

**In The Matter of an Appeal
Pursuant to s.179(1) of the Fair Trading Act, RSA 2000, c. F-2**

**And In the Matter of the Order made January 6, 2015 by
The Director of Fair Trading**

Between:

**Neel Roberts
("Mr. Roberts")**

- Appellant

-and-

**The Director of Fair Trading
(the "Director")**

- Respondent

DECISION

Appeal Board: John Welbourn, chair
Al Briggs
William Klasky

Hearing: At 3rd Floor Boardroom, 7015 Macleod Trail S., Calgary, Alberta, on
Thursday, April 2, 2015

Appearing for the Appellant:

Neel Roberts

Witness for the Appellant:

Neel Roberts

Appearing for the Respondent:

Michael Areshenko

Witnesses for the Respondent:

Ian Munroe

Jurisdiction and Preliminary Matters:

The chairman held a preliminary meeting with Mr. Roberts and Mr. Areshenko by conference call on February 27th, 2015. During that meeting, Mr. Roberts requested a stay of the Director's Order pursuant to s.180(2) of the Fair Trading Act (the "Act"). The chairman declined the request.

At the beginning of the appeal hearing, the chairman confirmed that the Appeal Board had been appointed on February 5th, 2015 by the Deputy Minister, Service Alberta, pursuant to s.179 of the Act.

The parties confirmed that:

1. The hearing room was satisfactory;
2. The proceedings would not be formally recorded;
3. The evidence of each witness would be given under oath or affirmation;
4. Non-party witnesses would be excluded from the hearing room until asked to give evidence;
4. The hearing would proceed as a new trial of the issues pursuant to s.179(8) of the Act.

Exhibits:

The following document was entered as an Exhibit by consent:

<u>Exhibit #</u>	<u>Document</u>
1	Engagement letter dated May 20, 2014.

The following documents were entered as Exhibits during the hearing:

<u>Exhibit #</u>	<u>Document</u>
2	Engagement letters dated April 15, 2007, January and May 29, 2008 between Mr. Roberts and ...
3	Memorandum dated October 29, 2014;
4	Director's Order dated January 6, 2015.

Facts & Evidence:

Mr. Roberts is the sole proprietor of PTC Canada which is in the business of preparation and filing of Canadian federal income tax returns for taxpayers. Part of his business is the preparation and filing of returns for taxpayers who are late in filing previous years returns. He lives and works in Vulcan, Alberta, and states that a number of his clients live outside Alberta and outside Canada.

As of May 20, 2014,) had not filed 2012 and 2013 federal income tax returns. She telephoned and spoke to Mr. Roberts that day. After explaining her situation to him, understood that Mr. Roberts could assist her in preparing and filing the 2012 and 2013 returns. He quoted her a fee of \$2,800.00 plus GST for his services. The fee would be reduced by 50% to \$1,400.00 if paid immediately.

agreed and Mr. Roberts then emailed an engagement letter to her which she did not read, but signed (the "Engagement Letter") and promptly returned with payment of the discounted fee of \$1,400.00 plus GST (\$1,470.00 total).

During their discussion on May 20, Mr. Roberts advised _____ that before he could prepare and file the required returns, she had to have her financial records in proper order. He believed she required assistance to organize her records and advised that he would refer her to an experienced bookkeeper. Mr. Roberts recommended _____ a bookkeeper residing in Priddis, Alberta. _____ spoke to _____ on May 25, 2014. During the conversation she learned that _____ : would charge \$50.00 per hour for her bookkeeping services. This was not included in the amount already paid to Mr. Roberts.

_____ telephoned Mr. Roberts later that day and advised him that she did not feel comfortable with _____ Mr. Roberts responded that he had never received any complaints about her work. _____ evidence is that she was feeling uneasy about working with Mr. Roberts and advised him that she wasn't sure if the relationship was going to work. After a moment of silence, Mr. Roberts said "Okay" and hung up the phone. Immediately thereafter and several times over the next few days, _____ telephoned Mr. Roberts each time leaving a message explaining why she was calling and asking him to call back. He did not answer any of the calls and did not respond to any of her voice messages. He did not respond to emails _____ sent to him. Despite her requests, Mr. Roberts has not refunded any portion of \$1,470.00 he received from _____ :

Mr. Roberts' evidence is that during the May 25 telephone call, he advised that alternate arrangements could be made to organize her records and tried in vain to discuss the matter with her. He hung up the phone only after she advised him that she did not want to deal with him. In doing so, she terminated the relationship. As she had ended the retainer, he did not respond to any of _____ subsequent phone messages and emails. Mr. Roberts confirmed that he did not perform any work or render any service to _____ and has not refunded any amount to her.

Ian Munroe ("Mr. Munroe") is an investigator employed by the Consumer Services department of Service Alberta. His evidence included his efforts to solicit Mr. Roberts' response to the complaint made against him by _____. Those efforts included 7 telephone calls, 2 letters (1 registered but returned "unclaimed"), and a personally delivered written request he left at Mr. Roberts' residence. Mr. Roberts denies receiving any telephone message or letter from Mr. Munroe or written request left at his home. Mr. Roberts confirms as correct the mailing address and telephone number Mr. Munroe used. Although Mr. Roberts mailing address is a post office box in Vulcan, Mr. Munroe's evidence is that he was able to determine the location of Mr. Roberts' home through the Town of Vulcan municipal office. At the home, Mr. Munroe noted the license numbers of 4 vehicles present at the location, each of which he later determined was registered to Mr. Roberts.

Mr. Roberts states that the first communication he received from Service Alberta was a letter enclosing the Director's Order which is the subject of this appeal.

Submissions:

The Director's Order requires Mr. Roberts to, "immediately stop engaging in the unfair practice of including in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided."

The Engagement Letter includes the following terms:

- a. The Company reserves the right to terminate services without notice at any time, and any monies, retainers, etc. paid are never refundable.
- b. In the event that there is a dispute in the fees or no company approved quote is provided or agreed upon, the client agrees to pay the company a minimum of \$10,000.00 unconditionally or without hindrance, regardless of what services was (sic) provided.
- c. Upon the request of the company, the client agrees to immediately pay \$5,000.00 in advance without hindrance or recourse in the event a dispute over the service or anything else related arises.

The term "Company" or "company" refers to PTC Canada, Mr. Roberts' sole proprietorship.

The Director submits that _____ was a "consumer" and Mr. Roberts was a "supplier" as those terms are defined in s.1(1)(b) and s.1(1)(l) of the Act. They entered into an agreement, the Engagement Letter, for the supply of tax return preparation services which was a "consumer transaction" as defined in s.1(1)(c) of the Act. S.6(3)(c) provides that:

It is an "unfair practice" for a supplier to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided.

The Director asserts that the first term noted above purports to allow Mr. Roberts to terminate his retainer with the client at any time without any reason. Further, in that event, the client would not be entitled to any refund of any portion of any amount already paid to Mr. Roberts. Effectively, once retained and paid in advance by a client, and before doing any work for the client, Mr. Roberts could terminate the relationship and keep the monies paid. This term, submits the Director, is harsh, oppressive and excessively one-sided.

The Director argues that the obligation to pay \$5,000.00 or \$10,000.00 imposed by the

second and third terms noted above is intended to intimidate and discourage the client from raising any issue with Mr. Roberts. The amounts are not estimates of costs or damages and are punitive in nature. As such, the terms are harsh, oppressive and excessively one-sided.

Each of the three terms constitutes an "unfair practice" as defined by the Act. S.6(1.1) of the Act states:

It is an offence for a supplier to engage in an unfair practice.

Mr. Roberts responds that _____ signed and returned the Engagement Letter. She is therefore bound by and he is entitled to rely on its terms. He is not responsible for her failure to read the document. The terms of the Engagement Letter are clear. _____ terminated the relationship and he is entitled to retain the full amount she paid.

Mr. Roberts refers to the Provincial Court of Alberta judgment in Roberts v. Baziw, 2010 ABPC (Docket: P0990105075 and P0990105074). Mr. Roberts was the partially successful plaintiff in that matter. He relies on the decision as authority that the Engagement Letter does not violate the Act. In fact, the engagement letters considered by the Honourable Judge did not contain any term requiring payment of any amount in the event of a fee or other dispute. The engagement letters did provide the right to terminate services without any fee refund, but the term was not relevant to the issues and not considered by the Court.

Findings:

In considering the evidence, where Mr. Roberts' testimony conflicted with that of another witness, the evidence of the other witness is preferred.

_____ was a consumer, Mr. Roberts was a supplier and they entered into an agreement that was a consumer transaction governed by the Act. Each of the three terms is harsh, oppressive and one-sided and therefore each is an unfair practice in violation of the Act.

The terms requiring payment of \$5,000.00 or \$10,000.00 are punitive. There isn't any evidence that either of the amounts is a genuine pre-estimate of potential cost, damage or loss. The intent of both provisions is to discourage a client from pursuing any dispute with Mr. Roberts. Both terms are harsh, and oppressive and one-sided.

The term purporting to entitle Mr. Roberts to terminate services and retain all monies paid effectively permits abuse of the consumer / supplier relationship. This cannot be tolerated. The purpose of the Act is to provide protection to consumers in their dealings with suppliers. That protection cannot be reduced or avoided. S.2(1) of the Act is specific:

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

S.179(6) of the Act limits the Board's jurisdiction to confirming, varying or quashing the Director's Order. The Board therefore specifically refrains from addressing the amount : paid Mr. Roberts and considering whether : is entitled to any refund for no services rendered by Mr. Roberts, as he acknowledged.

Decision:

The appeal is dismissed. The Director's Order of January 6, 2015 is confirmed without variation.

Conclusion:

Each member of the Appeal Board confirms that he does not have any conflict with either party or any witness in this matter.

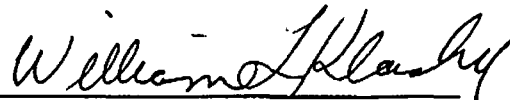
Signed at Calgary, Alberta on April 9th, 2015.



John Welbourn



Al Briggs



William Klasky