of the sales agreement, such as the deposit being nonrefundable, and that the Purchasers have had the use of a hot tub for more than two years. I am convinced by arguments of Sun Ray, that custom built hot tubs require materials and labor specific to the order; once production has started, these are costs that cannot be transferred to other orders. I am convinced that both Parties understood, and willingly agreed to, the provision of no refundability of deposit of the sales agreement. Neither Ms. Sibbio nor Mr. Boyechko were witnesses to the proceedings.
- e. Sun Ray's evidence shows that covid caused labor, supply chain and production disruptions. It is well known that many businesses were significantly, adversely affected by the covid pandemic. The Director's evidence does not show if, or how, the Director took the unprecedented, covid disruptions into consideration in the issuance of the Order. The Director was not a witness to the proceedings.
- f. The evidence shows that the Purchasers entered into the sales agreement willingly and that they had full knowledge of the terms of the agreement before they signed it. For example, the sales agreement shows several signatures, each signature specific to specific terms of the sales agreement.

c. *Did the Appellant make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact (S 6(4))?*

[45] Inspector Julian Smith, in a memorandum of March 12, 2020, submitted that Sun Ray promised numerous delivery dates; August 2018 (10-12 weeks from date of order), October 2018, September 2018 and October 2019; and that none of these dates were met. Mr. Smith was told the plant was not running properly, was not at full capacity because their ‘molder’ was not installed or operating. Mr. Smith submitted that, on this date (date of hearing), it has been three years, three months since the Complainant has made their initial deposit.

[46] Mr. Smith submitted that Sun Ray and the purchasers made an agreement, following a complaint by Ms. Sibbio to the Better Business Bureau, for a loaner hot tub to be provided. Ms. Sibbio stated to Mr. Smith that the hot tub no longer works and is now broken and that the company has not fixed it or tried to correct the situation.

[47] Mr. Smith submitted there were other complaints with regard to Sun Ray: one in 2016 which was withdrawn, another more recently wherein the investigators are still taking a look at the situation or have closed the file.

[48] Mr. Smith submitted that Sun Ray ought to have known that, because of plant-operation issues, that they were unable to supply product within the timeframes represented. Mr. Smith submitted that Ms. Sibbio (the complainant) was told by Sun Ray that the plant was experiencing issues, it was flooding, it was being moved and, the time frame for delivery was an estimate and not a guarantee.

[49] Mr. Smith submitted that a delivery date of 10 -12 weeks does not equate to the customer waiting over 21 months to receive the product. Therefore, Sun Ray is in violation of s. 6(4)(n) ‘*a supplier’s representation that goods or services will be supplied within a stated period if the supplier knows or ought to know that they will not.*’

[50] Mr. Smith submitted that during the site visit on February 12, 2020, that he was informed by Sun Ray that the Sun Ray plant was not fully operational, that the plant was ‘half running’ and it was only the molder that was not completely installed and not completely running.

[51] Mr. Smith submitted that the sales agreement was signed by the husband, Mr. Boyechko, and that it is Ms. Sibbio who is the complainant.

[52] Mr. Smith submitted that the sales agreement says the goods and services are improvements to the land and are subject to the provisions of the Builders Lien Act of Alberta.

[53] In the Brief of Argument, Mr. O’Kurley argues that even if the completion time estimate was not a firmly binding contract term, it was still a representation by Sun Ray of an obligation regarding the approximate delivery timeline, which was different from the contract terms Sun Ray later relied upon; Sun Ray argues that the Contract term eliminating the Purchasers’ right of a refund is not an unfair practice, yet under both the common law doctrine of frustration and the Frustrated Contracts Act, a party to a contract may be entitled to a refund if a contract is frustrated by the inability of the other party to fulfil its obligations.

[54] Mr. Roberts submitted that, with respect to the sales agreement, the section about the Builder Lien Act says that the customer warrants that he is the owner of the property where the goods and services are being delivered and receives and agrees that the goods and services are an improvement to the land and they are subject to the provisions of the Builders Lien Act of Alberta. This was a necessary clause to insert in to this specific contract because it's an improvement to the property and gives Sun Ray the ability to lien the client's property in the event of non-payment.

[55] Mr. Roberts submitted that Sun Ray clearly makes all customers aware that delivery dates are subject to availability of materials, labor and demand upon the manufacturer. This is an essential clause to have in the sale of this because if Sun Ray unable to get a half a dozen pipe couplings, then the hot tubs cannot be delivered.

[56] Mr. Roberts submitted that, typically, the Albertan sells for at least \$2000 more than the Gateway. It's a much more of a premium model.

[57] Mr. Roberts submitted that 'oil and gas crashes' and Covid affected Sun Ray's business because of resulting labor and supply chain disruptions. Sun Ray was forced to move several times, they did not move on their own accord; the first time the building was sold; the second time, the tenant and sub tenant were taking over the whole building.

[58] Sun Ray Counsel, Mr. Floden, in the closing Brief of Argument, argued that Sun Ray has not made representations that the consumer transaction involves or does not involve rights, remedies or obligations that are different from the fact. The Contract does not include that a specific time frame for delivery will be honored, nor does it state that there are any rights or remedies with respect to a specific time frame. Further, Sun Ray's representation that it could deliver the hot tub to the Purchasers by a certain date was factually accurate at the time the representation was made.

[59] Mr. Floden argued that Sun Ray's representations did not include any reference that the consumer transaction involves or does not involve any rights, remedies or obligations that were different from the fact. No evidence has been provided that any representations or rights or remedies or obligations were different from the fact. The Contract does not provide that there is any obligation that a specific time for delivery will be honored by Sun Ray. Nor does the Contract state that there are any rights or remedies with respect to a specific time frame. The Contract only provides an estimated delivery date along with a clear statement that "[t]he delivery date is an estimate and does not represent a warranty by the seller. The delivery date is subject to among other factors the availability of materials and labor and demand upon the manufacturer."

[60] A supplier making a representation that it can deliver a product by a certain date because it can fulfill this commitment at that time is not an unfair practice. At the time the transaction was entered into, Sun Ray thought it could fulfill its commitment. There is no evidence that has been produced that suggests Sun Ray had any idea at the time it entered into the Contract or at any subsequent time that it would not be able to produce the hot tub ordered by the Purchasers. There was no way for Sun Ray to have known or ought to have known that it would subsequently experience production issues beyond its control.

[61] Sun Ray then experienced a number of complications for reasons beyond its control. If circumstances change through no fault of Sun Ray, that is not an unfair practice.

[62] Mr. Floden argued the Consumer Protection Act is designed to protect consumers from dishonest business people, not punish business owners for experiencing problems through no fault of their own. Even though the delays were beyond Sun Ray's control, Sun Ray provided the Purchasers with an upgraded loaner tub compared to the model the Purchasers had ordered. The Purchasers have had the benefit of the use of this tub and will still receive the tub they originally ordered.

[63] I find that, with respect to s. 6(4) of the Fair Trading Act, the Appellants representations regarding rights, remedies or obligations were consistent with the fact. The reasons for this are as follows:

- a. The October, 2018 agreement for a loaner hot tub substantively changes the May 31, 2018 purchase agreement with respect to delivery time and intent. The October agreement met the Purchaser's needs for a hot tub and the Sun Ray need for time to deal with the disruptions of plant moves. The Purchasers agreed to this arrangement.
- b. The Purchasers ordered a hot tub valued at \$6720; a loaner hot tub valued at \$8720 was provided, this being 30% higher in value. I find this to be a reasonable, if not generous, accommodation on the part of Sun Ray.
- c. Ms. Sibbio was informed of delays, and reasons for delays, and was given new estimated dates which were a best estimate, at the time, of expected delivery time. The evidence and argument from both Mr. Smith and Mr. O'Kurley that the estimated dates of delivery were not met many times lacks full context; the loaner hot tub was provided within two months of the promised date shown on the order. This is significant because the Purchasers were not without a hot tub for three years and three months as purported but only for less than two months.
- d. Mr. Smith testified that, although installed in October, 2021, the loaner hot tub no longer works and is now broken and that the company has not fixed it or tried to correct the situation. While this may be the case, I find that the sales agreement does not mention anything about after sales servicing or other types of warranties. There is no evidence to show that Sun Ray was to provide after sales service except for delivery and hookup.

[64] The second substantive issue is: In the circumstances, is it appropriate for this Appeal Board to confirm, vary or quash the Orders that are being appealed?

[65] The decision on this issue is based largely on the decisions on the three points of the Order that are the subject of the first issue. The decisions with respect to each of points of the Order are that these points of the Order should be quashed.

[66] There are several other factors that are relevant with respect to this substantive issue which support that the Order should be quashed.

- a. The first factor is the covid pandemic. Sun Ray submits that the covid pandemic has significantly affected its ability to operate, that covid was an unprecedented event outside of its control. The Director submits that plant moves and other glitches are within operational control and are not factors considered in the issuance of Orders. I find that the covid event is unprecedented and is not simply an operational problem that can be ignored by the Director. At the time of this hearing, three years and three months, or 39 months, had gone by since the hot tub was ordered; 21 months were 'covid pandemic' months. Furthermore, the Purchasers had use of a loaner hot tub for 34 months of this time.
- b. The second factor is the significance of the order. In the Director's Brief of Argument, Mr. O'Kurley argues that Sun Ray has not been subject to any administrative penalty or license cancellation as a result of these events, and the Order does not contain any measures beyond a requirement to comply with the Consumer Protection Act. Sun Ray's opening statements at the hearing state that both Sun Ray and Mr. Roberts support that consumers have the right to be safe from unfair business practices, that businesses need to comply with legal rules. The point here is that the Director appears to 'downplay' the significance of the Order, that the Order merely says what the CPA already says. I find that the Director does not appear to take into account the significance such an Order can have on a small business; this is discussed more fully in the third factor summary that follows.
- c. The third factor is the importance, to the individual or individuals affected, of the [Director's] decision to issue an Order. As noted in the above paragraph, the Director implies that the Order is of little consequence. Sun Ray, in final rebuttal submission, submits that the Order is available on-line and that this has led to a loss of reputation for the company even though Sun Ray has not engaged in any unfair practices. Sun Ray submits that the Director's decision to issue the Order is of great importance to Mr. Roberts, his family and to Sun Ray employees and that, given the circumstances, a high degree of procedural fairness is required. While Mr. Roberts did not provide details of how the Director's Order has affected him and his employees, I am persuaded by Sun Ray's arguments that negative, on-line information of any type can cause significant impact on the company's operations.
- d. The fourth factor is Sun Ray's compliance record. In direct examination, Mr. Smith submitted that there have been two other complaints against Sun Ray: the first was in 2016 and was withdrawn; the second was more recent but the investigator is still looking at the situation or has closed the file. In direct examination, Mr. Roberts testified that he recalled one complaint about five years ago; some questions were asked, answers were provided and there was nothing further. Mr. Roberts submitted the company has been operational for 29 years. I find this to be a very good compliance record on the part of Sun Ray.

CONCLUSION

[67] My decision is that the Director's Order be quashed.

OBITER

[68] Sun Ray, in its Brief of Argument, raised two additional issues: *audi alteram partem* and procedural fairness.

[69] With respect to *audi alteram partem*, Sun Ray Counsel alleged that, during the hearing proceedings, there were incidences of aggressive and argumentative questioning, interruptions, bias and internet connections 'freezing' and, therefore, that the matter needs to be heard by a new Appeal Board.

[70] With respect to procedural fairness, Sun Ray Counsel alleged that, during the hearing, Ms. Sibbio (complainant) could not be cross-examined as she was not provided as witness, opposing Counsel engaged in unfair questioning by asking leading questions of his own witness and opposing Counsel used argument in his questioning; this resulted in a breach of procedural fairness during this proceeding and, therefore, the matter needs to be heard by a new Appeal Board.

[71] I have reviewed these and find that they were not relevant to the merits of the Director's Order and to my decision to quash the Order. Therefore, there would be no purpose for me to comment on, or to otherwise address, these points of argument.

Dated on December 29, 2021 at Edmonton, Alberta.



Dr. Nick Tywoniuk, Appeal Board member

Exhibits of the Respondent, Service Alberta:

- R1. Activity notes (excel file).
- R2. Letter of recommendation for administrative action dated March 12, 2020.
- R3. Attachments file.
- R4. Supporting documents.
- R5. Transcript of the December 20th interview by Julian Smith of Sibbio.
- R6. Audio recording of interview of Ms. Sibbio. Part 1.
- R7. Audio recording of interview of Ms. Sibbio. Part 2.
- R8. Brief of argument of the Respondent, delivered on November 19, 2021.

Exhibits of the Appellant, Sun Ray and Mr. Roberts:

- A1. Document regarding the delivery of the hot-tub loaner.
- A2. Document showing date of loaner delivery and full price being paid.
- A3. April 30, 2021 letter from Brad Roberts to Mr. Hood saying he does not have a client named Sibbio.
- A4. Brief of argument of the Appellant, delivered on November 12, 2021.
- A5. Rebuttal argument of the Appellant, delivered on November 26, 2021.

Note: a memory stick containing two audio files of the hearing proceedings was provided to each of the Parties and to each of the Board members.