granted them the right to register notice of the security interest on title to the ~~Plaintiff's~~ Plaintiffs' ~~property~~ properties without further notice to the Plaintiffs.

88. The security granted under the Leases was lawful, and the registrations of the NOSIs on the title to the ~~Plaintiff's~~ Plaintiffs' ~~property~~ properties ~~was~~ were lawful.

89. The registrations of the NOSIs ~~was~~ were not ~~a~~ false statements that the Plaintiffs had defective title or otherwise. Further, and in the alternative, the NOSIs ~~was~~ were not published maliciously or with malicious intent.

90. The Plaintiffs ~~is~~ are and ~~was~~ were at all times able to dispose of and deal with ~~her~~ their property. ~~Her~~ Their ability to do so is and was not affected by the registrations of the NOSIs.

91. The registrations of the NOSIs did not lower the values of the ~~Plaintiff's~~ Plaintiffs' ~~property~~ properties.

92. The Plaintiffs ~~has~~ have not suffered any loss or damage as a result of the registrations of the NOSIs, and the Corporate Defendants put ~~her~~ them to the strict proof thereof.

No Remedies

93. The Plaintiffs ~~has~~ have not suffered any loss or damage for which the Corporate Defendants are liable under the *CPA* or at law, as alleged or at all.

94. The Leases ~~was~~ were made in accordance with the *CPA* and is binding on the Plaintiffs. In any event, the Plaintiff, Ms. Bonnick, never made any payment under ~~the~~ her Lease or suffered any loss in connection with the Lease.

95. The Plaintiffs ~~is~~ are not entitled to any damages, under the *CPA* or at law, as alleged or at all.

96. The Plaintiffs ~~is~~ are not entitled to any remedies under s. 18 of the *CPA*, as alleged or at all.

97. The Plaintiffs ~~is~~ are not entitled to rescission of ~~her~~ their Leases. Rescission would deprive any applicable Corporate Defendants, who are third parties, of a right in the subject-matter of the Leases that they acquired in good faith and for value. The Corporate Defendants plead and rely on s. 18(2) of the *CPA*.

98. Further, and in the alternative, rescission of the Leases is not available because the Plaintiffs used the leased equipment and ~~is~~ are not in a position to return it in its original condition. Return or restitution of the leased goods and services is no longer possible.

99. Further, and in the alternative, the Plaintiffs ~~has~~ have not given notice of ~~her~~ their claims in accordance with the *CPA*, and as such is not entitled to rescission of ~~her~~ their Leases or any other remedies sought. It is not in the interest of justice to waive any notice requirement. The Corporate Defendants rely on s. 18(3) of the *CPA*.

100. Further, and in the alternative, if any Corporate Defendant, except for Simply Green Home Services Corp., ~~is~~ are liable to the Plaintiffs, which is denied, they are an "assignee" as defined under the *CPA* and their liability is limited to the amounts paid by the Plaintiffs to that specific assignee.

101. The Plaintiffs ~~is~~ are not entitled to disgorgement of any Corporate Defendant's profits, as alleged or at all. Disgorgement is not an available remedy under the *CPA*. Further, and in the alternative, it is not an appropriate remedy in the circumstances.

Unjust Enrichment

102. The Corporate Defendants have not been unjustly enriched, as alleged or at all.

103. None of the Corporate Defendants charged or retained any unlawful amounts from the Plaintiff.

104. The Plaintiffs ~~has~~ have not suffered any deprivation. ~~She~~ They received the goods and services provided to ~~her~~ them under the Leases and, in the case of Ms. Bonnick, she did not pay any amount due under the Lease.

105. Further, and in the alternative, the Plaintiffs ~~has~~ have not suffered any deprivation that corresponds to any alleged unjust enrichment of the Corporate Defendants.

106. Further, and in the alternative, the Leases ~~is~~ are a juristic reason for any enrichment of any Corporate Defendants.

107. Further, and in the alternative, the Plaintiffs ~~is~~ are not entitled to restitution of any amount by which any Corporate Defendant was enriched.

Injunctive Relief

108. There is no basis for injunctive relief with respect to the Plaintiffs. The Corporate Defendants deny the conduct alleged in the Amended Fresh as Amended Statement of Claim with

respect to their involvement with the Leases or the Plaintiffs, if any, was unlawful or that they are liable for it.

Punitive Damages

109. The Plaintiffs ~~is~~ are not entitled to punitive or exemplary damages as alleged or at all. None of the Corporate Defendants engaged in any wrongful conduct that was willful, deliberate, high-handed, outrageous, callous, or in contemptuous disregard of the ~~Plaintiff's~~ Plaintiffs' rights and interests or took advantage of any alleged vulnerability of the Plaintiffs. The Corporate Defendants' conduct did not depart to a marked degree from ordinary standards of decent behaviour.

No Joint and Several Liability

110. The Corporate Defendants deny that they are jointly or severally liable with any other Defendant in relation to the Plaintiffs or ~~her~~ their Leases, as alleged or at all, under s. 18(12) of the *CPA*, in law, or otherwise.

Claims ~~is~~ are Statute-Barred

111. The ~~Plaintiff's~~ Plaintiffs' claims ~~is~~ are statute-barred pursuant to s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The Corporate Defendants rely on s. 5 of the *Limitations Act*. The facts on which the Plaintiffs ~~relies~~ rely in the Amended Fresh as Amended Statement of Claim were available to ~~her~~ them more than two years before ~~she~~ they commenced the within Action.

112. The Corporate Defendants did not engage in any fraudulent concealment as alleged or at all. They not willfully or fraudulently conceal the ~~Plaintiff's~~ Plaintiffs' alleged causes of action,

any material term of the Leases or the NOSIs. It would not be unconscionable to enforce the applicable limitation period against the Plaintiffs.

Set Off

113. In the event that the Plaintiffs ~~is~~ are entitled to any damages, which is denied, the Leases remains a valid, subsisting, and binding agreement. The Plaintiff, Ms. Bonnick, has paid none of the amounts due under ~~the~~ her Lease and she is in breach of its terms.

114. Crown Crest Funding Corp. as trustee of Crown Crest Capital Trust purchased the Bonnick Lease in good faith and in an arm's length transaction with the expectation of receiving the amounts due under the Lease. Because of ~~the Plaintiff's~~ Ms. Bonnick's breach of her obligations under ~~the~~ her Lease, Crown Crest Funding Corp. as trustee of Crown Crest Capital Trust, has received nothing.

115. Crown Crest Funding Corp. as trustee of Crown Crest Capital Trust is entitled to set off the price of the buyout under the terms of the Bonnick Lease as against any damages due to the Plaintiff, Ms. Bonnick, which are denied. In the alternative, Crown Crest Funding Corp. as trustee of Crown Crest Capital Trust, is entitled to set off the cost of the Bonnick Lease as against any damages due to the Plaintiff, Ms. Bonnick, which are denied.

Class Proceeding Not Suitable

116. The Corporate Defendants deny that this action is suitable for a class proceeding. The criteria for certification under s. 5(1) of the *Class Proceedings Act*, S.O. 1992, c. 6 (the "***Class Proceedings Act***") have not been met.

117. The Corporate Defendants deny that that the Plaintiffs ~~is~~ are entitled to aggregate damages under the *Class Proceedings Act*. The requirements under s. 24 of the *Class Proceedings Act* have not been met.

118. This Amended Statement of Defence responds to the ~~Plaintiff's~~ Plaintiffs' individual claims only. The Corporate Defendants reserve the right to amend this Amended Statement of Defence if the action is certified as a class proceeding and respond to the claims, if any, as certified.

119. The Corporate Defendants ask that this action be dismissed with costs.

~~April 17, 2023~~ July 28, 2023

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Michael Rosenberg LS#: 58140U
mrosenberg@mccarthy.ca
Tel: 416-601-7831

Katherine Booth LS#61779U
kbooth@mccarthy.ca
Tel: 604-643-7198

Sharanya Thavakumaran LS#: 77841S
sthavakumaran@mccarthy.ca
Tel: 646-940-8965

Lawyers for the Corporate Defendants

TO: **SOTOS LLP**
180 Dundas Street West
Suite 1200
Toronto ON M5G 1Z8

David Sterns LS#: 36274J
dsterns@sotos.ca
Tel: 416-977-5229

Mohsen Seddigh LS#: 70744I
mseddigh@sotos.ca
Tel: 416-572-7320

Mishel Logasov LS#: 80445S
mlogasov@sotos.ca
Tel: 416-977-0007

AND TO: **LENCZNER SLAGHT LLP**
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Paul-Erik Veel LS#: 58167D
Tel: 416-865-2842
pveel@litigate.com

Caroline H. Humphrey LS#: 71951F
Tel: 416-438-8801
chumphrey@litigate.com

Lawyers for the Defendant,
Lawrence Krimker

ALGA ADINA BONNICK
Plaintiff

and

LAWRENCE KRIMKER, et al
Defendants

Court File No.: CV-21-00665193-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act*, 1992

AMENDED STATEMENT OF DEFENCE

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Michael Rosenberg LS#: 58140U
mrosenberg@mccarthy.ca
Tel: 416-601-7831

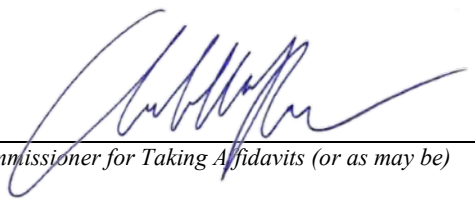
Katherine Booth LS#61779U
kbooth@mccarthy.ca
Tel: 604-643-7198

Sharanya Thavakumaran LS#: 77841S
sthavakumaran@mccarthy.ca
Tel: 646-940-8965

Lawyers for the Corporate Defendants

MTDOCS 46925539

This is Exhibit "D" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Court File No. CV-21-00665193-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ALGA ADINA BONNICK and GORAN STOILOV DONEV

Plaintiffs

and

LAWRENCE KRIMKER, CROWN CREST CAPITAL MANAGEMENT CORP., CROWN CREST FINANCIAL CORP., CROWN CREST CAPITAL TRUST, CROWN CREST CAPITAL II TRUST, CROWN CREST BILLING CORP., CROWN CREST CAPITAL CORP., CROWN CREST FUNDING CORP., SANDPIPER ENERGY SOLUTIONS, SANDPIPER ENERGY SOLUTIONS HOME COMFORT, SIMPLY GREEN HOME SERVICES (ONTARIO) INC., SIMPLY GREEN HOME SERVICES INC. and SIMPLY GREEN HOME SERVICES CORP.

Defendants

REPLY

(TO THE AMENDED STATEMENT OF DEFENCE OF LAWRENCE KRIMKER AND TO THE AMENDED STATEMENT OF DEFENCE OF THE OTHER DEFENDANTS)

1. The plaintiffs admit the allegations contained in paragraphs 20 (except the last sentence, which is denied) and 43 of the Amended Statement of Defence (dated August 5, 2023) of the Crown Crest Capital Management Corp., Crown Crest Financial Corp., Crown Crest Capital Trust, Crown Crest Capital II Trust, Crown Crest Billing Corp., Crown Crest Capital Corp., Crown Crest Funding Corp., Sandpiper Energy Solutions, Sandpiper Energy Solutions Home Comfort, Simply

Green Home Services (Ontario) Inc., Simply Green Home Services Inc. and Simply Green Home Services Corp. ("**Corporate, Trust and Other Entities**") .

2. The plaintiffs admit the allegations contained in paragraphs 2, 3, 4 (except the second sentence, of which the plaintiffs have no knowledge), 5 (only to the extent of the last sentence, and the balance of the paragraph is denied), 8 (only to the extent of the last sentence, and the balance of the paragraph is denied), 9 (only to the extent of the first and last sentences, and the balance of the paragraph is denied), 11 (only to the extent of the first and last sentences, and the balance of the paragraph is denied), 12 (only to the extent of the first, second to last, and last sentences, and the balance of the paragraph is denied), 13 (only to the extent of the first and last sentences, and the balance of the paragraph is denied) of the Amended Statement of Defence (dated July 28, 2023) of Lawrence Krimker.

3. The plaintiffs deny all other allegations in the Amended Statement of Defence of the Corporate, Trust and Other Entities.

4. The plaintiffs deny all other allegations in the Amended Statement of Defence of Mr. Krimker. Mr. Krimker's design of an opaque web of corporate, trust, and other entities (as he pleads) belies his allegations of being an arms-length director.

5. Mr. Krimker's portrayal of the Simply Group and his activities is the textbook shell game of using a complex network of companies and other entities to evade liability for unlawful predatory conduct at the expense of consumers like the plaintiffs and other class members.

6. The *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, looks beyond opaque and intentionally confusing corporate, trusts, and business names, and holds individuals like Mr. Krimker directly liable.

7. The terms defined in this Reply have the same meaning as in the Amended Fresh as Amended Statement of Claim issued July 4, 2023 ("**Claim**"), unless specifically stated here.

Regarding the Amended Statement of Defence of the Corporate, Trust and Other Entities

8. Contrary to paragraph 23, the defendants were involved in what happened to Ms. Bonnick through the defendants' pre-existing contractual relationship (Financing Agreement as pleaded in paragraphs 19 and 20 of the Claim) with MGA to identify targets, such as Ms. Bonnick, as prey for their impugned conduct.

9. The defendants entered into a Financing Agreement (which they titled "Master Assignment and Program Agreement") with MGA on June 14, 2017.

10. MGA representatives attended at Ms. Bonnick's home over a month later and at the direction of and under conditions set by the defendants in the Financing Agreement, on or about July 22, 2017, to carry out the impugned conduct as particularized in paragraphs 28-55 of the Claim.

11. MGA was acting as agent, on behalf of or as contractor of the defendants. That the defendants chose to off-load the door-to-door portion of the impugned conduct to a fellow predatory door-to-door company does not absolve the defendants of liability. Rather, it is a central component of their predatory conduct.

12. Contrary to paragraphs 25 and 26, Ms. Bonnick was never given a copy of the Consumer Agreement, and she first received what is presented by the defendants as her Consumer Agreement (which bears the date of August 23, 2017, i.e. a day after the actual date of the consumer transaction) in the course of this litigation in response to her request to inspect dated April 28, 2023.

13. Contrary to paragraph 26 and the defendants' allegation about a verification call with Ms. Bonnick, the MGA representative attending at her house told her this was a routine call and directed her to say yes to whatever was asked on the call as otherwise she would not qualify for government rebates. As the recording indicates, she was noticeably confused on the phone call when asked anything other than a yes/no/ok question in light of her age and vulnerability.

14. Regardless, the purported verification call has no relevance to the substance of the Claim except insofar as it confirms that Ms. Bonnick, like all other class members, never received disclosure of the material information at issue in the Claim. She, like all other class members, was never told her home would be held hostage by the defendants with a NOSI in return for unconscionable, previously undisclosed, payout sums.

15. Contrary to paragraph 48 and the defendants' allegation about a verification call with Mr. Donev, the defendants have failed to produce for inspection the complete recording of the call despite Mr. Donev's request to inspect.

16. The portion of a purported recording that has been produced shows that Mr. Donev was earlier asking the defendants' agents questions and so they disconnected the call, turned off the recording, and resumed again.

17. Mr. Donev had specific questions about the fees that the defendants would be charging him for the air conditioner in question and how those charges would be off-set by savings on his hydro bill as claimed by the defendants' predatory door-to-door salesman. Mr. Donev did not receive an answer except for the misrepresentations pleaded in the Claim, and he too was directed to say yes to the questions on the call and move on.

18. Regardless, the purported verification call has no relevance to the substance of the Claim except insofar as it confirms that Mr. Donev, like all other class members, never received disclosure of the material information at issue in the Claim. He, like all other class members, was never told his home would be immediately taken hostage by the defendants with NOSIs in exchange for unconscionable, previously undisclosed, payout sums which would be later unilaterally determined by the defendants.

19. As is the case with the purported verification calls with the plaintiffs, the defendants' phone agent never disclosed that this recording is intended to defeat consumer claims once the defendants' unlawful practices come to light, but merely say it is being recorded "for quality and training purposes".

20. The use of so-called verification calls with consumers, such as the ones alleged with the plaintiffs and presumably some other class members, is standard practice amongst predatory door-to-door businesses such as the defendants. The purpose of these recordings and the unusual questions asked is to defeat litigation that can follow from their standard consumer fraud practices (such as purporting to be associated with or acting on behalf of government agencies or reputable

businesses such as Enercare and Enbridge as was the case with the misrepresentations made to Ms. Bonnick at the door) and has been the subject of adverse judicial findings.

21. Contrary to paragraphs 55 and 60, Mr. Donev's situation illustrates the unconscionability of the defendants' conduct and the amounts they demand of consumers like the plaintiffs and other class members. Most consumers need to refinance, if not sell, their home at some point during 15 years. This need triggers the defendants' demand for unconscionable buyout sums in exchange for removing their NOSI(s). In such circumstances, a consumer like Mr. Donev would monthly pay a total of several times the value of an air conditioner over the course of the years and at the end still have to pay an exorbitant payout sum to the defendants, also several times the value of a new air conditioner, to unencumber his home title by removing the NOSI(s).

22. This is not what was disclosed to Mr. Donev or other class members when the defendants sought to entice them to sign the Consumer Agreements. Instead, Mr. Donev was handed Simply Green advertising brochures that stated the opposite:

> **SIMPLE TERMS**
>
> **INTELLIGENT BENEFITS**
>
> **Renting Can Save You Money**
>
> Consumer less Natural Gas and Electricity by upgrading to a High Efficiency HVAC System and see a drastic reduction in your heating and cooling costs. No installation or diagnostic charges, competitive monthly rental rates, no-cost repairs, and free replacement in the event that the equipment cannot be repaired.
>
> …
>
> **UPGRADE TO HIGH EFFICIENCY**

> Upgrade your low or mid-efficiency Furnace and Air Conditioner with brand new Simply Green, ENERGY STAR units and you can reduce your heating and cooling costs by up to 50%. Spend less money on utilities, and help the environment by choosing to heat and cool with Simply Green.
>
> **WHY CHOOSE SIMPLY GREEN?**
>
> **Save Money on Your Annual Energy Bill**
>
> …
>
> **SAVE MONEY ON ENERGY**
>
> …
>
> **Potential Savings of Over 50% on Monthly Heating and Cooling Expenses**
>
> ***Efficiency Ratings*** describe the percentage of fuel actually converted to heat. By upgrading from a 60% mid-efficiency unit to a 95% high-efficiency unit, you are effectively using 35% less natural gass. ***SEER Ratings*** for A/C's are efficiency ratios based seasonal electrical output. The higher the SEER rating, the less electricity used.
>
> **Conserve Energy and Spend Less on Heating and Cooling Costs. Upgrade with Simply Green.**

23. In the case of Mr. Donev, the defendants' advertising brochures specifically projected annual savings of between $1,138.60 and $2,341.24. This was false.

24. Mr. Donev, like all other class members, was not informed that his home title would be taken hostage by the defendants' use of NOSIs in exchange for total payments of many times the actual value of the HVAC and HVAC-related Equipment.

25. Contrary to paragraph 60, the defendants' purported "peace of mind" services do not justify the unconscionable undisclosed sums the defendants extract from class members.

26. New HVAC and HVAC-related Equipment is covered by manufacturers' warranties.

27. None of the Corporate, Trust and Other Entities are in the business of customer service; rather they are financiers in search of quick large sums of money off the backs of unsuspecting consumers like the plaintiffs and class members.

28. Mr. Donev has never needed to call for customer service regarding the air conditioner installed at his home. If "peace of mind" was what the defendants were offering Mr. Donev, and other class members, at the time of entering into the Consumer Agreement the defendants did not disclose to the plaintiffs or other class members that such "peace of mind" would cost many times the actual total market value of the HVAC and HVAC-related Equipment in question.

The Defendants' Limitations Arguments Should be Rejected

29. Contrary to paragraph 111 of the Amended Statement of Defence of the Corporate, Trust and Other Entities and paragraph 51 of the Amended Statement of Defence of Mr. Krimker, in addition to the plaintiffs' pleadings in paragraphs 134-138 of the Claim, the plaintiffs' claims (and the rest of the class as defined in paragraph 27 of the Claim) are centred on their home titles. The Claim encompasses claims regarding an interest in land and for declaration(s) in respect of land, which is specifically sought in paragraph 1 of the Claim.

30. Therefore, no limitation period applies to the plaintiffs' claims.

31. Alternatively, the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, applies to the claims of the plaintiffs and other class members, and not the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

32. Both plaintiffs (and thousands of other class members) still have the defendants' unlawful NOSIs on their home title.

33. Alternatively, the doctrines of postponement and discoverability apply to the plaintiffs' and class members' claims.

September 7, 2023

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto ON M5G 1Z8

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Mohsen Seddigh (LSO # 70744I)
mseddigh@sotos.ca
Maria Arabella Robles (LSO # 87381F)
mrobles@sotos.ca

Tel: 416-977-0007
Fax: 416-977-0717

Lawyers for the Plaintiffs

TO: **LENCZNER SLAGHT LLP**
Barristers and Solicitors
130 Adelaide Street West
Suite 2600
Toronto ON M5H 3P5

Paul-Erik Veel (LSO # 58167D)
pveel@litigate.com
Tel: 416-865-2842
Fax: 416-865-9010

Lawyers for the Defendant,
Lawrence Krimker

AND TO: **MCCARTHY, TÉTRAULT LLP**
Barristers and Solicitors
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto ON M5K 1E6

Michael Rosenberg (LSO # 58140U)
Tel: 416-601-7831
mrosenberg@mccarthy.ca
Katherine A. Booth
kbooth@mccarthy.ca
Sharanya Thavakumaran
sthavakumaran@mccarthy.ca

Tel: 416-362-1812
Fax: 416-868-0673

Lawyers for the Defendants,
Crown Crest Capital Management Corp., Crown Crest Financial Corp., Crown Crest Capital Trust, Crown Crest Capital II Trust, Crown Crest Billing Corp., Crown Crest Capital Corp., Crown Crest Funding Corp., Simply Green Home Services (Ontario) Inc., Simply Green Home Services Inc. and Simply Green Home Services Corp.

ALGA ADINA BONNICK et al.
Plaintiffs

-and-

LAWRENCE KRIMKER et al.
Defendants

Court File No. CV-21-00665193-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

REPLY

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto ON M5G 1Z8

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Mohsen Seddigh (LSO # 70744I)
mseddigh@sotos.ca
Maria Arabella Robles (LSO # 87381F)
mrobles@sotos.ca

Tel: 416-977-0007

Lawyers for the Plaintiffs

Email for parties served:
Paul-Erik Veel: pveel@litigate.com
Michael Rosenberg: mrosenberg@mccarthy.ca

This is Exhibit "E" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	**Judge/Case Management Master**	**Court File Number**:
	Akbarali J.	**CV-21-665193-00CP**

Title of Proceeding:

Alga Adina Bonnick Plaintiff(s)

-v-

Lawrence Krimker et al. Defendants(s)

Proceeding under the *Class Proceedings Act, 1992*

Case Management: X Yes If so, by whom: **Akbarali J.**	☐ **No**

Participants and Non-Participants: *(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) **Plaintiff**	**Mohsen Seddigh**	**mseddigh@sotos.ca**		**Y**
2) **Defendant Krimker**	**Paul-Erik Veel**	**pveel@litigate.com**		**Y**
3) **Defendants Crown Crest Capital Management Corp., Crown Crest Financial Corp., Crown Crest Capital Trust, Crown Crest Capital II Trust, Crown Crest Billing Corp., Crown Crest Capital Corp., Crown Crest Funding Corp., Sandpiper Energy Solutions, Sandpiper Energy Solutions Home Comfort, Simply Green Home Services (Ontario) Inc., Simply Green Home Services Inc., and Simply Green Home Services Corp**	**Michael Rosenberg**	**mrosenberg@mccarthy.ca**		

Date Heard: *(Rule 59.02(2)(c)(iii))* **October 20, 2023**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☒ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing ☐ Telephone ☒ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

1. **An order amending the timetable**

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Timetable amended as set out below.

Costs: On a **N/A** indemnity basis, fixed at $ are payable by to [when]

Brief Reasons, if any: *(Rule 59.02(2)(b))*

1. On consent, the parties seek an amendment to the timetable I ordered on June 21, 2023. The proposed new timetable preserves the hearing dates. I approve the amendments sought. Timetable to go as follows:

Step	Date
Plaintiff's reply motion record, if any to be served by	Tuesday, October 31, 2023
Cross-examinations to be completed by	Friday, December 22, 2023
Undertakings given on cross-examinations and refusals charts to be completed by	Friday, February 23, 2024
Refusals motion record (if any)	Wednesday, February 28, 2024
Responding refusals motion record (if any)	Wednesday, March 6, 2024
Refusals motion moving factum	Tuesday, March 12, 2024

Refusals motion responding factum	Friday, March 22, 2024
Refusals motion hearing	March 29, 2024
Undertakings or answers ordered following refusals motion to be completed by	30 days from release of reasons for decision from motion
Plaintiff's certification factum to be served by	Wednesday, July 17, 2024
Defendants' certification factums to be served by	Friday, August 30, 2024
Plaintiff's reply certification factum to be served by	Monday, September 16, 2024
Certification hearing	October 1, 2, and 3, 2024

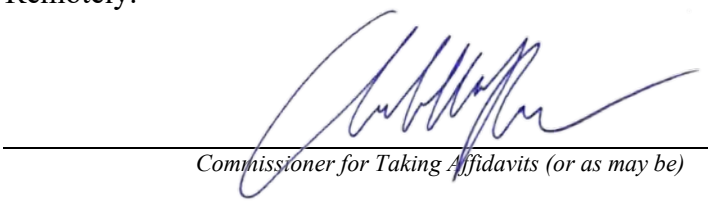
Additional pages attached: ☐ Yes **X** No

October 20, 20 **23**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*

This is Exhibit "F" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Service Alberta

Consumer Services Branch
Consumer Programs
3rd floor, Commerce Place
10155 - 102 Street
Edmonton Alberta T5J 4L4

DIRECTOR'S ORDER UNDER SECTION 157

OF THE *CONSUMER PROTECTION ACT* (formerly the *Fair Trading Act*)

TO

CROWN CREST CAPITAL MANAGEMENT CORP AND SIMPLY GREEN HOME SERVICES INC.

AND TO

ANY EMPLOYEE, REPRESENTATIVE, OR AGENT OF CROWN CREST CAPITAL MANAGEMENT CORP

OR

SIMPLY GREEN HOME SERVICES INC.

This Director's Order was issued under s. 157(1) of the *Fair Trading Act* in response to, in the opinion of the Director, contraventions of the Act. As mandated by s. 157.1(1) of the *Fair Trading Act*, this Director's Order is part of the public record.

Albertans who have questions or concerns about this business are encouraged to contact the Service Alberta Consumer Contact Centre at 1-877-427-4088.

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

Search for a Licensed Business, Charity or Fundraiser

To view a tipsheet on this business licence category, please click here:

Tipsheets

Alberta

Alberta Service Alberta

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

(formerly known as the Fair Trading Act)

TO

CROWN CREST CAPITAL MANAGEMENT CORP AND SIMPLY GREEN HOME SERVICES INC.

AND TO

ANY EMPLOYEE, REPRESENTATIVE OR AGENT OF CROWN CREST CAPITAL MANAGEMENT CORP

OR

SIMPLY GREEN HOME SERVICES INC.

ISSUE

Multiple Direct Sales contracts for the long-term rental of home HVAC equipment with Albertans in Entwistle and Edmonton. These contracts were entered into between January and September 2016 and were financed by Simply Green Home Services Inc. (Simply Green) and later, by Crown Crest Capital Management Corp (Crown Crest).

Crown Crest and Simply Green took responsibility for the financing of these contracts when contacted by Service Alberta's Consumer Investigation Unit (CIU).

The consumers in question exercised their extended cancellation rights, as prescribed under section 28(2) of the Act. Crown Crest and Simply Green did refund to the consumers that cancelled, however, those refunds were issued outside the timeframe required under section 31(2) of the Act.

As of January 1, 2017, the unsolicited sale of household energy products was banned in Alberta. This includes the offer for sale or rental of furnaces, natural gas and electricity energy contracts, water heaters, windows, air conditioners and energy audits.

ORDER

Crown Crest Capital Management Corp, and Simply Green Home Services Inc. and any employee, representative or agent of Crown Crest Capital Management Corp. or Simply Green Home Services Inc. must immediately:

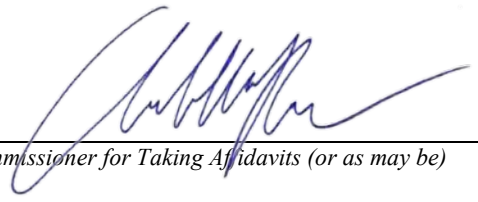
- Ensure that refunds are made to consumers within the timeframe required under section 31(2) of the Act following contract cancellation by a consumer.

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, IS GUILTY OF AN OFFENCE AND MAY BE PROSECUTED PURSUANT TO SECTION 163 OF THE *CONSUMER PROTECTION ACT*.

Deborah Wagar
Director of Fair Trading (as delegated)
August 16, 2019

This is Exhibit "G" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

CONSUMER PROTECTION BC

DECISION OF THE DIRECTOR

In the Matter of: *Business Practices and Consumer Protection Act*, SBC 2004, c. 2

Respondent: Simply Green Home Services (BC) Inc., Crown Crest Capital, & Lawrence Krimker

Case Number: 30128

Adjudicator: Robert Penkala

Date of Decision: June 9, 2020

Note: ***This version of the decision has been redacted to avoid disclosing personal identifying information in publishing the document. Except where already a matter of relevant public record or used in a professional capacity, individual names are abbreviated in a two-letter format, or, where single names are used in the original decision, as one capital letter. Minor stylistic changes have been made for some of the privacy redactions.***

INTRODUCTION

Consumer Protection BC is responsible for the administration and enforcement of the *Business Practices and Consumer Protection Act* and is authorized to impose administrative penalties and issue remedial orders where businesses ("suppliers") violate the Act.

Simply Green Home Services (BC) Inc. (herein Simply Green, or respondent) is a company with operations based in Toronto, Ontario. In 2015 Simply Green registered as a company in British Columbia and it has been active at certain times since then in BC. Simply Green's business as it relates to this matter consists of entering leasing agreements (contracts) with consumers for appliances including furnaces, heat pumps, water heaters, water treatment systems, and air-conditioners. The relevant consumer transactions are initially of a "door to door" nature, also known in the Act as "direct sales". According to the respondent it has not been engaging with BC consumers since April 2018.

On November 11, 2019 a Consumer Protection BC inspector issued a Report based on her investigations of several consumer complaints against Simply Green. The complaints involve allegedly deceptive sales practices and disputes concerning customers' attempts to cancel their direct sales contracts. The Report alleges that Simply Green's use of deficient contracts and its failure to provide refunds upon consumers' exercise of cancellation rights relating to those deficiencies violate the Act.

All of the consumer complaints cited by the Report arose from transactions with Simply Green occurring between June 2017 and March 2018.

The Report also names Crown Crest Capital Corporation (Crown Crest), Lawrence Krimker, BC Environmental Home Services Inc. (BCHES), and "AK" as respondents in the same proceeding. The Report indicates that both Simply Green and Crown are part of a "consortium" of companies known as the "Simply Group." Crown Crest Capital Corp. is an Ontario company also incorporated in 2015. Lawrence Krimker is a director of both companies. (According to the respondents Crown Crest is also known as Crown Crest Capital Management Corp. and Crown Crest Capital Trust.)

This decision makes no findings respecting BCEHS or AK, both of whom are excluded from the proceedings for the following reasons:

- AK was named as Crown Crest's CFO at the time of its registration, however according to the respondent he departed in 2016 and has no evident role in the subject matter of the Report.

- The Report reveals that BCEHS was an elusive target of investigation between December 2018 and February 2019, changing its business locations, personnel, corporate registration information, allowing email addresses and phone numbers to become non-functioning, and being ultimately unresponsive;

- The Report does not substantiate that BCEHS is or was an affiliate or agent of any of the other named respondents (at material times BCEHS, and Simply Green responding in this hearing, denied any connections of this kind); and,

- I was unable to serve notice of the proceedings on the company due to the lack of an email address or valid physical addresses for service (according to Canada Post the address associated with its company registration does not exist).

The exclusion of BCEHS as a respondent in this hearing means that I do not make any findings regarding its alleged contraventions of the Act in relation to four consumer complaint investigations discussed in the Report (itemized therein as #6 to #10). However, I may consider evidence originating in those complaint files to the extent of its relevance to the conduct of the respondent Crown Crest (creditor and assignee of assets in the BCEHS leases).

On June 15, 2016, in an earlier proceeding, Consumer Protection BC issued a compliance order against Simply Green after finding it had engaged in deceptive acts and practices contrary to section 5 (1) of the Act ("Order"). The Order required Simply Green to comply with the Act by:

- ceasing to represent to consumers that rebates are available in relation to the purchase or lease of goods and services when such rebates do not exist; and,

- not misrepresenting consumers' rights of cancellation before, during or after the consumer transaction.

Simply Green's alleged failure to comply with these specific terms of the Order is at issue in these proceedings.

OPPORTUNITY TO BE HEARD

In a letter sent to Simply Green and Crown Crest in December 2019 initiating a hearing of the Report allegations, I requested that the respondents reply to the Report in writing, providing any evidence or submissions by way of rebuttal, defence, or mitigation. Simply Green and Crown Crest responded to the hearing on January 14th in a submission from external counsel, Mr Apps. In that submission counsel requested a further opportunity to respond in the event the adjudication concluded that the respondents violated the Act. Consequently, I gave the respondents a further opportunity to address, prior to adjudication, issues relevant to their potential liability to penalty or other sanction (including a direct sales prohibition order). On February 26th I received a supplementary submission from Mr Apps. On the basis of these interactions respecting notice of the hearing, related disclosures, and the receipt of counsel's submissions, I conclude that the respondents have been duly provided with an opportunity to be heard.

ALLEGATIONS

The Report raises the following allegations against the respondents. Simply Green, it asserts, contravened:

1. Section 189 (5)(c)(ii) of the Act when it failed to comply with a compliance order by engaging in specified deceptive acts in consumer transactions;

2. Section 5 of the Act when it made further deceptive representations in consumer transactions;

3. Section 27 of the Act by not issuing a refund within 15 days to a consumer who cancelled a *direct sales contract* in accordance with the Act;

4. Section 56 of the Act when it failed to cancel future preauthorized payments or charges after the consumer cancelled the contract under Part 4.

Crown Crest is potentially implicated in allegations #3 and #4 above as well. Each of these allegations is explained in more detail later in this decision.

RELEVANT LEGISLATION

The provisions of the Act applicable to the allegations are reproduced below:

> **Section 5**
>
> *(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.*

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

Section 17

"direct sales contract" *means a contract between a supplier and a consumer for the supply of goods or services that is entered into in person at a place other than the supplier's permanent place of business*

Section 19

A […] *direct sales contract* […] *must contain the following information:*

[(a) through (d) omitted]

(e) a detailed description of the goods or services to be supplied under the contract

(f) […]

(g) *other costs payable by the consumer, including taxes* […]

[(h) to (i) omitted]

(j) *the total price under the contract, including the total cost of credit;*

[(k) to (o) omitted]

Section 20

(1) *In addition to the information required under section 19, a direct sales contract must contain*

(a) the name, in a readable form, of the individual who signs the contract on behalf of the supplier,

(b) the place where the contract is entered into, and

(c) the signatures of

(i) the individual who signs the contract on behalf of the supplier,

(ii) the consumer, and

(iii) if applicable, the guarantor.

(2) Despite section 23 (3), if that section applies, a supplier must give a copy of the direct sales contract to the consumer at the time the contract is entered into.

(3) A direct sales contract is not binding on a consumer if

(a) the supplier does not give to the consumer a copy of the contract at the time the contract is entered into, or

(b) the supplier requires the consumer to make a down payment in excess of the prescribed amount.

Section 22

If credit is extended or arranged by the supplier in respect of a direct sales contract,

(a) the credit agreement, as defined in section 57 [definitions], is conditional on the direct sales contract, whether or not the credit agreement is a part of or attached to the direct sales contract, and

(b) if the direct sales contract is cancelled under section 21, the credit agreement is cancelled.

Section 27

[…] *if a contract is cancelled under this Division, the supplier must refund to the consumer,*

(a) within 15 days after the notice of cancellation has been given, and

(b) without deduction except as provided for in this Division or in the regulations, all money received in respect of the contract, whether received from the consumer or any other person.

Section 28

(1) If a direct sales contract […] *contract is cancelled under this Division, the consumer must return any goods received under the contract by delivering the goods to the person named in the contract as the person to whom notice of cancellation may be given or to the business address of the supplier.*

(2) Subject to subsection (3), the return of the goods by the consumer under subsection (1) discharges the consumer from any obligation, in respect of the goods, arising under the contract.

(3) […]

Section 54 (2)

A notice of cancellation is sufficient if it indicates, in any way, the intention of the consumer or supplier to cancel the contract and, except in the case of cancellation under sections 21 (1), 25 (1,) or 26 (3) if it states the reason for cancellation.

Section 56

If a contract is cancelled under this Part, the supplier must cancel any future payments or charges that have been authorized by the consumer.

Section 189 [sub-sections other than (5) omitted]

(5) A person must not do any of the following:

(a) […]

(b) […]

(c) fail to comply with

(i) […]

(ii) a compliance order,

(iii) to (v) […]

SUMMARY OF INSPECTOR'S EVIDENCE

The Report outlines five consumer complaint investigations undertaken by the Inspector. Documentary evidence related to the investigations is exhibited in the Report. Below I summarize the factual allegations in the individual complaint investigations.

1. "GS"

- During a door to door interaction initiated by Simply Green in June 2017, GS entered a direct sales contract for supply of a water treatment system and a heat pump.
- GS reported that the salesperson told him his company was working in conjunction with BC Hydro and that GS would be eligible for a $800 rebate if he installed the water treatment system and heat pump. The equipment was installed the following day.
- GS told the Inspector he entered into a second direct sales contract with Simply Green the following day for the supply of a water heater. GS stated that he told the representative he had been trying to contact Simply Green about the BC Hydro rebate but the phone number was not in service. GS says the salesperson said he would complete the BC Hydro rebate process for him. The Inspector says "there is no indication he ever received the rebate."
- GS states he did not understand the nature of the contracts he signed, as English is not his first language.
- GS hired a contractor to inspect the purchased equipment and was told it had not been installed to code and the "water treatment" was not functional. GS stopped payment on the items, then removed and stored them.
- At a later point Crown Crest filed a notation on title of GS's residential property for non-payment. As GS was in the process of selling his home, he retained a lawyer to resolve the issues. The lawyer contacted Simply Green and Crown Crest in April 2018.
- Consumer Protection BC opened a complaint file in June 2018. The Inspector believes the contracts were not compliant with the requirements of the Act. She says the required information missing from the contracts was:

    1. A detailed description of the goods or services to be supplied, s. 19(e)
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j)

- In August 2018, GS's lawyer advised the Inspector the consumer had been receiving collection calls from a collection company though he had previously demanded Simply Green rescind the contract (and remove the equipment) due to the deceptive nature of the transaction.
- In October 2018, the Inspector sent notice of the complaint to Simply Green.

- Simply Green later agreed to cancel the contracts and in December 2018 refunded GS the money he had paid to date.

2. "AR"

- During a door to door solicitation at his residence initiated by Simply Green on November 22, 2017, AR entered into a direct sales contract for what he thought was the purchase of a furnace.
- AR alleges that during the sales transaction the salesperson told him:

    - he should replace his old furnace as Fortis BC was going to penalize households without high efficiency furnaces;
    - Fortis BC offered a rebate he could use toward the cost of installation;
    - the contract was a purchase agreement in the amount of $6,750 with payments of $99.99 per month for five years and option to purchase outright at any time.
- According to AR, he called Simply Green in February 2018 to exercise his option to purchase outright. During the call, the respondent informed him the contract was actually a lease. He was not provided a buyout price.
- AR told the Inspector his lawyer looked over the contract and said the ending the lease would cost over $12,000 and he would not own the furnace until paying an additional buyout.
- In April 2018, AR gave a notice of cancellation to Simply Green under section 21 (2) of the Act.
- Consumer Protection BC opened a complaint file in May 2018. The Inspector believes the direct sales contract executed by the parties does not comply with the Act. The required information missing from the contract is:

    1. A detailed description of the goods or services to be supplied, s. 19(e)
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j)
- Later in May 2018, AR advised the Inspector that Simply Green had not replied to his cancellation and continued to take monthly payments from his bank account.
- In July 2018, the Inspector attended Simply Green's office address in Vancouver and found that Simply Green was no longer at the location. An "HVAC" business called BC Home Environmental Services (BCHES), was operating at the same address. The Inspector spoke to the President of BCEHS, who advised it had no connection to Simply Green.
- Later in the month the Inspector was able to contact Simply Green and provide details of the complaint. A representative of Simply Green then called AR to discuss a purchase price.
- AR also told the Inspector he was receiving collection calls from Crown Crest. Around that time the Inspector was copied on emails between Crown Crest and Simply Green confirming they had been attempting to settle the matter with the consumer on terms other than his demand for contract cancellation and removal of the furnace.

- In August 2018, Simply Green informed the Inspector that Crown Crest had opted to cancel the contract and leave the furnace with AR and he would be refunded his payments upon completion of a mutual release. Several months after the Consumer Protection BC file had been closed the Inspector learned that AR had not been refunded any money related to the attempted cancellation. The amount of money at issue in fulfilment of the refund is not disclosed (monthly payments of $111 are mentioned).

3. MB & NB

- During a door to door sales call initiated by a Simply Green employee in January 2018, MB entered into a direct sales contract for a furnace, air conditioner and water treatment system.
- MB alleges that at the time of the consumer transaction, the salesperson told her he was affiliated with BC Hydro and Fortis BC.
- MB alleges Simply Green completed "assessments" of the existing appliances that "failed" everything in the "heating", "cooling" and "water quality" sections but "passed" the existing water heater.
- MB states she believed the contract she signed was a purchase agreement with a 3-year term. She claims the salesperson did not provide her with a copy of the contract at the time of the transaction but left a copy of the "assessment forms".
- MB says that on the day Simply Green installed the furnace, air conditioner and water treatment system, the salesperson told her the water heater was leaking, contrary to the assessment just done that found no leaks.
- In March 2018, she contacted Simply Green to return to the house to assess the water heater. The assessment form subsequently completed indicates the water heater received a "fail" after receiving a "pass" two months earlier. According to the new assessment the water heater was "over ten years old": two months earlier it was "assessed" as being "under five years old".
- On the day of the above "assessment", NB entered into a contract with Simply Green for the supply and installation of a water heater.
- In June 2018, MB and NB's daughter intervened on her parents' behalf and requested a copy of the direct sales contracts from Simply Green. She received them the next day.
- About one week later she sent Simply Green notices of contract cancellation under section 21 (1) of the Act ("cancellation within 10 days"). She says the respondent phoned her to say the cancellation was not a valid "10 day cancellation", as her parents had previously been given copies of each contract.
- In July 2018, Consumer Protection BC opened a complaint file. In October 2018, the Inspector sent the respondent written notice of the complaint.
- The Inspector believes the direct sales contracts executed with MB and NB were not compliant with requirements for direct sales contracts set out in the Act, in that the following contents were missing:

    1. A detailed description of the goods or services to be supplied, s. 19(e);
    2. Other costs payable by the consumer, including taxes, s. 19(g)

3. The total price under the contract, including the total cost of credit, s. 19(j);

- On October 30, 2018, an executive for the "Simply Group of Companies" emailed the Inspector advising, "*We've expired all assets registered at the property*", effectively cancelling the contracts and agreeing to refund the MB and NB (as did later materialize).

4. "FL"

- During a door to door interaction initiated by Simply Green in March 2018, FL entered into a direct sales contract with for the supply of a furnace, air conditioner and water heater.
- FL says he granted a salesperson access to the home when he claimed to be inspecting furnaces. FL alleges that the salesperson told him he could purchase the three appliances by making payments over eighteen months and he would receive a $500 rebate from Fortis BC within ten days of installation. FL says Simply Green did not provide a copy of the contract but the salesperson told him the head office would send it.
- FL alleges he did not receive the promised rebate. He contacted Fortis BC who told him no such rebate existed.
- FL contacted Simply Green in May 2018 and requested a copy of the direct sales contract he entered. Upon reviewing the contract, FL says, he realized he had been misled about the contract in that it was a lease (not purchase) and for a greater amount than he believed he would be paying.
- FL phoned Simply Green to complain but was unable to get to a manager. He says a promised call back never came.
- FL cancelled his pre-authorized payments for the leased equipment. Then he received an invoice from Crown Crest stating a buyout price of about $25,327.
- In July 2018, FL sent the respondent a notice of cancellation under section 23 (5) of the Act (cancellation within one year of receiving the contract if the contract does not comply with requirements).
- On August 22, 2018, Consumer Protection BC opened a complaint file. The Inspector concluded the direct sales contract executed by FL and Simply Green was not compliant with Act's requirements. She alleges that the contract did not contain:

    1. A detailed description of the goods or services to be supplied, s. 19(e);
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j);

- In September 2018, FL received a collection notice from Crown Crest and two calls from a third-party debt collector.
- In November 2018, the Inspector sent the respondent notice of the complaint. A representative of "the Simply Group" replied, agreeing to terminate the contract and to "*refund the customer the money they have paid us*…". (In fact due to an absence of payments no refund was required.)

- The Inspector was also informed that Simply Green allowed the consumer to keep the three appliances.

5. "NT"

- During a door to door interaction initiated by Simply Green in March 2018, NT entered into a direct sales contract with for the supply of a furnace. NT says he granted a salesperson access to the home when he claimed to be inspecting furnaces.
- NT alleges that the salesperson performed an "assessment" of his furnace. He was advised the furnace was very old and if he purchased a new one, he would receive a Fortis BC rebate of $500 within 10 days of installation. A Simply Green document with a hand-written notation on it indicating "10 days" and $500 rebate" is included in the evidence.
- NT states Simply Green represented that he believed the term of the contract for financing purchase of the new furnace was eighteen months (the same Simply Green document referenced above also has a hand-written notation of "18 months"). NT says the salesperson did not give him a copy of the contract.
- NT also says he then signed a form described by the salesperson as a Fortis BC rebate application.
- The new furnace was installed the following day.
- NT states he did not receive the promised rebate and contacted Fortis BC. He says Fortis told him its furnace rebate program had ended about one year earlier.
- NT says he called Simply Green, who told him the contract was a lease with a term of 120 months (the contract actually states the term as the "useful life of the equipment").
- NT claims he called Simply Green again and stated his intent to cancel the contract.
- In May 2018, Crown Crest advised NT that a buyout price of $11,951 was required to end the contract and have a security notice discharged. NT states he then canceled the pre-authorized monthly payments for the lease.
- In July 2018, NT sent Simply Green a notice of cancellation under section 21 (2) of the Act (cancellation of direct sales contract within one year) but received no response.
- NT says Simply Green sent him a copy of the contract in October 2018 at his request. NT stated that Crown Crest sent an invoice in November 2018 and, following that, he started receiving collection calls from Crown Crest.
- In January 2019, Consumer Protection BC opened a complaint file. The Inspector concluded the direct sales contract executed with NT did not comply with requirements in the Act. Allegedly the contract is missing the following information:

    1. A detailed description of the goods or services to be supplied, s. 19(e);
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j);

- The Inspector sent the respondent written notice of the complaint in January 2019. Subsequently the respondent and NT agreed to a one-time payment of $3,000 to resolve the dispute and release the parties.

Statements of the former Simply Green salesperson

- In May 2019, the Inspector interviewed a former Simply Green salesperson named "MR" (identified in the Report, name redacted here). MR had been present at one of the MB and NB direct sales transactions in early 2018. He shared the following observations and experiences with the Inspector:

    - Simply Green provided him with laminated information sheets for salespersons to show customers, suggesting they were working with Fortis BC or BC Hydro;
    - he and other salespersons "always talked to consumers about rebates but nothing too specific as there may not be a rebate available at that time";
    - during training he was instructed by a representative of Simply Green that gaining access to homes was the "first job". Rebate representations were a tactic to gain permission to enter the home;
    - they always presented the consumer with the cash price of the equipment which would be much lower than the total cost of the leasing agreement;
    - most consumers did not understand they were entering a lease agreement but thought they were paying installments toward the "cash price";
    - some consumers were able to figure out "they were being deceived" but many believed what they were told by the salespersons;
    - "English as a second language" was a factor in some consumers being unaware of the real nature of the contracts.
- In July 2019 the Inspector obtained a written and signed copy of the statements MR made during the interview, attesting to their accuracy.
- Being "uncomfortable with the deceptive sales tactics he was […] trained to use", MR left Simply Green's employment after two months.

Fortis BC Rebates

- Four complaints cited in the Report allege that Simply Green suggested or promised that rebates were available if the consumer accepted the contract.
- Two of the complainants reported to the Inspector they were told by the same Simply Green salesperson that they would receive the rebate within 10 days of the equipment being installed or within 10 days of the "paperwork" being mailed.
- Fortis BC advises that after the rebate application is received, the customer normally receives the rebate within 90 days.

- In May 2019, Consumer Protection BC requested copies from Fortis BC of any rebate applications submitted by Simply Green or consumers in the four complaint file contracts. Fortis BC was unable to locate any rebate applications.
- Fortis BC reported that it had offered a furnace rebate for up to $700 and a boiler rebate for $500 after July 10, 2018, after the transactions in the four Simply Green complaints.

Allegation of deception related to "Energy Star" certification

- Several contracts in the Report executed by Simply Green bear the "ENERGY STAR" logo.
- The ENERGY STAR name and symbol are trademarks registered in Canada and are administered by the Office of Energy Efficiency, Natural Resources Canada (NRC). They are used for products meeting an energy efficiency standard. Display of the logo on a contract requires permission from the Office of Energy Efficiency.
- In July 2019, The Inspector contacted NRC after noting Simply Green does not appear in its online public database of ENERGY STAR participants. The Inspector found that Simply Green had never been in the program and the NRC had asked Simply Green to stop using the logo on its contracts. (The website links to information warning consumers about door to door sellers promoting non-existent rebates and falsely claiming affiliation with the ENERGY STAR program.)

The BCEHS complaints

6. "GT"

- In January 18, 2019, GT received written notice from Crown Crest that it had taken over from BCEHS a direct sales contract originally entered in April 2018. GT discovered In February 2019 the contract was a lease when he contacted the Simply Group to report a problem with the equipment.
- On March 12, 2019, GT sent a notice of cancellation under section 21 (2) of the Act and received a response from the Simply Group advising there would be buyout costs for terminating the agreement. Two months later Crown Crest invoiced GT, citing a balance due of $25,967.
- On March 28, 2019, Consumer Protection BC opened a complaint file. The Inspector concluded the direct sales contract BCEHS executed with GT did not comply with the Act. The required information allegedly missing from the contract was:

    1. A detailed description of the goods or services to be supplied, s. 19(e);
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j);

- In April 2019, the Inspector sent Crown Crest written notice of the complaint. Crown Crest responded, stating it found no basis for the complaint allegations after reviewing the contract and a "third-party verification call".

- In May 2019 Crown Crest offered to cancel the contract and allow GT to keep the boiler with no further payment. In June the parties reached an agreement.

7. "SK"

- During a door to door interaction initiated by BCEHS on May 8, 2018, SK entered a direct sales contract for the supply of a boiler.
- In January 2019, Crown Crest notified SK that it had purchased the "rental assets" of BCEHS.
- On February 20, 2019, SK sent Crown Crest notice of cancellation under section 21 (2) of the Act. SK advised the Inspector Crown Crest did not respond to the cancellation and refund demand and continued to deduct monthly payments from his account until May 2019.
- On April 24, 2019, Consumer Protection BC opened a complaint file. The Inspector concluded the direct sales contract executed with SK did not comply with the Act. The required information missing from the contract was:

    1. A detailed description of the goods or services to be supplied, s. 19(e);
    2. Other costs payable by the consumer, including taxes, s. 19(g)
    3. The total price under the contract, including the total cost of credit, s. 19(j);

- On April 29, 2019, the Inspector sent Crown Crest notice of the complaint.
- Though SK initially wanted to return the boiler, he later opted to keep it. Crown Crest offered to release him from the contract with no further payments and in June 2019 the parties agreed to a settlement.

8. "MW"

- In June 2018, MW entered a direct sales contract with BCEHS for the supply of a heat pump. MW tried contacting BCEHS in January 2019 to request disclosure of the full cost of the contract. The number was no longer in service.
- He contacted Crown Crest, who said the contract was a lease. When he asked about cancelling the contract, he was told Crown Crest's lawyer would call him back. He says the lawyer did not call him.
- On April 22, 2019, MW sent BCEHS a written notice of cancellation citing his rights under section 21 (2) of the Act. BCEHS did not respond.
- Crown Crest continued to take monthly payments from his bank account.
- In May 2019, Consumer Protection BC opened a complaint file. The Inspector concluded the direct sales contract does not comply with the Act. The required information missing from the contract was:

1. A detailed description of the goods or services to be supplied, s. 19(e);
2. Other costs payable by the consumer, including taxes, s. 19(g)
3. The total price under the contract, including the total cost of credit, s. 19(j);

- In June 2019, the Inspector sent Crown Crest (or the Simply Group) notice of the complaint.
- In July counsel for the respondents contacted the Inspector to say he was assisting Simply Green with complaints received from Consumer Protection BC. Counsel advised that BCEHS is not a Simply Green company, though Crown Crest had financed its consumer contracts. He also said that a person involved in BCEHS had worked for Simply Green about two years earlier but was no longer an employee.
- This Consumer Protection BC complaint remains open and unresolved.

9. "KG"

- During a door to door interaction initiated by BCEHS in August 2018, KG entered into a direct sales contract for the supply of a heat pump and furnace. The following day the furnace and heat pump were installed.
- KG says she did not understand the nature of the contract or that the heat pump was included in the transaction.
- In December 2018, Crown Crest issued KG an invoice for $25,450. Soon thereafter she received a collection notice from Crown Crest and further notice from a third-party collector.
- Consumer Protection BC opened a complaint file in January 2019. The Inspector sent BCEHS notice of the complaint and requested a copy of the contract. After being unable to contact BCEHS, the Inspector notified Crown Crest, who responded and provided a copy of the contract.
- A representative of Crown Crest said a sales verification call that included KG showed the consumer had been fully informed of the terms of the contract.
- The Inspector concluded the direct sales contract BCEHS executed with KG does not comply with the Act. The required information missing from the contract was:

1. A detailed description of the goods or services to be supplied, s. 19(e);
2. Other costs payable by the consumer, including taxes, s. 19(g)
3. The total price under the contract, including the total cost of credit, s. 19(j);

- On March 6, 2019, KG sent Crown Crest a notice of cancellation.
- Crown Crest later agreed that KG would buy the furnace for an amount quoted by a local contractor and keep the heat pump at no further cost. In July 2019, Crown Crest provided the consumer with an invoice and "release" in order to transfer the furnace and heat pump. Crown Crest also confirmed it was not pursuing the consumer's debt for non-payment.

SUMMARY OF SIMPLY GREEN'S EVIDENCE (RESPONSE)

Counsel for the respondents in the January response (initial submission) stated that:

- Between November 2017 and April 2018 Simply Green operated in BC by using the services of Merkabah Marketing as an independent contractor performing sales on behalf of Simply Green.
- The Simply Group recognizes that persons associated with Merkabah "may have conducted themselves improperly" when engaged with consumers and acting directly as agents on its behalf.
- Around April 2018 certain persons associated with Merkabah became principals in BCEHS.
- The Simply Group (through Crown Crest) only acted as an "arm's length financing party" in relation to the BCEHS contracts.
- Crown Crest acquired consumer contracts from an "entity […] in which it had no stake, involvement or interest."
- Concerned about consumer complaints originating in BC, the Simply Group terminated its relationship with BCEHS in November 2018 and has carried on no "new business" in BC since then.
- With one exception, the respondents have resolved all issues in the five complaints in the Report to the satisfaction of the consumers. The exception (complaint #2 in the Report) is a matter that the Simply Group is following up on, based on it not having received the complainant's signed "mutual release" previously agreed to. The mutual release entailed full refund to the consumer as well as "retention of the leased equipment by the consumer at no charge".
- The respondents acknowledge the Inspector's allegations concerning deficiencies of the "standard form" contracts as set out in each of the consumer complaints. They the contracts were drafted by a "major BC law firm" and are unaware of any "legal decision" that upholds the Inspector's views as to their non-compliance.
- The respondents have instructed counsel to update the contract so as to be "responsive to the concerns and viewpoint" expressed by the Inspector. The Simply Group will not re-commence business activities in BC unless the revised contract is acceptable from the perspective of Consume Protection BC.
- If there are any other outstanding consumer complaints regarding the Simply Group and alleged infractions of sections 5, 27, or 56 of the Act the respondents wish to know of them and will immediately move to resolve them, including responding to cancellations and issuing refunds.
- Notwithstanding that the Simply Group has not carried out business in BC in 14 months, it is focussed on "righting any wrong" it is "legitimately perceived to have committed."

In the respondents' supplemental (February) submission in the hearing, counsel states:

- That the respondents formally enquire as to why the "principals" of BCEHS (four of whom specifically) are not named as respondents in the Report despite involvement in various allegedly deceptive acts.
- Simply Green "emphatically denies" ever having employed certain persons identified in the Report for having committed alleged deceptive acts or having been "trained" to do so by

Simply Green. The respondents say "R", "A", "F", and "J" were not engaged by Simply Green either as agents or employees.

- Simply Green asserts "it is entirely the conduct of Merkabeh [Merkabah Marketing], its employees, principals and agents which is at issue".

DISCUSSION & ANALYSIS (1) - The Simply Green complaints

The GS complaint

The Report does not provide any direct evidence establishing that Simply Green's alleged representations regarding an $800 BC Hydro rebate were false in the sense that the rebate did not exist. The Inspector wrote to Simply Green in October 2018 ("Inspector's letter"), and, in referring to the rebate matter, stated that the rebate "did not appear to exist". The Report also asserts that GS never received the rebate. However for the purpose of proving the breach, that is not precisely equivalent. The non-existence of the BC Hydro refund relative to Simply Green's representations is not clearly made out. Finally, I am unable to assess the Report's claim that GS "reported" that the salesperson represented his working "in conjunction with BC Hydro". The Report provides no context for the "reporting" or any form of corroboration (e.g., GS's statements as a first-person participant). Consisting of no more than the Inspector's characterization of GS's complaint, the evidence lacks sufficient weight to support a factual finding.

The Report does not provide direct evidence of Simply Green's (or Crown Crest's) misrepresentations of the consumer's statutory cancellation rights. However, it appears the complainant, through his lawyer, attempted to resolve "issues" with the respondents that may pertain to cancellation rights. The Inspector paraphrases GS's lawyer's letter to Simply Green allegedly terminating the contracts on the basis of misrepresentations made in the direct sale transactions. According to the Inspector, the lawyer demanded that Simply Green remove the equipment and reimburse GS. However, the case for a statutory cancellation under the Act under section 27 (i.e., under division 2 of Part 4) having occurred is not articulated.

Although the Inspector's letter notifies Simply Green of the potential basis, in her view, for a "Part 4" cancellation, the Report does not exhibit the consumer's notice of cancellation. GS's original dispute and self-help remedy based on alleged deception do not fall within the statutory remedies found in Division 2 of Part 4 of the Act. I am not convinced that the evidence supports either the allegation that Simply Green misrepresented GS's rights of cancellation so as to constitute a prohibited act of deception, or that Simply Green violated section 27 by failing to provide a full refund within 15 days of statutory cancellation. In any event, around two months after the Inspector's letter Simply Green settled the outstanding issue of GS's demand for reimbursement.

None of the above should be taken as my finding that Simply Green did not actually engage in a deceptive act in the original transactions with GS. I simply do not find, on the evidence and as a matter of probability sufficient certainty to conclude the violation occurred.

The AR complaint

While the Report relates that AR filed a formal complaint around May 2018, and further provides an email sent by the Inspector to Simply Green evidently stating or paraphrasing the complaint, there is no direct evidence of AR as the first-person witness or, alternatively, any form of corroboration. Lastly, Simply Green did not admit to the specific alleged facts. Where a Simply Green internal complaint-handling email is disclosed in the Report, it shows that Simply Green engaged with the consumer and found that he was "adamant" about his cancellation on the basis of the contract "not showing the information [the Act] requires".

One can surmise that the complainant recorded the relevant factual allegations in some fashion and relayed them to the Inspector. Additionally, the Report indicates that AR told the Inspector about the circumstances of the complaint, though how exactly the information was obtained, scrutinized, or verified is not evident. In other words, it is not possible for me to independently assess the evidence as to its likely veracity or its credibility. Thus, the weight of the evidence in support of the allegations concerning deceptive claims about rebates or about the consumer's rights is insufficient to find such violations occurred.

Similarly, I find critical evidence lacking regarding Simply Green's alleged failure to recognize a statutory cancellation and refund demand per section 27 of the Act. That is, the Report asserts that AR delivered a notice of cancellation to Simply Green in April 2018, who then failed to respond to it, without indicating how the notice meets the criterion of delivery in a "provable" form as required by section 54 of the Act. It is evident that by July 2018, after the Inspector's involvement, Simply Green took steps to engage with AR concerning his intended cancellation. However there is no evidence that the April cancellation notice was successfully delivered to Simply Green but ignored.

The Inspector notified Simply Green of the complaint in mid-July 2018 and the parties came to a resolution in early August (at some point in between Simply Green spoke with the complainant about his wish to cancel), but it is not possible to say whether the resolution (settlement) was delinquent relative to section 27. Finally, the final settlement and "release" involving Simply Green and AR may have a bearing on any allegedly outstanding refund, however I am not able to see that it is so (the Report has no direct evidence of payments made by AR or of the refund amount allegedly outstanding).

The MB and NB complaints

The MB [and] NB complaint involves two transactions, one in January 2018 and one in March 20018. MB and NB's daughter, "JB", intervened on her parents' behalf in June 2018. Though the Report does

not document statements made by [MB or NB], it reproduces communication between JB and Simply Green in which Jenifer demanded cancellation of the contracts, citing several bases, including: a delayed "10 day" cancellation (no reason required) triggered by late provision of the contract by Simply Green, and misleading representations made in the course of the January sales transaction.

Critically, JB states in her communication to Simply Green that she was present at the January sale. In her email of June 11th, she states: "I was there when [your] agent gave us false information and [deceived] us regarding your products." The cancellation letter she sent to Simply Green states that "your company" misrepresented its affiliation with BC Hydro and Fortis BC. It also accuses Simply Green of withholding "vital information like the items are for rent and not for sale, that it's not three years to pay but a lifetime rental, and that payments increase annually."

This appears to be first-person complainant evidence of an original and contemporaneous kind. It was created prior to the opening of the complaint and reflects directly the basis of the complainants' dispute with Simply Green. In this case the complaint does not expressly state the reason for cancellation as contractual deficiency per section 21 (2)(a), however it does provide "the reason" for cancellation (per section 54 of the Act). In my view, providing reasons for cancellation relating to deceptive sales practices does not impair the consumer's ability to cancel the contract when it is objectively deficient according to the section 19 and 20 requirements. In the latter connection, I have scrutinized the two contracts and agree, as put forward in the Report, [MB and NB's] direct sales contracts fail to meet the section 19 criteria of a detailed description of goods and services, the amount of tax applicable to the consumer's cost of the contract, and the total cost of the contracts including the cost of credit.

On the whole, I find the Report persuasive in respect of the MB and NB complaint as it demonstrates Simply Green's agent's probable deceptive practices with respect to its "affiliation" with BC utilities and in failing to adequately disclose the material fact that the contract does not entail a three-year purchase but a much longer and more costly equipment lease (I note that the deceptive practices discussed above do not align precisely with the alleged breach of the Order's narrowly prescriptive language).

I find also that the MB and NB cancellation in June 2018 is verifiable and effective, and consequently Simply Green's delay until October in reaching a satisfactory resolution including payment of a refund (acknowledged by the parties) is well outside the "15 day" refund requirement in section 27 and is therefore [in] violation [of] that provision.

The FL complaint

As mentioned previously, the absence of original first-person accounts as well as corroborative documentary evidence limit an adjudicator's ability to assess the likelihood that certain alleged violations occurred. That is largely also the case in the Report's presentation of the FL complaint, which relies on the Inspector's narrative summation of events without exhibiting further supporting evidence. I decline to rely on the Inspector's summation of events, and little else, in arriving at an

adverse conclusion in an administrative hearing. Moreover, though Simply Green's participation in a consumer transaction with FL is substantiated, and FL's complaint bears remarkable similarity to other complaint allegations in terms of deceptive acts, in this case FL's motivation to cancel the contract was not to reverse a monetary loss (as there was none), but presumably be free of unwanted future contractual obligations. After a period of about four months from cancellation, FL's complaint was resolved by Simply Green on terms evidently quite favourable to FL. Irrespective of the outcome in this particular dispute, the factual allegations are clearly relevant to the larger case against Simply Green. If not up to the standard of proof needed to support findings of contravention, the evidence has weight in considering whether "reasonable grounds" exist to believe that a pattern of Simply Green's conduct is inimical to the public interest, and in that relation whether a direct sales prohibition is merited.

The NT complaint

The Report relies again primarily on the Inspector's summation of information gathered from the complainant. Though many of the narrative aspects of the complaint as related in the Report are not further supported by corroborative evidence or details of the investigative process, certain documents in evidence *are* probative of the allegations. I believe that NT provided a document to the Inspector that indicates the likelihood that Simply Green made representations regarding "rebates" and an 18 month term for purchase during the original direct sales transaction. It would be unduly skeptical of me not to accept the likelihood that NT conveyed an account of deception to the Inspector closely related to the notations "10 day" / "rebate" / and "18 month" on the Simply Green document. It is unlikely that NT would be in possession of a document with those notations unless it came to him via a Simply Green sales agent. Considering also the Inspector's queries regarding Fortis BC's record of rebate applications and its statement concerning rebates being unavailable at the material time, I accept that Simply Green's contracting with NT for supply of a furnace (not an electrical appliance) involved a representation about a non-existent Fortis BC rebate.

I find that in the matter of this complaint NT did effect cancellation of the contract with Simply Green. He did so in July 2018 by fax (transmission to the respondent is confirmed). I also agree with the Inspector's analysis of the contract for the purpose of establishing grounds for cancellation per section 21 (2)(a). That is, the contract does not have a detailed description of goods and services, does not disclose tax payable by the consumer, and does not state the total cost of the contract inclusive of the cost of credit. If follows then, that after a valid cancellation and in keeping with section 27, Simply Green ought to have responded and offered a refund and stopped any preauthorized payments, as applicable. In fact, there was no "refund" issue or matter of post-cancellation payments since NT had made no payment and had cancelled his pre-authorization of future payments. The parties came to a resolution / settlement involving a buyout for the furnace and nullification of the contract, but not until January 2019.

DISCUSSION & ANALYSIS (2) – The BCEHS complaints

Below I set out, to the extent of their relevance to the case against the respondents, what I believe to be the salient facts and findings in the BCEHS complaints.

The GT complaint

I find that GT entered a direct sales contract for a "boiler" with BCEHS in April 2018 and about eight months later received notice from Crown Crest that it had purchased the rental assets in the equipment lease from BCEHS. The Report substantiates GT's cancellation, with notice to Crown Crest, in March 2019. Representatives of the Simply Group did not accept the statutory cancellation, insisting the agreement was valid and citing costs for terminating the agreement. Two months later Crown Crest invoiced GT for a total balance of $25,967.

The Inspector concluded the BCEHS direct sales contract with GT did not comply with the Act. She communicated to Crown Crest her view that GT's cancellation was a valid statutory cancellation. Upon review of the contract, I agree that the required information allegedly missing from the contract and providing a basis in Act for cancellation within one year included;

1. A detailed description of the goods or services to be supplied (the boiler is referred to only as "COMBI", without further specifications or description).
2. Other costs payable by the consumer, including taxes (no taxes are calculated);
3. The total price under the contract, including the total cost of credit (while the contract includes an amount circled in pen on the back page for "cash value", I find the "total cost" and "total cost of credit" are nowhere indicated clearly).

With the Inspector's involvement, on May 30th, 2019 Crown Crest agreed to allow GT to cancel the contract and keep the boiler with no further payment. The period between cancellation and resolution is therefore about two and one-half months.

The SK complaint

I find that SK entered a direct sales contract with BCEHS for the supply of a boiler in May 2018, and in January 2019, Crown Crest notified SK that it had purchased the "rental assets".

The Report demonstrates that on February 20, 2019 SK sent Crown Crest notice of cancellation under section 21 (2) of the Act. In April 2019 the Inspector notified Crown Crest of the complaint citing the attempted cancellation. She stated that the cancellation was made on the basis of section 21 of the Act for alleged contractual deficiencies but did not further identify these and stated that SK had not received a reply to the notice from Crown Crest. SK and Crown Crest agreed to a settlement and "mutual release' dated May 31, 2019. The settlement involves the transfer of the equipment to SK at no further cost.

The Report does not include evidence of payments made by SK to Crown Crest that may have been subsequently subject of refund demand. Nor does it document any post-cancellation withdrawal of pre-authorized payments by Crown Crest. I therefore cannot conclude that a breach of section 56 occurred in the absence of such documentation. I am also unable to conclude that a failure to *refund* a specific amount is material to the allegation of a section 27 violation. It is possible the complainant's intention in cancelling the contract was to end any pending or future financial obligations under the contract rather than to obtain restitution.

The MW complaint

It is apparent that in June 2018, MW entered a direct sales contract with BCEHS for the supply of a heat pump. The Report contains a copy of a cancellation form evidently filled and signed by MW. Proof of delivery is not provided (the Inspector says MW sent it to BCEHS). In June the Inspector contacted the Simply Group in June to follow up on MW's complaint and attempted cancellation, allegedly delivered in April. Counsel for the respondents replied, pointing out that the Inspector's version of the complaint cited conduct by BCEHS but did not describe the alleged contractual deficiencies ostensibly being relied upon for the exercise of the right to cancel. He said that the Simply Group had no part in BCEHS's conduct and that the contract appeared not to be deficient.

The Report itemizes contractual deficiencies the Inspector believed supported the contention that MW's cancellation was in accordance with the Act (i.e., the contract is missing information required by section 19). However, neither MW's cancellation form nor the Inspector's letter name those specific deficiencies. Counsel advised that absent that information, "we reject the basis for the Notice upon which the Complainant has relied". He also requested that the Inspector provide details in support of her opinion regarding the contractual deficiencies and said the respondent would immediately attempt to come to a resolution with the complainant. The Report states the complaint remains unresolved. (I have checked the complaint file and it appears that discussions toward a mutually acceptable resolution and "release" were indeed ongoing at the time the Report was issued, concluding in early April this year. The file is in fact closed.)

I find the Report lacks evidence verifying effective notice of cancellation to Crown Crest and establishing quantum of the refund in dispute (or ongoing post-cancellation payment withdrawals). It also does not demonstrate that the respondents' request for specifics regarding the basis for cancellation was fulfilled. For these reasons, I do not find the Report proves Crown Crest contravened the Act in this instance.

The JG and KG complaints

Evidence in both of the above complaints is not sufficient to support, for adjudicative purposes, any of the Report's allegations as they apply potentially to Crown Crest. There is no specific evidence as to when Crown Crest received the cancellation notices or when it reached the resolutions that appear to have been satisfactory to the complainants. The KG complaint does not disclose specifically what

refund amount or continuing post-cancellation payment withdrawals may have been at issue. The Report includes a copy of a cancellation letter purportedly delivered to the Simply Group by mail and email in March 2019, however it demands removal of the equipment by Simply Green and does not include a refund demand or refer to monthly payments. In the case of the J-G complaint, there is similarly no evidence of effective notice of cancellation to Crown Crest, or evidence of refund amounts or post-cancellation payment withdrawals being at issue.

Did Simply Green breach the Order by engaging in specified deceptive acts, contrary to sec. 189 (5)?

I preface this part of my analysis by referring to a fundamental theme in the respondents' submission. According to the Simply Group respondents, the Report presents a flawed picture of the relationships between the various entities the Inspector named originally as the respondents. The respondents say the Report does two things in error: it misidentifies persons associated with Merkabah Marketing as "employees" of Simply Green, and it attempts to associate the conduct of the Simply Group companies with the actions of BCEHS.

I agree that the Report asserts repeatedly that persons acting as sales agents (presumably hired by Merkabah as an "independent contractor") were Simply Green "employees". However, the Report does not contain evidence of this relationship. It is also true that the Report does not formally name as respondents Merkabah or any of the individuals believed to have been the "principals" operating it or the related entity BCEHS. The Report consistently suggests that the respondents are responsible for the same conduct complained of in relation to BCEHS: it refers to the conduct of the respondent *and* BCEH ("the Respondent, BCEHS, and their employees") and in formalizing the allegations outlines them in a manner suggesting that liability for the breaches of sections 5, 27, and 56 is interchangeable, rather than particularizing them for each entity.

It appears to be common ground that Merkabah played a key role in recruiting sales agents and executing consumer contracts in BC on behalf of Simply Green. I do not find that Simply Green acted in the matters of the consumer complaints through its employees, at least in regard specifically to the alleged breach of the Order or to other deceptive practices Simply Green is accused of carrying out through its sales agents' conduct in the consumer transactions. It should be obvious that I have not proceeded either against BCEHS (for procedural reasons relating to notice), nor do I accept that the conduct of BCEHS as alleged in the Report is attributable to Simply Green. I agree that the Report could have made specific allegations against the persons directly associated with the sales that are the subject of the Simply Green complaints (and perhaps some of the BCEHS "principals" in connection to the BCEHS complaints). However, I believe that notwithstanding these issues of attributing responsibility with precision, the case against Simply Green can also be made by considering its implied "permission" or acquiescence in the conduct of its agents and sub-agents. Or, put in another way, Simply Green can be found liable for breaches of the Act in the absence of proof that its employees did the things complained of. Though the respondents' submissions question the accuracy of the Report's allegations regarding its *employees* as contrasted with its agents or others in turn hired

by its agent to conduct sales on behalf of Simply Green, counsel does not identify a legal basis to find Simply Green not responsible for the conduct of agents entering into contracts on its behalf. I believe, instead, that Simply Green can be liable for failing to supervise its agent with respect to obligations under the Act, even if it did not authorize or direct its agent in regard to every specific violation. The failure of the Report to establish the status of individuals implicated in deceptive sales practices as "employees" of Simply Green is not the end of the matter.

The Order required the respondent to cease representing to consumers that they will be given rebates to purchase or lease goods or services when the rebates do not exist. Four transactions cited in the Report allegedly involve Simply Green's sales agents telling consumers about the existence of rebates and suggesting consumers' eligibility.

According to the Inspector, among the Simply Green complainants NT and FL each stated they called Fortis BC about rebates sales agents had represented as being available and were told no rebate existed for their purchases or leases. I have accepted that certain documents in the NT complaint originated in the transaction and corroborate that a representation about rebates was made by the sales agent. However, according to Fortis BC, it did not receive rebate applications in relation to any of the Simply Green consumers listed in the Report. In any case, the four Simply Green contracts would not have been eligible for a Fortis BC rebate for installations prior to July 10, 2018. Thus, evidently none of the consumer-complainants *could* have received a rebate.

In addition, former Simply Green sales agent MR stated that he was trained to tell consumers "about rebates" without being "too specific". The statement of MR says that he witnessed the sales practices of "A", another Simply Green sales agent, and refers to MR's discomfort "with deceptive tactics". The statement does not strictly speaking include an admission of MR that he made deceptive representations about non-existent rebates or that he observed "A" make such representations in relation to any of the complaints. MR says he did not keep any training documents and thus they are not put into evidence. However, given the overall pattern in the complaints, as reported by the Inspector, I find it plausible that some "training" of salespersons by Simply Green's agent occurred that involved assurances about rebates irrespective of their actual availability.

I find the evidence in its totality, suggests it is more likely than not that Simply Green's agents made representations regarding rebates that were not in fact offered at the time by Fortis BC. Though the complainant's evidence is not in the best or strongest possible form, I take it that the Inspector's review and summation of the complaints and interviews with the complainants provide a sufficient guarantee of their reliability on the whole. While denying Simply Green's direct involvement in the deceptive sales representations, the respondents have not undermined or rebutted the essential thrust of the alleged facts. I find it difficult to conceive of a pattern of complaints (involving five transactions with four different consumers) with the recurring theme of "rebates" without the existence of the alleged misleading representations.

Did Simply Green contravene section 5 (1) of the Act by engaging in deceptive acts in consumer transactions?

Bearing in mind my view that Simply Green may be found responsible for "permitting" or acquiescing in the violations of agents representing it in consumer transactions (including Simply Green failing to supervise its agent adequately in relation to its sales practices), I now turn to allegations in the Report concerning deceptive acts apart from those specifically prescribed by the Order.

Section 4(a) and 4(b) of the Act provide that any representation or conduct by a supplier that has the capability or effect of misleading or deceiving consumers is a deceptive act or practice. The Report cites six potentially applicable discrete instances of deceptive representations occurring in the consumer transactions that are the subject of the complaints.

As per section 4(3)(b) of the Act, the following are deceptive acts or practices:

representations by a supplier that,

- *it has a sponsorship, approval, status, affiliation or connection that the supplier does not have;*
- *a service, part, replacement or repair is needed if it is not;*
- *the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact;*
- *uses exaggeration, innuendo, or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading*

Further, as per section 4 (3)(c) of the Act, the following is also a deceptive act:

> *a representation by a supplier about the total price of goods or services if* […]
>
> > *(ii) the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or*
> >
> > *(iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the high price before the goods or services are supplied.*

Supplier's misrepresentation of sponsorship, approval, status, affiliation, or connection

With respect to one of the prohibited deceptive acts apart from those identified in the Order, the Report alleges that the use of the "Energy Star" logo on Simply Green contracts represented an official certification or "program" that the Office of Energy Efficiency stated Simply Green had never been a

part of. The Office of Energy Efficiency stated it had warned Simply Green to stop using the logo on its contracts.

I find that the evidence in the Report demonstrates convincingly that Simply Green represented an affiliation with the Energy Star certification or program when that was inaccurate and capable of misleading consumers. In this case I hold Simply Green responsible, directly, for the deceptive misrepresentations. While its agent may have initiated consumer transactions involving the false Energy Star affiliation or approval, the design and distribution of the contracts embedding the misrepresentations lies squarely with Simply Green operating as the supplier in the transaction.

A second example of an allegedly misleading representation of Simply Green's affiliation relates to its agents stating or suggesting an affiliation or "partnership" with Fortis BC or BC Hydro.

I find an apparently first-hand complainant observation (in the MB and NB matter) to the effect that a consumer recalled Simply Green's sales agents representing an association with Fortis BC or BC Hydro. In other cases there are allegations concerning "rebates" that could relate to consumers' perception or recollection of an additional implied association, however precise witness observations on the latter point are not set out. I find MB and NB's complaint relevant to the alleged deceptive representation, and I accept the statements of JB in her communication of cancellation to Simply Green as supporting some likelihood that the violation occurred. However, this is the only case in the Report with evidence of an original, direct assertion by a consumer in the transaction.

I also consider the statement of the former Simply Green sales agent MR, noting that it does not specifically say that he or "A" *made* the misrepresentation of being associated with Fortis BC or BC Hydro in transactions related to the complaints in the Report. MR also claims Simply Green's agent provided him with "laminated sheets" to represent to consumers an association with Fortis BC or BC Hydro. However, the evidence of the complainants does not refer to salespersons showing the "laminated sheets" and, as the respondents point out, no such physical evidence has been disclosed in the investigation or Report. On the whole, I find the evidence of misrepresentations regarding affiliation or so-called partnership with either Fortis BC or BC Hydro to be rather insubstantial. It is not sufficiently clear to prove the misrepresentation occurred in several transactions, as has been alleged.

Supplier's representation that a service, part, replacement, or repair is needed if it is not / misrepresentation regarding purpose or intent of solicitation or communication with a consumer

The complainants described and to some extent document Simply Green's agents calling on the consumers at their homes to "inspect" or "assess" their existing equipment. The Inspector believes Simply Green persuaded consumers to enter contracts for the supply of goods represented to be "needed" when that was not the case. Inconsistencies in the content of several "assessments" are cited to this end. Thus, the Report alleges that the purpose of the direct sales calls was not in fact to inspect

or assess the appliances, but rather to induce consumers to enter long-term lease obligations not initially disclosed by the sales agents when they sought access to the consumers' homes.

The evidence regarding allegedly deceptive representations in the "assessments" of consumers' existing furnaces, water heaters, or other appliances does indeed feature several inconsistencies, as pointed out by the Inspector. However, without a more complete record of how the sales agents characterized the "inspections" or "assessments" (including their qualifications to do so) or knowing the condition of the appliances objectively, I am not able to make the factual determinations to support these sub-allegations of deception. In other words, it is difficult to determine whether the "inspections" or "assessments" were so divorced from the true purpose of soliciting consumers to agree to replacement of their appliances to rise to the level of material deception. For example, it is not clear that Simply Green agents represented their *only purpose* was to give advice or information about the condition of the appliances. Similarly, despite inconsistent "assessments", in which an appliance is once deemed in need of replacement and once deemed not to be, determining whether an appliance "needed" replacement, based on such limited evidence, invites conjecture. In respect of these two sub-allegations, then, I make no specific finding of fact.

Supplier's use of ambiguity about a material fact or failing to state a material fact, if the effect is misleading (outright purchase vs long-term lease obligations)

The actions of all the consumers disputing the terms of the contract or cancelling their agreements with Simply Green seem to relate to their belated recognition of the extent of the financial obligations the agreements entailed. Such an evident pattern gives rise to the allegation that Simply Green failed to disclose material facts about the nature of the contracts and the supply of goods and services (i.e., about long-term leases as compared to outright purchase, and as to their total cost). However, further to my mention earlier of the limitations of evidence in several instances, the Report's evidence on the issue is limited to the Inspector's summation of the complaint record or accounts of what complainants apparently "told the Inspector". Though the contracts are in fact titled "agreements for lease and service", refer to the "lease term", and are said, in the first item of "terms and conditions" to "form a lease", the Report attempts to demonstrate that the AR, MB and NB, FL, and NT complaints all involve the consumers believing the transaction with Simply Green was for the purpose of purchasing the equipment on terms variously of 18 months, three years, or five years. *How* the consumers came to their understanding of the transactions as purchases in the face of the language of the lease agreement is not detailed, and in no case except the MB and NB complaint is there any documentary record of the complainants' assertion in this respect specifically as it relates to attempted cancellations and disputes with Simply Green. (The MB and NB case includes an email from the complainant to Simply Green asserting that the terms of the agreement had been misrepresented.) Though the Inspector also writes that three of the complaints allegedly involve the same sales agent, identified as "A", who did not leave the a copy of the contracts with the consumers in those cases, it is not obvious to me that this outline of a pattern in the Report makes the occurrence of the contravention more likely. On the whole, however, the evidence on this point is more in the nature of bare assertion and hearsay rather than an account of first-hand witness observations. Though the complainants may not have reviewed the

agreements before entering them, and while conceivably sales agents could have mischaracterized the agreements, it is difficult to properly assess and come to a firm conclusion on the matter, as is required to resolve a central conflict in the evidence. For this reason, the evidence does not adequately support a finding that the alleged misrepresentations occurred in relation to the purchase vs lease nature of the agreements.

Supplier's representation of the total price of the goods or services is not given the same prominence as the price of a unit or instalment in the transaction / supplier's estimate of the price is materially less than the price subsequently determined by the supplier unless consumer has expressly consented to the higher price before supply occurs

I have found that the contracts in evidence do not reflect the "total costs" of the leases. In principle, this, alongside other contractual deficiencies under section 19 of the Act, supports the consumers' statutory rights of cancellation found in section 21(2)(a). Though the mechanisms of cancellation are not always demonstrated in a technical sense (e.g., in accordance with section 54 of the Act), it is clear that Simply Green engaged with the complainants and resolved the matters on the basis of cancellations or attempted cancellations. My review of the agreements exhibited in the Report leads me to conclude that in no case did Simply Green's agents calculate and disclose the aggregate cost of the leases for their entire duration inclusive of cost of credit (inclusive of future increases in interest charges) and taxes. They did, however, enter on the first page of the contract a monthly charge for the lease term. Although this deficiency on one hand simply violates a disclosure requirement for direct sales contracts under section 19, given the recurring pattern of non-disclosure and the fundamental nature of the omission, the failure to reveal the true costs of the agreements is also a form of deception in the consumer transactions. This evidence is unambiguous and nothing Simply Green provides in its response demonstrates that total costs for the agreements were given *at least equal prominence* in the contracts or in the transactions as a whole. There is evidence the respondents disclosed total "buy out" costs for consumers to terminate the agreements, but this occurred long after the original transaction and then in relation to complaints or attempted cancellations. For these reasons, I find that Simply Green's consistent failure to disclose "total costs" is well-captured by the language of section 4 (3)(c)(ii), describing a particular type of deception prohibited by section 5 of the Act.

Having made the finding above, I dispense with analysis of the sub-allegation relating to the supplier's higher estimation of the price of goods and services relative to the original statement or estimate. There is no need to also consider the potential disparities between earlier and later prices as represented by the supplier after determining the primary relevance of its misrepresentations concerning total costs.

In light of the above, I find the preponderance of evidence and the very nature of the complaints are such that Simply Green or its agents must be seen to have engaged in misleading or deceptive acts in two respects, apart from the continuance of deceptive acts breaching the Order. To summarize, Simply Green or its agents violated section 5 of the Act when it, or they:

1. falsely represented an affiliation or approval it did not have by its use of the Energy Star logo or mark;
2. misled consumers in regard to, or failed to disclose as a material fact, the total costs of long-term leases, while failing to give at least equal prominence to the total costs of goods and services relative to the monthly payment instalments stated in the lease agreements.

Did Simply Green or Crown Crest contravene section 27 of the Act by failing to refund all money received under direct sales contracts within 15 days of receiving cancellation notices from consumers?

The Report alleges that:

- in all cases the complainants were unable to successfully exercise their cancellation rights under the Act and receive refunds or settlements without the involvement of Consumer Protection BC;
- Simply Green made no refund payments to MB and NB within 15 days after the direct sales contracts were cancelled. It did so several months later.

I find that Simply Green violated section 27 as alleged in the case of the MB and NB complaint, by failing to respond to the consumers' notices of cancellation and demands for refunds (on grounds set out in the Act), within 15 days. Although I do not find the precise quantum of the refund for the June 2018 cancellation stated in the Report, I find that the materials demonstrate that Simply Green acknowledged the refund issue and resolved it several months later. In its response Simply Green takes no exception or issue with the assertion that the MB and NB complaint in fact concerned cancellation and a demand for refund of the payments it received from the consumers. All parties appear to have agreed that the return of payments was relevant to the cancellation demand.

Simply Green's approximately six-month delay in dealing with NT's cancellation would have been well wide of the mark with respect to compliance with section 27, had there been a refund amount in dispute. However, in the absence of an actual refund dispute Simply Green cannot have contravened sections 27 of the Act.

Crown Crest is implicated in alleged section 27 allegations in the BCEHS complaints, in that it became the "owner" of the contracts at a material time. In the matter of the GT complaint, I find that Crown Crest became a party to the contract and to the statutory obligations that inhered in it. Though it was not the direct seller, it effectively became a substituted supplier when it "took over" the contract and therefore became potentially liable for failure to accept valid cancellations within one year, based on section 19 or 20 deficiencies. Alternatively, if the contracts had not been assigned or purchased and Crown Crest had remained purely a lender to the transaction, under section 22 of the Act valid direct sales cancellations are deemed also to cancel the related consumer financing agreement. However, if not satisfied that Crown Crest had been notified of the cancellations, I can not hold Crown Crest liable

for failing to recognize and respond to a cancellation within 15 days in the matter of refunds or failing to immediately cancel pre-authorized payments.

In the GT complaint I do not find the failure to give refunds substantiated. However, in a technical matter aside from the undocumented refund, Crown Crest did breach the intent of section 27 when it insisted on invoicing GT, post-cancellation, for $25,000 and insisted on GT's requirement to pay "buyout" costs to terminate the contract. Those matters would constitute a "deduction" from any refund amount which is not permitted by the Act in direct sales contract cancellations. Due to the fact that the eventual resolution and "mutual release" in GT's complaint indicates that the previously invoiced and buyout amounts were *not* applied, I do not find Crown Crest liable for breach of section 27 for imposing an impermissible deduction from a refund.

For reasons already given above, I find that in order to prove a breach of section 27 certain evidentiary requirements must be met:

1. Consumer contractual cancellation made in a provable form on a particular date, based on a cancellation right in Part 4 of the Act; and,
2. An ascertainable refund of consumer's payments owed and not returned by the supplier within 15 days of cancellation.

I have found in the foregoing review that in the balance of the cases not already mentioned in this part of the decision, either the consumer complaints did not require a refund or the allegations involving section 27 do not include documentary or other verification of:

- the original payments made by consumers being disputed or demanded by way of refund in the cancellation;
- delivery of the cancellation notices to Simply Green or Crown Crest on a particular date (per sec. 54 of the Act).

Did Simply Green or Crown Crest contravene section 56 of the Act when they failed to cancel future payments and charges authorized by the consumer after the direct sales contracts were cancelled under Part 4 of the Act?

The Report states that consumers accuse Simply Green or Crown Crest of continuing to deduct scheduled payments from their bank accounts or credit cards after having been notified of a valid cancellation under the Act. Section 22 of the Act states that credit arranged by the supplier in respect of a direct sales contract is cancelled if the direct sales contract is cancelled under section 21. If the direct sales contracts investigated by Consumer Protection BC were subject to a right of cancellation under section 21, the credit agreements should have been cancelled upon the consumers' contract cancellation.

Similar to my discussion of the requirements inherent in proving the section 27 allegations, the absence of clear evidence regarding the withdrawal of pre-authorized payments is equally critical in establishing breach of section 56. The Report focuses its conclusions in respect of section 56 in the following way: it says Simply Green continued to withdraw payments from AR's bank account after his valid cancellation; and, it says Crown Crest continued to make scheduled withdrawals from SK and MW's bank accounts after their cancellations.

In the case of AR the Report simply states that in May 2018 the complainant told the Inspector that Simply Green had not responded to his earlier cancellation notice and continued to withdraw $111 in monthly payments. A copy of AR's cancellation notice is exhibited, which is dated April 5th but does not indicate how or when it was delivered to Simply Green, or if at all. It is unclear if the alleged post-cancellation withdrawal of $111 is meant to refer to April and May payments, or only one or the other. No banking or other records relating to the payments are cited. This is not evidence substantial enough to support a finding of contravention.

The section 56 allegations against Crown Crest also do not include any specific details of SK's pre-authorized payments in respect of the contract, or of Crown Crest's alleged continued taking of the payments after SK's cancellation. The same is true in the MW matter: in my review I have not seen direct evidence of effective cancellation, a refund amount demanded or in dispute, or the ongoing taking of pre-authorized payments after cancellation. In both the latter cases, in the absence of the expected documentation I do not conclude that a breach of section 56 occurred.

DUE DILIGENCE

The respondent is entitled to a "defence of due diligence" if it shows that it took all reasonable steps to prevent the contraventions, and these occurred despite such efforts. There is some evidence in the Report of Simply Green meaningfully engaging in the complaint resolution process. In fact, very little in the way of monetary disputes or the consumers' concerns about contractual cancellation remains unresolved. However, on the particular aspects of the contravening conduct, I am not satisfied that it has satisfied the standard of due diligence. Simply Green has merely stood on its view that its contracts are invariably correct in all respects with regard to requirements of the Act. It has not demonstrated that it has in any way modified its practices with respect to the contractual deficiencies underpinning consumers' attempted statutory cancellations. Given the specific terms of the Order, neither did Simply Green sufficiently supervise its agents and prevent the recurrence of certain deceptive acts in consumer transactions, or the occurrence of additional misleading representations. Aside from denying any association with the impugned acts of its agents, it did not divulge what steps it took to ensure compliance with the Order and prevent the occurrence of fresh breaches of section 5 in 2017 and 2018.

CONCLUSION

Simply Green contravened section 5 (1) of the Act by engaging in deceptive acts and practices in respect of certain consumer transactions (cited in the Report, referenced above) when it:

1. stated that rebates were applicable to consumer transactions when they were not, continuing deceptive acts established in a previous proceeding, thereby breaching the Order, contrary to section 189 (5);
2. falsely represented an affiliation or approval it did not have by its use of the Energy Star logo or mark;
3. misled consumers in regard to long-term leases, by failing to give at least equal prominence to the total costs of goods and services relative to the monthly payment instalments stated in the agreements.

ENFORCEMENT ACTIONS

As an adjudicator determining that the violations occurred as alleged, I may take one or more of the following actions:

- Prohibit Simply Green from engaging in direct sales transactions;
- Issue a compliance order (under section 155 of the Act), which may include orders:
  - to take specified action to correct the issue;
  - to reimburse a consumer or provide suitable compensation (restitution); and,
  - to repay Consumer Protection BC the costs of this inspection.
- Impose an administrative penalty of up to $5,000 on an individual, or up to $50,000 on a corporation (under section 164 of the Act).

I have considered each of these possible enforcement actions and determined that the circumstances merit, as applicable, a monetary penalty, and a compliance order against the respondent to reimburse Consumer Protection its costs of the inspection (investigation) in connection with the Report. I will also make a conditional direct sales prohibition order to prevent Simply Green from repeating the business practices that are the subject of the contraventions detailed in the Report and confirmed in this decision. This entails remediation of the underlying direct sales contractual requirements, by requiring Simply Green to ensure its contracts include adequate description of goods and services and proper disclosure of the total costs including cost of credit. These enforcement measures are implemented with a view to both specific and general deterrence of a pattern of behaviour that can obviously harm consumers.

Direct Sales Prohibition

In accordance with the Act, a direct sales prohibition may be imposed on a direct seller on the basis of reasonable belief in a pattern of behaviour harmful to the public interest or for proven contraventions of the Act.

Section 156

(1) In this section:

"direct seller" means

(a) a supplier who enters into direct sales contracts, solicits consumers to enter into direct sales contracts, or both, or a salesperson of that supplier, and

(b) a person, including an officer and a director, who performs services related to the management of the business of a supplier referred to in paragraph (a).

(2) After giving a direct seller an opportunity to be heard, the director may order the direct seller to stop entering into direct sales contracts or soliciting consumers to enter into direct sales contracts, for a period of time specified in the order or until the director rescinds the order, if there are reasonable grounds to believe that

(a) based on the past conduct of the direct seller, it is contrary to the public interest for the person to carry on the business of a direct seller, or

(b) the direct seller has contravened this Act or the regulations.

(3) A direct sales prohibition order may be reconsidered in accordance with Division 1 of Part 12.

Simply Green submits that it has not been active in engaging in new consumer transactions in BC since 2018. Further, it states it intends, before resuming any consumer transactions, to comply with the requirements of direct sales contracts according to the Act, and to adhere to Consumer Protection BC's expectations with respect to those statutory requirements. In view of both the "public interest" rationale and the existence of proven contraventions, stated in sub-sections (2) (a) and (b) above), I will issue a direct sales prohibition against Simply Green, attached to these reasons, subject to these conditions:

1. It will not engage in any direct sales with BC consumers for a period of 12 months from the effective date of the prohibition;
2. its direct sales contracts will comply in form and content with the Act's requirements for,
    i. *detailed descriptions* of goods and services; and,
    ii. *total costs* to consumers, *applicable taxes*, and *total cost of credit;*
3. it must assume responsibility with respect to the prevention of misrepresentations and deceptive sales practices, for training and supervising any employees, agents, or persons entering direct sales contracts on its behalf; and,
    a. all training and sales materials will be provided to and approved by Consumer Protection BC before being used;
    b. the identities of any agents hired or retained by Simply Green to conduct consumer sales must be disclosed to Consumer Protection BC, and Consumer Protection BC may refuse to remove this prohibition in the absence of such disclosure or if it deems the removal of the prohibition to be contrary to the public interest;
    c. internal policies must be developed that expressly prohibit any conduct by employees, agents, or other persons dealing with consumers on behalf of the respondent representing the respondent's

endorsement by or affiliation with utilities-providers or official bodies (including reference to rebate programs, unless factually based); and,

d. such policies must be provided to Consumer Protection BC, which may refuse to remove this prohibition if the policies are not provided or are deemed inadequate;
e. Consumer Protection BC must first be satisfied that the respondent will disclose clearly the intended terms of agreement for the supply of goods and services so as to not mislead consumers about costs, obligations, and duration of lease agreements, including any materially relevant terms pertaining to outright purchase, rent to own, "buyouts", or similar terms.

Administrative penalty

As per section 164 (1) of the Act, an administrative monetary penalty ("AMP" or "penalty") may be imposed where a person contravenes a prescribed provision of the Act. Sections 5, 27, and 189 (5) of the Act are prescribed for the purpose of imposing an AMP. After considering the factors under section 164 (2) of the Act (below), I determine that an AMP is warranted. I am, however, limited in applying AMPs due to the two-year limitation stipulated by the Act. For this reason I cannot consider the application of AMPs for any violations occurring on the dates of execution of the seven separate consumer contracts listed in Table 1 of the Report. This includes the breach of the Order per section 189 (5), and the making of additional deceptive representations per section 5. The violation of section 27 that I confirm in connection with the failure to issue a refund within 15 days of cancellation in the case of the MB and NB complaint is within the two-year limitation and I proceed with imposing an AMP in respect of it.

Section 164 (2) of the Act sets out the following factors that must be considered before imposing an AMP:

(a) previous enforcement actions for contraventions of a similar nature by the supplier
(b) the gravity and magnitude of the contravention
(c) the extent of the harm to others resulting from the contravention
(d) whether the contravention was repeated or continuous
(e) whether the contravention was deliberate
(f) any economic benefit derived by the person from the contravention
(g) the person's efforts to correct the contravention

For the violation at issue, I consider all these factors to decide whether an AMP should be imposed. If imposing an AMP, to determine the *amount* that should be imposed I consider the section 164 (2) factors together with the Consumer Protection BC policy, "Calculation of Administrative Monetary Penalties Policy and Procedures" (the "Policy"). The Policy model and rationale are discussed below.

The Policy, normally applied by Consumer Protection BC, sets out how the AMP amount is calculated, starting with a base penalty amount. The Policy helps to ensure that calculations of AMP amounts are consistent, transparent, flexible, and proportionate to the contraventions at issue, and that suppliers subject to AMPs know how Consumer Protection BC interprets the Act and analyses the criteria

determining AMP amounts. Consumer Protection BC has developed the Policy from its experience and expertise in providing consumer protection services, and from its mandate to administer the Act in the public interest.

According to the Policy, contraventions for which AMPs are imposed are first categorized into Type A, Type B, or Type C, as set out in the Appendix. Consumer Protection BC makes these assignments based on its purposes and experience in delivering consumer protection services in the public interest, and the consideration of two factors: (1) the inherent severity of harm specific to the contravention, and (2) the probability that a person will experience harm from the contravention.

After categorization of the contravention, the decision maker considers a set of "adjustment factors" laid out in the Policy. These "adjustment factors" are based on section 164 (2), plus one additional criterion consistent with the legislation. The Policy requires the decision maker to choose a "gravity" value for each adjustment factor based on consideration of the relevant aggravating or mitigating circumstances.

When applying the Policy, the decision maker is considering all the factors under section 164 (2) in his or her calculation or analysis of the AMP amount that should be imposed. The decision maker continues by then deciding in his or her discretion whether the amounts in the Policy should be imposed or different amounts imposed based on consideration of the factors under section 164 (2) (and one additional related criterion) and any other relevant circumstances.

In the respondents' notice of this hearing, I identify the Policy and advise that it will be applied as part of any decision that may impose an AMP. This notice further states that the Policy can be viewed on our website and would be provided to the respondents in paper form upon request. Therefore, the respondents have had an opportunity to respond to the Policy by making submissions on the appropriateness of its application or its consistency with the criteria under the Act.

Calculation of AMP

I first apply the Policy to calculate an AMP amounts. I then decide whether that amount or a different amount should be imposed based on consideration of the factors under section 164 (2) and one additional criterion, and any other relevant circumstances.

Violation of section 27 of the Act is a "Type C" contraventions under the Policy**.** I agree with the categorization of the contravention in the present circumstances at a relatively high level of inherent severity and potential harm as contemplated by the Policy.

My assessment of the adjustment factors applicable to these contraventions under the Policy's "Penalty Matrix" is set out in the table below:

Adjustment Factor	**Effect on Gravity**	**Analysis**

1. Previous enforcement actions for contraventions of a similar nature	**+3**	In a hearing (case #29277) concluded in June 2016, Simply Green was alleged to have violated section 27 of the Act. However, the adjudicator found in once instance that Simply Green had not violated this provision, and in another instance he did not rule on the issue. (Simply Green was found to have engaged in deceptive acts and failed to provide information to an inspector, but those violations are not directly germane to my assessment of AMP for the cancellation and refund issues in this decision.) The "adjustment" permits me to consider *similar* previous contraventions. The 2016 decision found Simply Green had twice failed to recognize the effect of consumers' cancellation on their pre-authorized payments. For this "adjustment" analysis, I find the conduct to be similar to the failure to respond to a valid cancellation in the manner required by section 27. The previous decision has a bearing on this matter due to the respondent's having express prior notice regarding suppliers' obligations in respect of cancellations and either refunds or "stop payment" situations. The previous enforcement action therefore is moderately aggravating relative to the AMP in this case.
2. Gravity and magnitude of the contravention	**+1**	Any matter involving obligations to consumers exercising a right of cancellation, including the refund remedy, is inherently serious. Delay in delivering post-cancellation refunds may be aggravating. In this case the refund component of the consumer's complaint was not finalized until several months post-cancellation. It is not a small deviation from the "15 day" rule, and therefore somewhat aggravating.
3. Extent of the harm to others resulting from the contravention	**0**	This matter relates to monetary disputes and potentially significant consumer losses where the consumer's right of cancellation is not recognized. As captured in the Policy, some degree of harm is entailed. I find based on the limited information in the Report concerning the nature of financial harm to the complainants in the refund matter it is appropriate to see this factor as neutral rather than aggravating.
4. Whether the contravention was repeated or continuous	**0**	Within the scope of the Report the respondent was allegedly implicated in several such contraventions. Due to the constraints of evidence in this hearing the violation is limited to one instance. Therefore there is no basis to find repetition or continuity as an aggravating factor.

5. Whether the contravention was deliberate	**+2**	After having been the subject of several complaint investigations and a previous hearing involving similar disputes, the respondent deliberately chose initially not to respond to the demand for return of the consumers' payment. This conduct is aggravating.
6. Economic benefit derived by the person from the contravention	**0**	I believe Simply Green likely derived economic benefit from the contravention of section 27, though not in a quantifiable or enduring sense. This factor is therefore neutral.
7. Whether the person made reasonable efforts to mitigate or reverse the contraventions' effects	**-1**	The respondent has mitigated or reversed the contravention by making the consumer whole, in terms of returning the payments by way of refund several months after cancellation. There is a modest mitigation of the total penalty under this factor.

Final Calculation of AMP

The Policy determines violation of section 27 is a Type C contravention with a base penalty amount of $5,000. For this violation, application of the AMP "Matrix" involves two contributing aggravating factors, and one factor mitigating penalty. Thus, the adjustment to "gravity level" of the contravention, overall, is plus five (+5), and I apply a penalty of **$8,000** per Part 4.3 of the Policy (penalty matrix). Attached to these reasons is the required Notice of Administrative Penalty.

Compliance order

Having found Simply Green responsible for contraventions of sections 5, 27, and 189 (5) of the Act, I have authority under the Act to order reimbursement of Consumer Protection BC's costs for the relevant inspection, including preparation of the Report for this hearing. An order pursuant to section 155 of the Act is an appropriate action against Simply Green to compel it to reimburse Consumer Protection BC for its conduct of investigations involving multiple complaints and preparation of a relatively complex Report. Therefore, I order Simply Green to pay to Consumer Protection BC partial costs for the inspection of this matter in the amount of **$2,500** to be paid within **30 days** of delivery of the Order to the respondent. In calculating these costs, I take into account that in several respects the Report deals with matters unrelated to Simply Green's liability under the Act as found in this decision.

CONCLUSION

The respondent Simply Green has been found to have contravened sections 5, 27, and 189 (5) of the Act and are subject to a monetary penalty, compliance order (for costs only), and a direct sales prohibition. The respondent may apply to Consumer Protection BC to request reconsideration in

respect of these actions within 30 days of receiving these reasons, in accordance with sections 181 and 182 of the Act:

- by fax to 604-320-1663;
- by electronic mail to shahid.noorani@consumerprotectionbc.ca;
- or by mail or courier to the address below:

Consumer Protection BC
Attention: Shahid Noorani, VP of Regulatory Services
200 – 4946 Canada Way
Burnaby, BC V5G 4H7

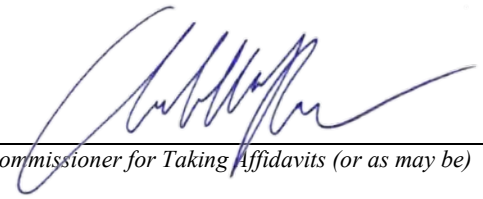
Decision issued June 15, 2020 in Vancouver, BC

original signed

_____

Robert Penkala, Manager, Enforcement Hearings

This is Exhibit "H" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Business Details

Current as of June 25, 2021 at 09:20 AM

Business or individual name	CROWN CREST CAPITAL CORP
Other name (if any)	
Address	2225 Sheppard Avenue East, Suite 800 Toronto, Ontario M2J 5C2 Canada
Phone	1-888-667-5945
Fax	
Email address	customersupport@crowncrestcapital.com
Description of complaint (including the act the complaint falls under)	
Action taken by Ministry of Government and Consumer Services (if any)	
Charges laid (if any)	**CROWN CREST CAPITAL CORP** Consumer Protection Act, 2002, CPA 2002 - Fail to Refund, 4 charges on 9/23/2020 Consumer Protection Act, 2002, CPA 2002 - Fail to Refund, 1 charge on 12/11/2020

[New Search (/en/cbl/search)]

Please note:

Not all consumer complaints submitted to the Ministry of Government and Consumer Services are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

statement)

Business Details

Current as of December 22, 2022 at 12:08 PM

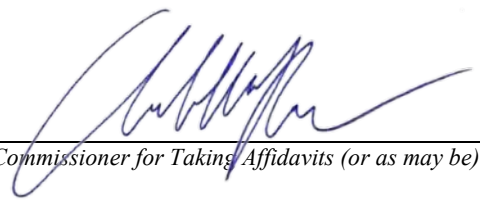
Business or individual name	CROWN CREST CAPITAL CORP
Other name (if any)	
Address	2225 Sheppard Avenue East, Suite 800 Toronto, Ontario M2J 5C2 Canada
Phone	1 888 667 5945
Fax	
Email address	customersupport@crowncrestcapital.com
Description of complaint (including the act the complaint falls under)	
Action taken (if any)	
Charges laid (if any)	Consumer Protection Act, 2002, CPA 2002 - Fail to Refund, 1 charge on 2022-06-10 **Lawrence Krimker** Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 1 charge on 2022-06-10

[New Search]

Please note:

Not all consumer complaints submitted to the Ministry of Public and Business Service Delivery are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

This is Exhibit "I" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Business Details

Current as of June 29, 2021 at 03:22 PM

Business or individual name	Lawrence Krimker
Other name (if any)	
Address	2225 Sheppard Avenue East, Suite 800 Toronto, Ontario M2J 5C2 Canada
Phone	
Fax	
Email address	
Description of complaint (including the act the complaint falls under)	
Action taken by Ministry of Government and Consumer Services (if any)	
Charges laid (if any)	**Lawrence Krimker** Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 4 charges on 9/23/2020 Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 1 charge on 12/11/2021

[New Search (/en/cbl/search)]

Please note:

Not all consumer complaints submitted to the Ministry of Government and Consumer Services are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

Business Details

Current as of December 22, 2022 at 12:10 PM

Business or individual name	Lawrence Krimker
Other name (if any)	Director Crown Crest Capital Corp
Address	2225 Sheppard Avenue East, Suite 800 Toronto, Ontario M2J 5C2 Canada
Phone	
Fax	
Email address	
Description of complaint (including the act the complaint falls under)	
Action taken (if any)	
Charges laid (if any)	Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 1 charge on 2022-06-10

[New Search]

Please note:

Not all consumer complaints submitted to the Ministry of Public and Business Service Delivery are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

Business Details

Current as of November 14, 2023 at 05:44 PM

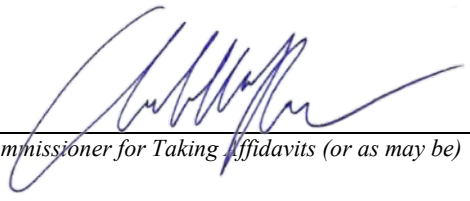
Business or individual name	Lawrence Krimker
Other name (if any)	Director for Simply Green Home Services Inc.
Address	2225 Sheppard Avenue East, Suite 800 Toronto, Ontario M2J 5C2 Canada
Phone	
Fax	
Email address	
Description of complaint (including the act the complaint falls under)	
Action taken (if any)	
Charges laid (if any)	Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 3 charges on 2022-06-10

[New Search]

Please note:

Not all consumer complaints submitted to the Ministry of Public and Business Service Delivery are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

This is Exhibit "J" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Business Details

Current as of December 22, 2022 at 12:09 PM

Business or individual name	SIMPLY GREEN HOME SERVICES INC.
Other name (if any)	Simply Green Home Services
Address	2225 Sheppard Avenue East, Suite 800 TORONTO, Ontario M2J 5C2 Canada
Phone	800 764 5138
Fax	800 764 5138
Email address	customersupport@mysimplygreen.com
Description of complaint (including the act the complaint falls under)	
Action taken (if any)	
Charges laid (if any)	Consumer Protection Act, 2002, CPA 2002 - Fail to Refund, 2 charges on 2022-06-10 **Lawrence Krimker** Consumer Protection Act, 2002, CPA 2002 - Fail to take reasonable care as director, 3 charges on 2022-06-10

[New Search]

Please note:

Not all consumer complaints submitted to the Ministry of Public and Business Service Delivery are posted to the Consumer Beware List. A business or individual is only guilty of the offences in the "charges laid" section of the search results when they are found guilty in a court of law.

This is Exhibit "K" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

Act

Consumer Protection Act, 2002 Review Consultation Paper

Regulation Number(s):

Consumer Protection Act, 2002

Instrument Type:

Act

Bill or Act:

Consumer Protection Act, 2002

Summary of Proposal:

The Ontario government is considering how to improve the Consumer Protection Act (CPA).

The CPA is the law governing most retail transactions by consumers - from buying furniture in a store to shopping online to renovating your home.

The CPA's rules support a fair and competitive marketplace where consumers make their own choices without being subject to unfair business practices.

Whether it's an in-store sale, a written contract or an online purchase, the CPA sets out basic rules for retailers to follow and remedies for consumers if retailers don't follow the rules.

It has been over 15 years since the government has undertaken a full review of the CPA. The CPA needs updating to work better in the new marketplace. Updating it will enhance consumer protection and reduce burden for the retail community in general, while addressing specific problems more effectively than the current law.

The consultation paper explains proposals for a new CPA that would include:

Simpler and Stronger Contract Rules
1. Clearer, Consistent Rules for Consumer Contracts in General
2. Stronger Rules Protecting Against Unilateral Contract Changes
3. Controlling Price Changes in Contracts with Termination Costs

Improved Protection Against Unfair Practices
4. Clearer and Stronger Approach to Unfair Practices
5. Protecting Against Contract Breaking Offers

Better Rules for Specific Contracts
6. Addressing Concerns with Purchase Cost Plus Leases
7. Addressing Issues with Registration of Notices of Security Interests
8. Improving Timeshare Disclosure and Exit Rights

Strengthened Basic Consumer Rights
9. Protecting Consumers' Right to Review Business Performance
10. Prohibiting Contracts Misleading Consumers About Rights
11. Forbidding Dollar Limits on Implied Warranty Claims
12. Preserving Consumer Rights When Contracts Change Hands

Stronger and Clearer Rights to Remedies
13. Remedies for Unfair Practices During Ongoing Contracts
14. Enhanced Recovery if Consumers Forced to Sue for a Remedy
15. Continuing to Improve Ministry Enforcement Powers

We welcome your responses to consultation questions and any additional comments or suggestions you wish to offer. Please provide examples or evidence to support your suggestions where possible.

You may download this paper and submit your completed responses by email to consumerpolicy@ontario.ca or by mail to the address provided.

Further Information:

Improving Ontario's Consumer Protection Act

Proposal Number:

20-MGCS023

Posting Date:

December 1, 2020

Comments Due Date:

February 1, 2021

Contact Address:

CPA Consultation
Consumer Policy and Liaison Branch
Ministry of Government and Consumer Services
56 Wellesley Street West - 6th Floor,
Toronto, ON, M7A 1C1

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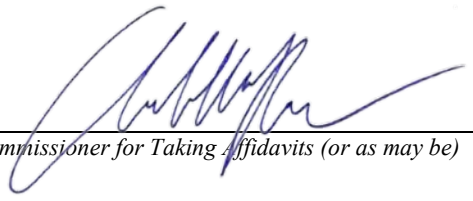
This is Exhibit "L" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

IMPROVING ONTARIO'S CONSUMER PROTECTION ACT

Strengthening Consumer Protection in Ontario

December 2020

Contents

About This Consultation

The Ontario government is considering how to improve the Consumer Protection Act (CPA). The CPA is the law governing most personal and household transactions by consumers - from buying furniture in a store to shopping online to renovating your home.

The CPA's rules support a fair and competitive marketplace where consumers make their own choices without being subject to unfair business practices.

The CPA sets out basic rules for businesses to follow and remedies for consumers if businesses do not follow the rules.

It has been over 15 years since the government has undertaken a full review of the CPA. The CPA needs updating to work better in the new marketplace. Updating it will enhance consumer protection and reduce burden for the business community in general, while addressing specific problems more effectively than the current law.

The CPA protects individuals acting for personal, family or household purposes, not business purposes. It is intended to work with and support a competitive marketplace. The CPA:

- Establishes and protects basic consumer rights with respect to consumer contracts;
- Bans unfair practices such as being deceived or misled by a business about a consumer contract; and
- Sets out which contracts must be in writing, what information must be provided, and what additional rules some contracts must follow.

Why This is Important Now

Now, more than ever, consumers need the power to control their budgets and protect themselves against hidden costs and scams, particularly those exploiting economic hardships.

Businesses need laws to be clear and not to impose unnecessary burdens on entrepreneurs focused on recovery.

We want to ensure that the laws governing the marketplace are in tune with our times and build on the existing consumer protection framework.

Your Comments are Important

The government wants to hear from Ontarians about the parts of the law that are working well and what areas may need to be improved. Your comments will help us create proposals to update the CPA.

We welcome your responses to the consultation questions and any additional comments or suggestions you wish to offer. Please provide examples or evidence to support your suggestions where possible.

You may download this paper and submit your completed responses by February 1, 2021. You can submit comments by email to consumerpolicy@ontario.ca or by mail to:

> Consumer Protection Act Review
> Manager, Consumer Policy Unit
> Ministry of Government and Consumer Services
> 56 Wellesley Street West – 6th Floor
> Toronto, ON, M7A 1C1

Please provide your name and contact information such as an email or mailing address.

Name/Organization

PRO BONO ONTARIO

Contact Information

Lynn Burns
Executive Director
lynn@probonoontario.org
416-977-4448 ext 925

Jennifer Marston
Knowledge Management Lawyer
jenniferm@probonoontario.org
416-977-4448 ext 905

Please also check a box to indicate whether you comment primarily as a:

☐ Business

☐ Business Association

☐ Consumer

☐ Consumer Association

☐ Academic

x Other – Non-profit pro bono legal organization serving consumers

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Thank you for taking the time to review these proposals. If you have any questions about this consultation, please email consumerpolicy@ontario.ca.

Privacy Statement

Please note that unless agreed otherwise by the Ministry of Government and Consumer Services (the ministry), all submissions received from organizations in response to this consultation will be considered public information and may be used, disclosed and published by the ministry to help the ministry in evaluating and revising its proposal. This may involve releasing any response received to other interested parties. The ministry will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization.

Responses from individuals who do not show an affiliation with an organization will not be considered public information. The ministry may use and disclose responses from individuals to help evaluate and revise the proposal. The ministry may also publish responses received from individuals. Should the ministry use, disclose, or publish individual responses, the ministry will not disclose any personal information such as an individual's name and contact details without the individual's prior consent, unless required by law. The ministry may use your provided contact information to follow up with you to clarify your responses.

If you have any questions about the collection of this information, please contact the ministry by email - consumerpolicy@ontario.ca.

Proposals for Your Review

The CPA and its regulations can be complex to read and apply. The CPA review aims to simplify the law and improve its clarity while also improving its effectiveness, both for consumers and businesses.

You do not need to read the current law to respond to these proposals. If interested, the paper includes references to specific sections of the act and regulations that relate to proposals.

This consultation focuses on proposals that the government would potentially develop into proposed legislation to replace the current CPA with a new law. This new law would not come into effect unless, and until, the Legislature passes a proposed bill and government develops, consults on and approves regulations. Until that time, the contents of this paper remain proposals.

We welcome your comments on as many of the consultation questions as you choose to answer, and any added comments or suggestions you wish to offer.

❑ Matters Covered by Other Consultations and Laws

This paper does not address matters covered by other consultations or by laws other than the CPA.

There are other consultations planned on alternative financial services (such as high-cost consumer loans). The government is considering how to better protect vulnerable consumers who use alternative financial services, some of which the CPA currently regulates.

In June 2020, the government announced the creation of a task force to improve provincial oversight of the towing industry. The task force is helping develop a regulatory model that will increase safety and enforcement, clarify protections for consumers, improve industry standards and consider tougher penalties for violators. The Task Force will consider the CPA's towing rules as part of its work. The CPA contains specific tow and storage services rules to help protect consumers who need a tow or roadside assistance in Ontario. The CPA is a major part of consumer protection law in Ontario. However, it is only one of many laws protecting consumers.

- Some laws protect significant purchases in specific sectors – such as a home or used car, travel that is planned with an agent, or funeral arrangements.
- Other laws protect consumers who may be more vulnerable due to their financial circumstances – this includes people using payday loans and people facing debt collection or repossession of their goods.

There are also specialized sets of legal rules governing professionals (e.g., lawyers, veterinarians, regulated health professionals, accountants). Federal law governs matters such as consumer product safety, copyright, bankruptcy, product labelling, banking and telecommunications.

The next sections of the paper explain the proposals for changes to the CPA that are the subject of this consultation.

Simpler and Stronger Contract Rules

Communications technologies are continuing to change how businesses and consumers interact. The CPA currently uses contract categories such as “internet,” “remote,” meaning transactions completed by phone or mail, and “direct,” meaning transactions completed away from a place of business such as in a consumer’s home. All of these contract categories are impacted by changes in the use of technology.

Consumers also increasingly enter into ongoing and long-term contracts through subscription services and memberships. In addition, leases of household appliances are more common. With these trends, consumers may also find they have entered into contracts with automatic roll-overs, renewals or price increases in fine print. These are all things the CPA could better address.

1. Clearer, Consistent Rules for Consumer Contracts in General

Businesses and consumers can be confused by the CPA’s approach to requirements for written contracts. The CPA currently divides contracts into several categories when it imposes requirements that contracts must be in writing. Different categories include if the consumer and business are not in the same place when they enter into a contract or if either party is to do something in the future, such as make a payment or make a delivery.

In these situations, it is useful to make sure the consumer and business are clear about what each party is agreeing to do, and for the consumer to have a copy of the contract. As communications technology continues to create new ways to shop and blurs the lines between the ways we shop, it can be confusing to determine which category of rules under the CPA applies to a contract (e.g., internet or future performance). For example, a consumer stands in a store and orders something for future delivery using the store’s computer.

The issue is that the CPA’s current rules, based on different categories of contracts, is increasingly becoming more difficult for businesses to apply and for consumers to understand as business continues to innovate.

A more technology-neutral approach to consumer law would better serve Ontario in the future. Basic rights and obligations should not differ between different ways of shopping, unless evidence calls for more rules in specific areas, such as door-to-door sales.

The ministry is considering if the CPA should include one set of core requirements when contracts must be in writing to make it simpler for businesses and consumers. The three

sets of existing rules (internet, remote and future performance) currently have similar contract requirements such as the need to include the name of the business, the goods or services and prices paid for them, payment terms, delivery dates and other critical information. They could be consolidated into a single set of rules without reducing consumer protections or increasing business obligations. This would mean that consumers and businesses would only have to check one list of rules to understand their rights and responsibilities in most cases.

There are rules for additional types of contracts in the CPA where there is a need for greater intervention such as cooling-off periods or added rules about disclosure or payment. These specific additional rules would continue in areas such as motor vehicle repair, water heaters, fitness clubs and timeshares.

Subject to the passage of a bill applying this approach to the CPA, the ministry would consult on regulations to create this core set of disclosure rules.

Proposal #1: Combine written contract disclosure rules for internet, remote and future performance agreements into a single set of core rules to apply except where there is a demonstrated need for more specific disclosure requirements.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

The details of such a core set of disclosure rules would be part of a consultation on regulations, should the proposed changes be made. You are welcome to make suggestions before that consultation.

Explanation and Additional Comments:

Pro Bono Ontario (PBO) is a registered charity whose mandate is to harness the skills and commitment of volunteer lawyers to address the unmet civil law problems of low-income Ontarians to help them lead secure, healthy, and productive lives. PBO delivers on this mission by developing and directly managing pro bono programs that enable lawyers to provide high-quality legal services to those who cannot afford a lawyer or qualify for government-funded legal assistance. PBO provides direct legal services to consumers through several programs, but the majority are assisted by PBO's Free Legal Advice Hotline (the "Hotline"). Since the

Hotline launched in 2017, staff and volunteer lawyers have answered almost 8,500 calls in the area of consumer protection and debt.

In 2018, PBO entered into a fee for service agreement with the Ministry of Government and Consumer Services, wherein PBO provides legal assistance to consumers whose issues could not be resolved through the Ministry's complaints process. As of writing, PBO has provided 3,075 consultations to 1,225 clients referred by MGCS. These clients present with several, often intersecting problems, the top five of which are:

Door-to-Door Sales	1188
Consumer Rights re Contracts	307
Commencing Small Claims Proceedings	174
Work Inadequate or Not Performed	128
Consumer Complaints - General	83

Our clients experience multiple dimensions of vulnerability in addition to low-income. For example, 46 percent of consumers calling about door-to-door sales contracts are senior citizens. This submission is based on our extensive experience assisting Ontarians who depend on the CPA's ability to create meaningful and enforceable consumer rights and deter bad actors.

PBO agrees with this proposal, and with any efforts to simplify the terms of the CPA.

PBO has observed that the different contract categories as described above by the Ministry often result in confusion, even for lawyers accustomed to reading complex legislation. As the Ministry has noted, in many cases, it is difficult to determine which category applies to a particular transaction. In other cases, a transaction falls into multiple categories, and PBO lawyers must review and compare multiple sets of prescribed requirements that are only subtly different from one another to determine whether a contract has met the requirements of both categories. This exercise is no doubt just as difficult for businesses attempting to follow the rules,

and is beyond the reach of most members of the public without the assistance of a lawyer. A simplified approach would benefit all parties.

PBO also recommends that the remedies under the CPA be simplified for similar reasons, as explained further under “Other Suggestions”, at the end of this submission.

2. Stronger Rules Protecting Against Unilateral Contract Changes

Consumers are sometimes concerned about why they are still paying for a membership that they thought should have expired, or whether a charge on their credit card has increased from the price they agreed to pay when they first subscribed to a service.

Both consumers and businesses want certainty in contracts – knowing what they are promising and for how long, for example when billing will end. To promise a specific price or other terms, businesses may need a commitment for a specific time period. Consumers also want predictability and expect when they enter into contracts that they will get the promised good or service on the terms and price they agreed.

The current CPA allows for amendments to any contract if the consumer gives clear consent. This is the only way to amend most contracts governed by cooling-off periods. The majority of contracts can also be amended if a business gives notice to the consumer as long as the contract meets certain requirements, including a requirement to give the consumer either an option to end the contract or an option to keep it unchanged (or both) instead of accepting the amendment (see General Regulation, sections 41 to 43).

The current approach that allows amendment by notice has several challenges. Proving businesses sent notices or proving consumers received notices can both be difficult. Consumers do not always read a notice in time to use the choices provided (termination and/or leaving the contract unchanged). Finally, whether a termination option must be without cost is also unclear.

The ministry is considering whether a clearer set of rules that are easier to apply could balance the ability of a business to change a contract with the ability of a consumer to end it. Either the contract is one that both parties will stick with as written for the duration, or it is a contract that the business can change but that the consumer can walk away from whenever they wish.

Proposal #2(a): The only way to change a consumer contract should be if:

- **The consumer expressly consents, in writing if the initial contract needed written consent; or**
- **The business sends advance notice of the change and:**
  - **The contract is one which the consumer can cancel at any time and without termination costs; or**
  - **The change(s) do not increase the consumer's obligations or reduce the business's obligations (e.g., disclosing changes in business contact information).**

x Agree

☐ Disagree

☐ Other – Please Explain Below

Explanation and Additional Comments:

PBO agrees with this proposal.

PBO has observed that consumer contracts are frequently characterized by unequal bargaining power. Even if a contract is entered into freely and is viewed by all parties as being in their interests, the reality is that an individual, low-income consumer inevitably bears a greater risk of unforeseen circumstances and change. As such, legislative provisions respecting the prospect of changing consumer contracts should be consumer-friendly in the manner outlined by this proposal.

Proposal #2(b): Automatic contract renewal should only be possible if the consumer then has an ongoing ability to cancel at no cost from that time onward.

Contract renewal could be either by express consent, in writing if the initial contract needed written consent, or by a renewal process that includes advance notice to the consumer and renews the contract into an indefinite term (e.g., month-to-month or a shorter period) with no termination costs.

x Agree

☐ Disagree

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal. Our observations above respecting unequal bargaining power apply to this issue as well.

In addition, to address the common problem of notices "going astray", as noted by the Ministry, we suggest that consumers should be relieved of the obligation for payment for any period following the renewal date and up to the date of cancellation, provided the consumer did not avail themselves of any benefit during that period.

Proposal #2(c): If adopted, these rules would apply to all contracts entered into after the rules come into force and to existing contracts one year after the in-force date (e.g., a subscription to a service entered into before the law is changed could not be amended or renewed without either clear consent or adopting a cost-free termination right after one year following the in force date of the new law).

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal, with the caveat that the Ministry should examine available data respecting amendments and renewals, with a view to adopting an even wider application regime if data suggests that existing contracts have caused significant problems for consumers.

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3. Controlling Price Changes in Contracts with Termination Costs

Consumers have raised concerns with not being able to rely on the prices that contracts appear to set out. A clear contract commits both parties to specific dollar amounts for a set amount of time. Even contracts lasting several years use this approach in some cases. For example, automobile leases usually last 36 to 48 months, but commit to fixed lease payment amounts for their entire term.

However, some contracts use price escalation clauses allowing businesses to increase charges every year. Consumers are often unaware of price escalation clauses as they are usually in the later pages of a contract, in smaller print along with more standard contract terms, such as those for late payments.

For example, consumers leasing a water heater under a contract on which the front page clearly shows a lease rate of $34.99 a month might see that monthly cost increase every year, so that after five years they would in some cases be paying almost $50 a month.

Price escalation clauses may set out a formula for increasing prices or provide for annual increases equal to or greater than the national measure of inflation calculated by Statistics Canada, the Canadian Price Index (CPI). A consumer reading the fine print in their contract might see a provision stating the “annual price increases CPI + 2%”, meaning that if inflation was 2.5% in a year, their price would go up 4.5% at year end. Such increases compound year over year, potentially making products and services more expensive over time.

Currently, the CPA allows such price escalation clauses where the price paid over the course of the contract can increase over time. The CPA could better ensure that consumers can rely on the prices set out in contracts.

The ministry is considering whether the CPA should ban changing the amount charged during the term of the contract, unless consumers are able to cancel cost-free at any time. This would mean that if the contract uses monthly or annual payments those amounts must be the same until the contract ends. Exceptions could allow a business to offer to waive initial payments as a signing bonus or defer payments for a consumer in difficulty.

Contracts that allow consumers to cancel without penalty at any time, for example with a month’s notice in a month-to-month contract, would be able to increase prices either through price escalation clauses or by notice.

Proposal #3: Allow price changes under contracts only if the consumer explicitly consents to them as amendments to the contract (in writing if the initial contract needed written consent) or if the contract also gives the consumer a right to cancel cost-free at any time.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

If you believe price increase or escalation clauses are necessary in contracts where consumers cannot cancel without penalty, please tell us why.

Explanation and Additional Comments:

Additional Suggestion: Written Notice Requirement

PBO agrees with this proposal, but suggests that suppliers also be required to give written notice of each price increase, even where there is a price escalation clause in the contract.

PBO has observed that pricing changes have been used by a number of suppliers and assignees of suppliers to regain access to the bank accounts of consumers who have properly cancelled contracts (or become aware that their contract is void under section 43.1 of the CPA) and have stopped payment under pre-authorized debit arrangements. It would appear that banks are interpreting requests to cancel pre-authorized debit arrangements as if they apply only to the dollar amount initially specified by the consumer in their cancellation instructions to the bank. Requiring written notice of price increases (along with express consent or a cancellation right) would provide such consumers with an opportunity to refresh their stop payment instructions.

Additional Suggestion: Identify Full Contract Cost on First Page of Contract

The challenge of identifying the full impact of price escalation can also be mitigated by ensuring that consumers have the best possible access to information about the overall cost of a contract. While the Ministry's proposals address the issue of burying fine print, the additional requirement of identifying the full contract cost on the first page of a contract will allow consumers to easily assess the impact of any proposed escalation, as discussed further under Proposal #6(b).

Improved Protection Against Unfair Practices

The CPA does not allow businesses to make false, misleading, deceptive or unconscionable representations in connection with consumer contracts (see CPA sections 14, 15, and 17). These unfair practices contravene a consumer's right to make free and informed choices.

Over the past 15 years the ministry has seen new unfair practices emerge and has also found weaknesses in the CPA's approach to addressing some practices.

4. Clearer and Stronger Approach to Unfair Practices

The CPA's approach to unfair practices needs to be strengthened. The list of examples to help understand and apply these prohibitions has not been updated in over 15 years and the prohibition against unconscionable conduct such as price gouging needs to be stronger.

The CPA both prohibits unfair practices and gives a list of examples of prohibited misleading practices to make the law easier for consumers and businesses to understand (see CPA section 14) — for example, misrepresenting whether goods are new or used or the reason for contacting a consumer, such as pretending to be calling about a contest when the real purpose is to sell them something.

The ministry is considering two ways that these rules could be improved. The first would be to add more examples of unfair practices to make them easier to understand and better address practices in the marketplace today, including in areas like aggressive door-to-door sales. Examples of new misleading practices could include:

- Falsely claiming to have a government license or approval; and
- Claiming a consumer has or will win a prize or get some similar benefit when there either is no prize or benefit or the consumer would have to pay to get it.

The second way the ministry is considering improving the CPA is to take a stronger approach to conduct such as price gouging and convincing consumers to enter excessively one-sided contracts. Even though these are unfair practices, the CPA does not ban actions such as price gouging or using undue pressure on consumers the same way it bans misleading practices. Instead, the current the Act states that, in determining whether a representation is "unconscionable," it may be "taken into account" that the person "knows or ought to know" that they are engaging in such practices (CPA section 15).

It would be clearer and provide stronger protection for consumers if the law no longer used this multi-part approach. Instead it could set out examples of prohibited unconscionable conduct, clearly defined and readily understood, just as there is a list of examples of prohibited misleading practices.

Examples of unconscionable conduct this approach would address more strongly include price gouging, using improper pressure to obtain a consumer's consent, entering into contracts where there is no reasonable probability of the consumer paying their obligation in full, or taking advantage of factors such as a consumer's inability to read the language of a contract.

Recently, the Ontario government used this clearer approach in its emergency order on price gouging during the COVID-19 outbreak, which clearly banned the practice of charging grossly excessive prices for necessary goods.

Proposal #4(a): Add more examples of expressly forbidden misleading practices such as false claims of government oversight or other licensing and false prize claims as unfair practices.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

Explanation and Additional Comments:

You may enter any additional comments here:

Suggested Examples of Misleading Practices

PBO agrees with the proposed examples of expressly forbidden misleading practices above, and suggests that the following additional items also be considered:

i) Giving the impression of affiliation with a government body or agency, even if no direct claim is made, e.g. through use of an ambiguous name (names including "Ontario", for example), misleading identification badges, or other words or conduct.

ii) Obtaining entry to a consumer's home or business by offering an "inspection" or "assessment" of any kind when one of the purposes of the visit is to promote the sale of a product or service.

iii) Failing to identify that one of the purposes of approaching a consumer is to promote the sale of a product or service.

iv) In the absence of independent, written evidence from an objective, arms-length source, giving the impression that a product or service will enhance a consumer's safety.

v) Any practice that has the effect of confusing the consumer regarding the applicability of section 43.1 of the CPA to the contract, such as including language in a contract suggesting the consumer has invited the supplier to the door (in order to discourage reliance on section 43.1 for prescribed goods).

vi) Misleading the consumer regarding the efficacy, state or condition of current equipment.

vii) Misleading the consumer regarding returning or dealing with any current rental equipment. PBO has seen situations where, for example, a consumer is already renting a water tank and a new supplier tells the consumer that the current tank is not good, and that they will remove it and return it to the owner. However, they remove it but do not return it, leaving the consumer responsible for two pieces of equipment.

viii) Representing that consumers will receive a rebate or discount that does not exist.

ix) Representing that the goods are required by law, if they are not.

Unfair Practices After Execution and During Contract Administration

As detailed under Proposal #13, PBO also recommends that unfair business practices be expanded to encompass practices engaged in by the supplier or assignee of the contract after the contract has been executed, both in the administration of the contract and in response to attempts to cancel the contract, given that misleading conduct is commonly used to defeat consumer rights at later stages in the relationship.

Recognition of Unfair or Unconscionable Practices is Not the Main Problem

While we support the expansion of the examples of unfair practices, in PBO's experience, consumers are not having difficulty recognizing unfair business practices or outright fraud, and seldom refer to the statute. The real problem for consumers who have exercised a legitimate right to cancel for unfair business

practices (as well as for those who cancel during the cooling-off period or whose contract is void by reason of section 43.1) lies in the damage that the supplier can do to the consumer's credit if the consumer cancels payments under a void or cancelled contract, and the adverse effects of a notice of security interest registered on title to their home, which can be removed only if: a) the consumer is somehow able to persuade an unwilling security holder to remove it; or b) the consumer is able to bring a successful application to the Superior Court, a costly, time-consuming process which is out of reach for most people without the help of a lawyer. This issue is discussed further below under Proposal #7(a).

Proposal #4(b): Strengthen the banning of unconscionable practices by explicitly prohibiting certain specific practices such as price gouging.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

If you have suggestions for other practices to be defined as misleading or unconscionable, please include them below.

Explanation and Additional Comments:

Suggested Additions to Unconscionable Conduct

PBO supports an expansion of examples of unconscionable practices to include those listed above. Although the CPA addresses unfair business practices of all types, it currently provides examples almost exclusively, of misrepresentations rather than unconscionable practices.

We suggest the following as additional unconscionable practices:

i) Instructing the consumer on how to respond to questions asked on "verification" calls. These calls take place in the consumer's home at the behest of the supplier representative, who dials a phone number for the consumer, holds the phone up to the consumer, and tells the consumer to just answer "yes" to each question asked, regardless of what is said. The questions are framed and the call is recorded for the purposes of defeating section 43.1 and other sections of the CPA.

ii) Failing to provide a copy of the contract in a timely manner. Although a right to cancel for failure to provide a copy of the contract exists in other sections of the CPA, it is a practice used to prevent consumers from understanding their rights and should be considered unconscionable and subject to the potential extension of the notice period in the interests of justice available under section 18(15) of the CPA.

iii) Suggesting to the consumer that they do not have to read the contract.

iv) Suggesting to the consumer that a product or service or a particular price for that produce or service will only be available if they sign immediately.

v) Discouraging a consumer from taking time to consider the agreement or from consulting with a third party about the agreement.

vi) Suggesting to the consumer that the price the consumer will pay is different from the price reflected in the contract (for example by virtue of the existence a rebate).

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5. Protecting Against Contract Breaking Offers

Over the last several years, consumers have raised concerns to the ministry that they have lost money by paying a company in advance for help to get out of contracts they have signed without receiving any benefit. Such contracts can involve ongoing payments for items such as timeshares, water heater leases or other installed home appliances (e.g., furnaces, water filtration systems or smart home systems).

Consumers may pay these companies thousands of dollars in advance for help to end a contract or to transfer their obligations, such as negotiating lower termination costs with a water heater rental company or finding a purchaser for their timeshare. The consumer then finds they either get no help or receive an offer that is not meaningfully better than the termination charges they already considered too harsh.

The CPA does allow for some advance payments. Certain businesses can only operate if they receive some payment in advance (for example, many home renovators need money in advance to pay for supplies).

However, the CPA bans advance payment for some services that were found in the past to be taking consumers' money without providing any real result. In those cases, the CPA prevents businesses from demanding payment just for "trying" to deliver the service. These bans cover services targeting consumers with credit problems, namely loan brokering and credit repair. In these cases, the CPA bans payment until the consumer

receives the loan or the consumer's credit report is materially improved. The CPA also gives consumers a 10-day cooling off period in which they can cancel such agreements.

The ministry is considering whether the CPA should include new advance fee bans for contract breaking services in order to prohibit payment until the consumer gets a clearly agreed upon outcome, such as ending or transferring their contract obligations without greater cost than they expressly agreed.

Proposed new bans would be applied in a similar way to existing bans which define clear criteria for the business to meet before demanding or accepting payment. For example, if the consumer agreed that they are looking to end a contract for a total cost of no more than $500, the service could take payment only once it delivered that result. Such costs would have to clearly include the termination or exit service's own fees.

Proposal #5: Ban advance payment for contract breaking and exit offers such as timeshare exit and home fixture lease breakers. Payment should only occur after the consumer receives at least the minimum outcome the law requires for an agreed cost.

Agree

☐ **Disagree**

x **Other – Please Explain Below**

If you have suggestions for other businesses that should not take payment in advance, please include them below.

Explanation and Additional Comments:

Further Issues with Home Fixture Lease Breaking Services

PBO is reluctant to take a firm position on this proposal because we think advance payment arrangements can be fair and ethical. We submit that the Ministry should focus on the dubious practices that are taking place, and remain open to a market in which these services are provided appropriately. As a related point, we worry about unintended consequences of a ban. For example, some may (however wrongly) interpret a ban as an indirect criticism of practices such as collecting retainers for legal fees, which are well regulated and do not need to be revisited as part of this consultation.

One fundamental problem we see is that these contract breaking agreements, as they are drafted, are often so imprecise that determining whether they have been

performed seems impossible and, to the extent there is any obligation on the service provider, it would appear to be minimal. Consideration should be given to regulating direct contracts for home fixture lease breaking services.

PBO has observed that different service providers operating in the home fixture lease breaking realm employ a form of service contract with similarly vague terms. The Ministry's proposal to ban advance payment may have little practical effect, as the contracts themselves do not contain any clear description of the service to be provided or the outcome to be sought by the service provider or any significant obligation on the service provider.

The home fixture lease breaking service agreements as observed by PBO generally:

1. Do not provide specifics of the contract to be broken.

2. Imply that the service provider will aim to resolve the consumer's "dispute" without recording any information regarding the nature of the dispute, what is owing under the contract, what steps the consumer may have already taken to exercise their rights or how many years prior the contract was executed. In some cases, the contracts to be broken have not even been provided to the service provider.

3. Do not provide for an opinion as to whether the consumer has a valid basis for dispute, although one form of contract provides for a "non-legal" review.

4. Create a highly inappropriate and opaque scheme involving the possibility that legal counsel will be engaged on behalf of the consumer in order to resolve the unspecified dispute. This scheme is propped up by the practice of having the consumer appoint the representative, on their doorstep, to act as their attorney for property in relation to the undisclosed dispute, by executing a Limited Power of Attorney. We have observed that these Powers of Attorney are often witnessed only by the supposed attorney, which would render them invalid at law. The contract-breaking service agreement furthers the scheme by cautioning the consumer that it is improper for the consumer to engage with the supplier thereafter, as the consumer is now represented by counsel.

5. Do provide in the mandatory disclosure that the consumer can lodge a complaint with the Ministry without the assistance of the service provider, but:

(a) do not obligate the service provider to lodge a complaint with the Ministry on the consumer's behalf, and

(b) do not provide the parallel mandatory disclosure regarding the availability to the consumer, at no cost, of accessing consumer protections.

In addition, PBO has observed that contract breaking services have commenced risky and ill-conceived litigation on behalf of consumers without obtaining their instructions to do so. In one particularly troublesome case, a number of these consumers were thereafter sued by a finance company for abuse of process, even though they didn't even know that lawsuits were started on their behalf.

Better Rules for Specific Contracts

The CPA has additional rules for contracts in sectors with a greater history of harming consumers. In each case, the CPA has specific rules to address the risk of harm. The ministry is considering two sectors where the CPA could be amended to better address consumer concerns.

6. Addressing Concerns with Purchase Cost Plus Leases

The ministry has heard concerns over consumers entering into a lease or rental agreement under which the consumer would eventually pay more than they would to buy the item outright (referred to in this paper as "purchase cost plus leases").

Consumers see an increasing variety of products, such as water heaters, furnaces and security systems, offered under leases, rather than as cash sales or financed purchases. Instead of purchasing an item and making monthly payments for it, the consumer gains the use of the item for similar monthly payments but does not become the owner at the end of the contract.

The ministry has heard concerns that some leases can be very costly to end, using what is called 'full cost termination', meaning that a consumer who wishes to end the lease early must to make all the remaining lease payments. For example, if the lease was expected to last ten years, and a consumer wishes to cancel after three years, they would have to make the remaining seven years of lease payments immediately. In situations where the lease's duration can be the product's whole useful life, a buy-out or termination cost can be two or three times the item's purchase value.

An additional concern is that key terms in a contract that result in such high termination costs are usually found amid mostly ordinary 'boilerplate' terms and conditions. As a result, consumers often do not realize the size of these termination costs until they face a need to end a lease early.

While the CPA currently limits the cost to end a loan by paying it off early (CPA section 76), it does not limit the cost to end a long-term lease, even if it is for the entire life of the product. Under a typical credit (loan) agreement, a consumer cannot owe more than their purchase's original cost to pay off their loan unlike what can happen in a full cost lease termination. This means a consumer who leases a water heater or furnace may face much higher termination costs than a consumer who finances the purchase of the same item.

The ministry is considering ways to improve sections of the CPA to define a category of lease where total payments, whether over the life of the lease or due to added termination costs, exceed 90% of the leased good's retail value. This would cover leases that are replacing financed purchases of the product.

Most of these transactions are entered into in consumers' homes, making them 'direct agreements' with a 10-day cooling-off period. If made online, as may be the case in future, under the current CPA such contracts would no longer have the benefit of a cooling-off period.

Given the circumstances often surrounding the formation, duration, cost implications and complexity of these contracts, a cooling-off period may be appropriate whether or not they are direct agreements (e.g., the same way in which timeshare and fitness club contracts have cooling-off periods regardless of how they are entered).

In addition, the ministry is considering whether leases in this category could then be subject to several rules.

- A 10-day cooling-off period, regardless of how the consumer enters into the contract.
- Clear, standard format, first page disclosure obligations to ensure consumers have a better understanding of key lease costs and terms.
- Limits on termination costs similar to the limits on prepayment charges for loans, meaning that costs would decline from the retail value of leased items over time.

Under such reforms, leases would continue to be subject to full cost disclosure rules and need to show their implicit interest rate, as a Lease Annual Percentage Rate (APR). The lease APR discloses the interest rate a lease is using to calculate payments. Just like loans, all long-term leases have interest rates. The Lease APR allows a consumer to compare the cost of leasing to the cost of financing the same product since loans also disclose an APR.

Under the proposed approach, a consumer who ended such a lease early would only owe a portion of the cost leased item, considering their payments to date. The calculation of the maximum permitted cost would parallel maximum loan prepayment costs, treating lease payments as if they were loan payments and using the Lease APR to calculate the

interest rate. A consumer would thus never owe more than the product's retail price, including installation and other fees shown as part of the purchase price. Many businesses leasing such items to consumers already use a declining payout schedule of this sort.

Applying the same principles to purchase cost plus leases as those applied to credit agreements would also mean that any services provided in connection with such a lease would have to be either:

- considered part of the lease and included in the lease costs and Lease APR, continuing or ending with the lease; or
- considered separate service contracts, in which case they would be optional services subject to termination by the consumer at any time without penalty.

Consumers who buy new homes often enter into leases as part of the real estate transaction. The CPA does not cover these leases as it does not govern new home sales. However, through new regulations under the *New Home Construction Licensing Act*, the law could require that home builders give consumers a copy of a CPA-compliant lease, sale or service contract if one is part of a new home purchase (e.g., as a schedule to the agreement of purchase and sale). This would ensure information needed to calculate lease termination costs is set out. The proposed termination rights could then also apply to these leases.

Termination rights would continue despite a lease changing hands through home resales, with a new home owner taking over the declining schedule of termination costs.

The ministry would also consider steps to promote better disclosure of lease terms and termination rights to purchasers of resale homes to help ensure that they are aware of the implications of any on-going contracts associated with their home purchase.

Proposal #6(a): Make all leases with total payments exceeding 90% of the item's retail value include a 10-day cooling-off period, regardless of whether the contract was entered in-home, in-store, online or otherwise.

x Agree

☐ Disagree

☐ Other – Please Explain Below

Explanation and Additional Comments:

PBO agrees with this proposal, but notes that the effectiveness of the cooling-off period is dependent upon several other factors. In particular:

- Exercise of the cooling-off period is dependent on consumers receiving copies of the contract, which continues to be a problem in the case of door-to-door sales. As discussed below under “Other Suggestions”, this could be addressed by requiring suppliers to provide a copy of all contracts to the consumer by traceable means, and putting the onus on suppliers to prove that they have done so if challenged by the consumer.

- PBO has encountered many instances where a financing agreement is the only evidence of a direct agreement for equipment supply. In other words, it appears that no lease or supply agreement has been provided to the consumer. This renders the cooling-off period irrelevant, unless disclosure requirements are extended to related financing agreements, as PBO recommends below under “Other Suggestions”. If a consumer receives only a financing agreement that contains no disclosure of the existence of a cooling-off period, then the financing company is shielded from cancellation during this time period, notwithstanding that the consumer would be released from that finance agreement pursuant to the CPA if they were to cancel the non-compliant supply agreement during the cooling-off period or otherwise.

- One tactic routinely used by suppliers to defeat cooling-off rights is the immediate installation of new equipment, and the removal of the consumer's existing (often fully functional) equipment, without providing trade-in value, without informing the consumer that the equipment will be immediately destroyed, and without advising the consumer of the implications of this practice on their right to cancel during the cooling-off period, or on any subsequent rescission request (the latter is discussed below under Proposal #6(b) and under “Other Suggestions”). Suppliers in door-to-door sales (1) should not be able to install the equipment until the cooling-off period is complete, or, at minimum (2) should be required to retain the consumer’s old equipment for the duration of the cooling-off period and to immediately return and reinstall any equipment they removed once the consumer cancels, in the same condition as when it was removed from the home.

- While PBO acknowledges that exercising the right to cancel a contract during a cooling-off period does not require technical expertise, we suggest that it should be as easy as possible for consumers to do this. One possibility is a requirement that contracts with a cooling-off period contain a mandatory,

one-page, plain language, fill-in-the-blanks form called “Consumer’s Notice of Cancellation During Cooling-Off Period”. This would relieve consumers of any technical hurdles involved in enforcing this important right. PBO suggests the creation of similar forms for all aspects of rights enforcement under the Act.

Proposal #6(b): Require leases of this type to make standardized and consistent first page disclosure of critical contract information including their full cost and buyout charges.

If you have suggestions for critical disclosure requirements, please include them below. Please note that such a requirement would be in regulations, subject to the passage of a proposed bill. There would be further consultation in developing the disclosure requirements. Your suggestions now would help inform proposals for that consultation should this proposal move forward.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO has answered over 1,800 phone calls in the past three years from concerned consumers regarding contracts entered into for equipment installed in their homes at a cost that greatly exceeds its value, as described above by the Ministry. Although section 43.1 of the CPA has improved this situation by forbidding the door-to-door supply of certain types of equipment, direct agreement companies have pivoted to other products like home security or home automation systems, and have begun employing sophisticated and deceptive means of securing “invitations” to consumer homes to circumvent section 43.1.

PBO agrees that improved disclosure is crucial to protecting consumers.

Non-Disclosure is the Norm

Of the hundreds of purchase cost plus lease agreements PBO has reviewed, we can recall **none** that have complied fully with the CPA disclosure requirements. Invariably, there has been no disclosure of the lease value (i.e. retail value) of the equipment in these contracts. Most forms of lease currently in circulation are not compliant with the CPA in this respect, and in rare instances where the form of lease does contain a box for inserting this value, the box is routinely left blank in practice. Overall, very little of the mandated disclosure actually included has been disclosed in accordance with either the general requirements of section 5 of the CPA or the specific requirements of the regulations regarding prominence.

Disclosure deficiencies are among the most frequent complaints PBO hears from consumers, second only to unfair business practices. Consumers routinely report that they would not knowingly have signed the agreement had they realized how much they would have paid relative to the retail value of the equipment over the life of the contract. That is, had the mandated disclosure been made and understood, they would not have signed.

PBO has many clients who have discovered the disparity between the retail value of the equipment they have leased and the amount payable over the life of the lease only when their legitimate efforts to cancel without obligation (in connection with a CPA-derived right or an oral misrepresentation) are rejected by the supplier. Some discover the disparity only when they are in a desperate position due to a pending sale or refinancing of their homes.

As noted above, PBO also sees cases where a financing agreement is the only evidence of a direct agreement for equipment supply (i.e. the presumed sale agreement). In these cases, there is no written record of the terms of supply at all, contrary to the CPA requirements for direct agreements, and thus no disclosure compliance of any kind. As discussed further under “Other Suggestions”, below, PBO recommends that disclosure obligations under the CPA with respect to the retail value of the goods or services be extended to apply equally to financing agreements related to direct agreements for the sale or lease of goods.

Every Failure to Disclose is Significant

Disclosure is addressed by the CPA to help the consumer to understand the obligations that come into play on *signing* an agreement. If any element of mandated disclosure is deficient, the agreement is inequitable simply by virtue of the unavailability of critical information to the consumer.

Enforcement is Essential

While PBO strongly supports the proposed change, it is critical be mindful of supplier disregard of existing requirements. This disregard suggests that expanding rights is not enough. Instead, *effective enforcement* of the CPA disclosure requirements is key to giving effect to consumer rights under the Act, including the proposed amendments.

Contract disclosure is entirely within the control of the supplier and should be a routine business matter. Cancellation based on non-disclosure also has the potential to be a powerful remedy for consumers, given that non-disclosure is apparent on the face of a contract and can be assessed by the Ministry without the need for adjudication of disputed accounts between the parties. The proposed changes to disclosure requirements combined with consistent enforcement would improve consumer outcomes considerably.

Disclosure Deficiencies Should Justify Discharge of NOSI

The consumer, on discovery of any failure to meet even a single disclosure requirement, must have an effective right to cancel the agreement. Effective enforcement is the only way of making consumers whole and incentivizing lawful behaviour. Due to the unfair advantage that notices of security interest give to suppliers in the door-to-door sales context (as detailed in our response to Proposal #7(a)), and because non-disclosure is a matter apparent on the face of the written agreement, a means of applying *ex parte* to clear the notice from title would be a fair and reasonable remedy for the consumer in such circumstances. This could be created by amendment to the *Land Registry Act*, the *Personal Property Security Act* and/or the CPA, as discussed further below under Proposal #7(b).

Suggested Front Page Disclosure, Including Regarding Oral Representations

PBO has observed that by far the most prevalent form of false representation in the formation of direct agreements is that the consumer will not have to pay the prices disclosed because they are eligible to receive a rebate, or to receive the equipment for free or at a discount to the price shown. Although the CPA already facilitates the provision of oral testimony in court to counter the terms written into the signed agreement, mandating a disclosure statement *in plain language and with context,* similar to that suggested below should reduce the need to litigate on these matters.

PBO suggests the following first page disclosure for the typical purchase cost plus lease agreement, requiring signature on the first page and *initialling of each element* of disclosure:

By signing and initialling below, I acknowledge that:

- ❑ I am committing to making monthly payments in the amount of $____ each for a term of _____ years.
- ❑ Over the term of the agreement I will pay $**[total lease cost]** for equipment with a **current retail value of $_____**.
- ❑ I may be responsible for these payments whether or not the goods function as expected.
- ❑ If I want to cancel this agreement early, I will have to pay a fee at least equal to the part of the retail value of the goods remaining unpaid. I understand that I cannot cancel this agreement and return the equipment without paying out the remainder of the lease, unless there is a legal reason to do so.
- ❑ This agreement allows the supplier and its assignees to register a notice on the title to my home as soon as the goods are installed, which will affect my ability to renew or increase my mortgage or sell my home without the co-operation of the supplier or its assignees.
- ❑ If any promise was made to me that is not included in these pages (for example if I have been promised that the pricing shown does not apply to me, or that I am entitled to receive a rebate, or that I can cancel anytime without charge), I may have no remedy if the supplier does not honour that promise.

Proposal #6(c): Limit termination costs of such leases in a similar way to limits on loan prepayment costs. Maximum termination costs would decrease over time in keeping with a disclosed schedule, based on the implicit finance rate in the lease, just as loan prepayment costs decline over time.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO strongly agrees with this proposal. As noted above, the amounts demanded by suppliers to buy out these contracts are generally a shock to consumers, and far exceed the value of the goods provided. This would significantly improve outcomes for consumers and would decrease disputes, given that many consumers would be willing to pay to terminate when necessary if the prices were fair.

PBO also suggests that the lessee be required to provide monthly or quarterly statements to the consumer, so that the consumer is aware of the current termination cost throughout the life of the contract.

Proposal #6(d): Require service contracts connected with such leases to be optional services subject to termination by the consumer at any time, unless service is included in the lease and its costs covered by the lease cost disclosures. As optional services, this would mean the business could raise the price of such services from time to time under Proposal #3, since the consumer may cancel without cost.

☐ **Agree**

☐ **Disagree**

x **Other – Please Explain Below**

Explanation and Additional Comments:

PBO has not observed service contracts associated with purchase cost plus leases in any way other than that such contracts may be part of the menu of goods or

services to which some suppliers seek the consumer's long-term commitment. Most often though, these service offerings seem to be used as part of an unfair business practice in relation to an equipment lease. The consumer is offered the service contract at no *additional* cost as an inducement to signing a high-priced, long-term, non-compliant equipment lease. Many PBO clients complain about suppliers' failure to maintain or repair equipment, either under a service contract for the consumer's own equipment or under the equipment lease. The clients report that suppliers "disappear" soon after the contract is signed (having first "assigned" the *equipment lease* to another corporation who pursues the client for payment). The consumer then believes they are compelled to pay the full price of the equipment lease and are helpless regarding the unavailability of the value promised under the service contract to offset the pricing under the equipment lease.

In fact, the typical equipment lease is silent regarding maintenance and repairs. The consumer seemingly commits to paying for the equipment many times over whether or not it is functioning.

PBO has heard from many clients regarding equipment leases where the equipment was improperly installed, delivered but not installed, never functioned appropriately, was wrongly-sized for the size of the home, or broke down. The supplier demands payment regardless.

PBO has observed that the typical life-cycle of a purchase cost plus lease is:

Day 1: signature

Day 2-5: installation of equipment (before the expiry of the cooling-off period)

Within 30 days:

a) assignment to a second corporation
b) registration of a notice of security interest on title to the consumer's home
c) registration of notice of assignment of security interest commensurate with each subsequent assignment

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Proposal #6(e): Apply these prepayment rights to such leases entered as part of new home sales and continue them when homes are resold.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with the proposal, but questions the Ministry's assumption that the CPA does not apply. These contracts are not in fact "assumed" on purchase of the home by virtue of transfer of title to the home despite the equipment being affixed to the property (see discussion regarding (in)significance of notices of security interest in our response to Proposal #7(a) below). The new home seller requires, via the agreement of purchase and sale, that the purchaser either "assume" the seller's existing contract or enter into a fresh lease on closing.

In the first situation, despite the language of the Agreement of Purchase and Sale, there typically is no agreement for the supply of a *specific piece of equipment* for the consumer to assume, as the developer has entered into a single agreement to purchase multiple units from the supplier. PBO clients report that the supplier, not the seller, convinces them to enter into a fresh agreement following closing, by falsely claiming that for privacy reasons, the supplier can't share with the consumer the agreement that the consumer has agreed to assume. The consumer, unaware that in such case they would have no obligation even to the seller to sign a fresh lease, enters into a new, direct agreement with the supplier, to which the CPA appears to apply.

PBO expects suppliers' practices in relation to new home developments will evolve to overcome the forgoing "technicality" regarding the non-existence of an "assumable" agreement, to create a more sophisticated arrangement such that the agreement between the seller of the new home and the supplier is capable of assumption by the consumer. In such case, the only reason that the form of lease would *not* be covered by the CPA would be that the original lease for the supply of equipment intended for consumer purposes was entered into by the seller for business purposes. An expansion of the definition of "consumer agreements" should easily address this.

In the latter situation, where the consumer is compelled to sign a fresh lease as a condition of closing, the new lease is not signed at the supplier's place of business and is no different than those routinely signed "at the door".

7. Addressing Issues with Registration of Notices of Security Interests

In addition to concerns about termination costs related to purchase cost plus leases, the ministry has received complaints about registered notices on title to consumers' homes for leased goods that become attached or "affixed" to the property (e.g., water heaters or HVAC equipment). These notices are most commonly registered in the Land Registry System (LRS) as 'Notice of Security Interests' (NOSIs), but other forms such as 'Notice of Lease Chattel' or 'Notice of Lodgement Title Documents' are also used. Such notices are commonly described as liens as they are registered on the title of property and businesses may require payment in full for the equipment or lease value before they will remove the notice from title.

Registering in the LRS provides the business or financing company who leases or finances the fixture the best priority position under the Personal Property Security Act (PPSA). For example, in the case of a consumer agreement that allows the company to register a security interest in a fixture such as a gas furnace, the HVAC company may register a notice of security interest in the LRS to ensure their interest in the fixture has priority over any subsequent interests in the real property, such as a new mortgage arising from the sale of the home or refinancing.

While registered notices in the LRS have become standard practice in the leased goods industry, these registrations on a consumer's real estate title can cause significant issues for consumers when they try to obtain financing, sell their home or end their agreement. Lenders and buyers will often want the notice cleared (paid off) in these high-pressure, time-sensitive circumstances. This can result in complications and added stress and costs for consumers. Improving consumer awareness of these registrations through standardized disclosure, see Proposal #6(b), is something the government would continue to consider in regulation development.

In other circumstances, consumers find that despite the fact they have cancelled or terminated a contract in accordance with the CPA, and PPSA requirements, businesses may not discharge the notice. Consumers have also found multiple registrations on title when the contract is assigned and the subsequent party (typically a financing company) registers a new notice, but the previous business does not discharge their notice. The fact that the consumer must seek an order from the Superior Court to have the registration discharged when a business does not meet their obligations to do so worsens the impact of these issues.

When a contract is cancelled under the CPA, the act states that the contract and all related agreements including all guarantees and security, such as registered notices, are cancelled as if they never existed. The CPA does not explicitly require businesses to take

any action to ensure that notices are discharged, compliance orders are not currently issued to address this issue, and the CPA director has no existing authority to assist in the removal of registered notices.

The ministry is considering, in addition to preventing duplicate registrations, see Proposal #12(b), whether the CPA could better clarify a business's obligation to discharge notices relating to cancelled contracts, whether under the CPA or under other contract termination provisions (where they exist). Where the business fails to do so, the Director under the CPA could issue a compliance order. Once the compliance order was confirmed (e.g., 15 days pass without appeal or the order is appealed and upheld), the CPA director could have the authority to issue a statement to discharge the notice that the consumer could be able to register on title in the LRS.

Proposal #7(a): The CPA should clarify a business's obligation to discharge notices related to leased consumer goods registered in the Land Registry System when the contract for the leased good is cancelled or terminated in accordance with the CPA.

x Agree

☐ Disagree

☐ Other – Please Explain Below

Explanation and Additional Comments:

Clarity Should be Coupled with Increased Powers to the Director

PBO notes that the *Personal Property Security Act* already permits consumers whose obligations under the agreement granting the security interest "have been fulfilled" to require discharge of the NOSI, and provides for a penalty where the registrant fails to do so without good reason. PBO routinely advises clients to make such a demand, pointing out the application of this law to suppliers, but these demands are never heeded.

While PBO is in favour of greater clarity regarding a business's obligation to discharge a NOSI, we believe that this suggestion will only be effective if coupled with a mechanism to seek discharge without notice to the security holder upon proof of non-disclosure (as suggested above in Proposal #6(b)), increased powers on behalf of the Director, as suggested in Proposal #7(b), and perhaps with penalties for requiring the involvement of the Ministry. For example, the CPA could establish and clarify that:

- If a consumer requests cancellation in writing and accurately identifies a disclosure deficiency on the face of the contract, the contract is automatically considered cancelled and the NOSI must be removed within a specified period of days;
- Automatic cancellation under these provisions gives rise to a right to obtain an order discharging the NOSI from the Superior Court of Justice without notice to the NOSI holder; and
- If the supplier does not comply and if the Director is called upon to issue a compliance order and agrees that the disclosure deficiency was apparent on the face of the contract, the Director will issue a compliance order that will include an additional penalty for the supplier. (This would have the same effect as a presumptive costs award in court when a litigant's reasonable settlement offer is not accepted.)

All Companies Involved Should be Required to Ensure Removal of NOSI

A common issue encountered by consumers dealing with NOSIs is a lack of co-operation from companies other than the original supplier. The legislation should be clear that all companies involved should be required to remove or cause to be removed any NOSI related to their transaction. PBO has observed that, even in situations where there is no assignment, the NOSI is often registered by a different company than the one with whom the consumer entered into the contract. This financing company, related company, or assignee typically says it has nothing to do with the violation of consumer rights and does not have to honour the cancellation request. When the consumer then tries to deal with the original company, that company (if it still exists) disclaims responsibility for the NOSI given that it is under the name of the second company.

To address this, there should be a clear obligation for all companies involved to remove or cause the removal of the NOSI that stems from an unfair practice that they or their predecessor engaged in, regardless of whether it is under their name, failing which there should be penalties.

Further context for this suggestion can be found under "Other Suggestions – III. Extend the Focus of Enforcement to Assignees/Finance Companies".

Consideration Should be Given to Making NOSIs Unavailable to Door-to-Door Suppliers

Of the hundreds of cases PBO has seen where a consumer contract is properly voided pursuant to section 43.1, or where the consumer has exercised the right to cancel under the unfair business practices provisions of the CPA, PBO cannot recall a single one where the notice of security interest was removed without a problem. This illustrates the astounding chasm between the existence of rights and the enforcement of rights.

In law, equipment installed on a property becomes part of the property and is treated as part of the real estate. The supplier or assignee can and does register a NOSI under the *Personal Property Security Act* on title to the consumer's home (as does the supplier's lending partner in the presumed sale scenario), but the legal effect of this registration is simply to alert anyone dealing with the real estate that the consumer/homeowner has already pledged the fixture as security for a personal obligation. The obligation to pay for the fixture does not pass to a purchaser of the house despite registration of a NOSI. The existence of a NOSI does not give the lessor/supplier the right to enter the home and repossess the equipment, nor to force a sale of the house if the lease payments are not made. A NOSI is not a lien. Practically though, the NOSI is an enormous burden to the consumer because (i) residential mortgage lenders regard the existence of a NOSI as an unacceptable encumbrance on title and refuse to lend unless the NOSI is lifted, and (ii) real estate purchasers demand removal of the NOSI prior to closing, which forces the homeowner to promptly pay out the contract on the supplier's terms or risk jeopardizing their closing.

The significance of NOSIs in law, i.e. discerning, as between creditors, which creditor has "priority" in applying the value realized on the sale of the water heater to the debt, is of little, if any, importance to the supplier of a water heater.

That the NOSI is of little concern to the supplier for their use in establishing priorities is underscored by the obvious carelessness employed in ensuring their validity: the leases themselves rarely identify the collateral (i.e. the equipment) with the degree of detail required under the *Personal Property Security Act* to actually allow for the creation of a security interest in the equipment in the first place. Identifying information (i.e. "detail"), such as a serial number, is not known at the time the contract is signed. A significant proportion of the notices examined by PBO

are invalid in providing notice of a security interest as intended, by reason of one or more of the following deficiencies:

- The collateral is not sufficiently described in the NOSI e.g. the NOSI refers to the collateral simply as “HVAC”.
- The notice references a security agreement between the registrant who is an assignee, and the title holder, when there is no such agreement. The lease presumed to be relevant was made between the title holder and the original supplier.
- The NOSI registration form is completed as for an assignment and no assignee is named.
- The NOSI refers to assignment of a NOSI which does not appear on the parcel register.
- The security interest has not been granted by all registered title holders.

The primary value of the NOSI to the supplier is in leveraging payment from a consumer unwilling to continue payments demanded under the lease, *not* in the purpose for which the instrument was created. This is further reinforced by the fact that suppliers rarely, if ever, repossess equipment following the cancellation of a lease, even where they have the right to do so under the CPA.

PBO is not aware of any businesses leasing similar equipment to consumers, other than those engaged in door-to-door sales, that employ NOSIs.

Refusals by registrants to remove notices of security interest on proper request are rare outside of the context of direct agreements. PBO suspects that no other segment of the economy where security is taken in personal property has rates of refusal to register discharges anywhere near those experienced in connection with direct agreements. The cost to the consumer of and the complexity involved in obtaining an order to discharge a NOSI effectively hands suppliers of goods under direct agreements a huge, unintended advantage in refusing to acknowledge protected consumer rights. This is a windfall that is propped up on the backs of vulnerable consumers.

Currently, the Superior Court of Justice is the only venue with jurisdiction to directly address this issue. Given that the monetary amount underlying the invalid NOSI is usually less than $10,000, this is inappropriate and disproportionately complex. Despite the possibility of claiming higher damage awards and the availability of a simplified procedure, this remains a woefully inadequate means of redress.

Superior Court proceedings inevitably take time and corporate defendants can devise strategies to wear down vulnerable litigants or delay matters to the point where consumers are under pressure to buy out the security interest.

From a practical standpoint, this often means that consumer redress is unavailable. Consumers need and deserve reforms that level the playing field. Ideally, the *Personal Property Security Act* would be amended to preclude the availability of NOSIs in connection with direct agreements.

NOSI Requirements Should Be Changed to Better Protect Consumers

Alternatively, if NOSIs continue to be permitted for these types of transactions, other changes to registration requirements could provide some relief to consumers.

First, restrictions should be put in place so that the value of the security reflected on the NOSI does not exceed the fair market value of the equipment. Interest, fees, installation, and financing costs should not be part of the NOSI. This is consistent with the purpose of the NOSI as discussed above – that is, to provide security for the equipment itself – and would make it easier for consumers to pay off the (much smaller) amount registered on title in order to clear the NOSI in cases of urgency. If the supplier or financing company wants to pursue the consumer for further damages payable under the contract, they can do so in court and will not have the additional and unwarranted leverage of the NOSI.

Second, a copy of the NOSI registration should be required to be served on the consumer within a specific time after the instrument is either registered *or assigned*. This would not only ensure that consumers understand that a NOSI is being registered early in the contract term, but would also provide consumers with notice of the existence and contact information of assignees.

Third, a better description and model number of any/all equipment should be required to be included when a supplier or creditor registers a NOSI, to ensure that the consumer can identify the relevant information. While the PPSA requires a description of the collateral sufficient to enable it to be identified, the failure to provide such a description does not appear, in practice, to pose any impediment to registration of the notice on title.

Payment Into Court Should be Available for NOSI Disputes

The Ministry should consider implementing a system that permits consumers to pay the value of a NOSI into court in the event of a dispute. This would allow the consumer to quickly remove the NOSI as an obstacle to refinancing or sale of the property, while also protecting the interests of both parties.

A similar process is used for vehicle repair liens under section 24 of the *Repair and Storage Liens Act*. In that case, if a repairer claims a lien on a vehicle for repair costs, the consumer can pay the full amount claimed into court and immediately recover the use of the vehicle. The parties have an opportunity to exchange settlement offers, knowing that if a settlement is reached, the money is readily available to be paid out. Alternatively, either party can commence a claim. The money is held until the matter is settled or resolved by the court, or, if the repairer takes no steps after 90 days to pursue the matter, the money is returned to the consumer.

Implementing a similar system for NOSIs would substantially diminish the undue leverage the NOSI gives to suppliers and creditors.

Proposal #7(b): Where the Director under the CPA has issued a compliance order after a business fails to discharge the registered notice and the order is confirmed, the CPA should empower the Director to issue a statement which the consumer could have registered on title to discharge the notice. The consumer would work through a Teraview licensee (typically lawyers) to complete the registration.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO strongly agrees with this proposal. As noted above, at present, the inability of consumers to have NOSIs removed from title by court order without application to

the Superior Court creates a strong imbalance of power in favour of the supplier when a consumer validly cancels a contract.

Empowering the Director to issue a compliance order as proposed could be the single most helpful development to come out of this consultation process in relation to direct agreements, provided that the Director is, in practice, able to issue these orders. It is PBO's understanding that, for good reason, the Director is generally unable to adjudicate between competing versions of the facts in consumer disputes. Many cancellations – particularly those based on unfair practices – are based on disputed facts as to what occurred at the time of the sale. These situations may not be capable of being adequately addressed through compliance orders, unless the Director assumes an adjudicative role. (PBO has suggestions for reducing some of these instances of disputed facts by introducing presumptions, discussed below under "Other Suggestions".)

There are, however, other breaches of the CPA discussed in this proposal that are apparent on their face and do not depend on assessments of credibility, such as breaches of contract disclosure obligations and some cases of sale of prohibited goods under section 43.1 (where the supplier has no evidence of a valid invitation from the consumer), that would lend themselves well to Ministry intervention and compliance orders. PBO believes that this would be a tremendous help to consumers seeking to set aside NOSIs in these circumstances. It would also provide a further incentive for suppliers to comply with disclosure obligations, which would help to prevent unfair contracts in the first place.

Additional Suggestion: Expanding the jurisdiction of Small Claims Court or the Powers of the Registrar of Land Titles

Expanding the jurisdiction of the Small Claims Court is another alternative that could be used in addition to the proposed compliance orders, to address these gaps. Most of the disputes regarding these contracts that are litigated are ending up in Small Claims Court, despite the absence of jurisdiction in relation to ordering the discharge of NOSI registrations. Small Claims Court actions are initiated either at the instance of the supplier as a collections matter, or by the consumer for damages or a refund, or to claim the penalty of $500 provided for under the PPSA for failure to remove the NOSI. Consumers also initiate these actions in the hopes of creating a forum to negotiate the discharge of a NOSI. While PBO has seen this

strategy succeed, this is an inherently inadequate response because the very court that consumers engage does not have the power to order what they need.

If the jurisdiction of the Small Claims Court itself cannot be expanded, perhaps the Director of Land Titles could be authorized under the CPA to rely on any decision of the Small Claims Court from which it is reasonable to infer that the consumer's obligations under the supply agreement have been fulfilled in issuing an order which leads directly to discharge of the NOSI. PBO is confident that the Director would welcome a thorough exploration of the merits of this increased authority.

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8. Improving Timeshare Disclosure and Exit Rights

Timeshares are complex arrangements that are often marketed aggressively. Consumers may only later realize the arrangement is not as attractive as it seemed during the sales presentation. For this reason, all timeshare contracts are subject to disclosure requirements and a 10-day cooling-off period.

However, there are potentially more fundamental concerns that can appear in such a long-term commitment. The ongoing costs associated with timeshares, which may not have seemed like a concern at first, can become a concern over time. A consumer's travel and financial capabilities and preferences may change, making the continued cost of a timeshare less and less affordable.

Timeshares can take several different legal forms. Some are pure service contracts while others are differing forms of ownership interests in real estate. Consumers do not always understand the difference between these formats and the risks of buying a real estate timeshare.

A real estate ownership type of timeshare can only come to an end for a consumer if someone else takes ownership of the property. Like all real estate purchases, it is "in perpetuity". Unlike real estate in general, a real estate timeshare is more likely to depreciate from its original sale value.

This results in consumers locked into timeshare arrangements, particularly when the resale market gives their timeshare no value or even a negative one, and a timeshare operator is unwilling to offer a buy-back or take-back program.

The CPA currently does not address these more fundamental and ongoing concerns with timeshares.

The ministry intends to consider ways to improve disclosures such as ensuring consumers understand clearly if they are buying real estate interests, during the development of regulations in the future.

The ministry is considering whether a new CPA should also provide that timeshare contracts must include an “exit option”. At a minimum, this approach would allow any timeshare owner who has held their interest for at least 10 years to give notice that they are exiting their timeshare. A 10-year period before the statutory exit right can be exercised is intended to give timeshare developers time to recover their start-up costs.

In addition, the ministry is considering a maximum cost to exit of no more than one and a half times the annual fees. This is the nature of the exit fee recently found reasonable by a court approving the winding up of an Ontario timeshare.

Such a rule could apply to all timeshares, meaning service-club type timeshares, lease-based timeshares and any form of real estate interest timeshares.

In the case of an ongoing service timeshare or service contracts related to timeshares, such as memberships in points exchanges, the law could provide that those types of contracts would end if the consumer surrenders their timeshare interest.

In the case of a real estate interest timeshare, the contract would have to set out a buy-back or similar provision the consumer can invoke to surrender their ownership interests.

When laws governing contracts change, new rules usually apply only to contracts entered into after the changes come into force. However, the permanent nature of some timeshares means that consumers who bought prior to the new law will always be at risk of finding themselves unable to exit their timeshare contract. This risk could be addressed by making the exit/mandatory buy back right apply to existing timeshares.

Proposal #8(a): Require timeshare contracts to make improved disclosures about future obligations and financial risks involved in real estate interest-based timeshares.

If you have suggestions for improved disclosure, please include them below. Such improvements would be in regulations, about which there would be further consultation. Your suggestions would help inform proposals for that consultation.

- x **Agree**
- ☐ **Disagree**

☐ **Other –Please Explain Below**

Explanation and Additional Comments:

PBO supports amendments requiring plain language disclosure for timeshares, and in particular for real estate-based timeshares as an alternative to options discussed under Proposal #8(b) below. These increased disclosure obligations could include highlighting the consumer's obligation to contribute to the ongoing costs of operation without restriction, and the lack of relationship of the purchase price of the interest to the value of the property as real estate.

PBO has assisted clients in a segment of the vacation club membership sales industry who have been victimized by use of official looking documents to mislead. In this situation, the consumer is told that the monies they use to purchase the vacation club membership will be invested in an RRSP in their name, the idea being that they will benefit from both the capital they pay to purchase the membership and the membership benefits. There is a reference to an RRSP buried deep within the purchase contract which "may" come into existence if certain events transpire, concerning which the seller has no obligations. In this case, one of the few pages the consumer is required to sign is a formal disclosure statement that is made to look like a document legally required in connection with the sales of RRSPs and includes information as to the identity of the trustee appointed to hold such funds. Stronger disclosure requirements or other regulatory measures should be imposed to forestall this practice. The average consumer would have no reason to cancel during the cooling-off period, having separate streams of documentation (they believe) in relation to their RRSP investment and vacation club membership.

Proposal #8(b): Require timeshare contracts to include an exit option that consumers can use once they have owned a timeshare or been in a timeshare contract for at least 10 years. The largest exit cost allowed would be one-and-a-half times the timeshare annual fee.

☐ **Agree**

☐ **Disagree**

x **Other – Please Explain Below**

Explanation and Additional Comments:

Concern Regarding the Proposal's Impact on Other Consumers in Real Estate-Based Timeshares

PBO agrees with this proposal as it applies to timeshare agreements *other than real estate-based timeshare arrangements*.

Although the concerns regarding onerous obligations noted above apply equally to real estate-based timeshares, those obligations are owed to other co-owners (a group that may or may not include the developer).

PBO suggests that the Ministry shift its focus from mandating exit options for this group, to controlling the division of property interest into unmanageably small units. The real estate timeshare typically offers for sale to the consumer a minute interest in the real property, in common with others, in a development intended to be operated as a vacation resort. The value of the minute real estate interest depends on the continued successful operation of the development as a whole, as a vacation resort. The successful operation of the development depends, in turn, on all of the owners bearing a proportionate share of the operating costs, whether or not the owner/consumer wishes to vacation at the property in any year or not.

Looked at another way, the value of the real property on which the resort is located does not depreciate, but rather the consumer is paying a price to acquire the interest that far exceeds the value of the tiny interest as tenant in common acquired by the consumer, valued on the basis of land alone. The ongoing charges payable by the owners are required to address the costs of maintaining the value of the development as well as operating it. Although the developer may indirectly benefit to the extent that the developer has an interest in the operations manager engaged by the property owners, the bulk of the fees collected do not benefit the developer. The obligations of a consumer to continue to fund the resort operating costs from year to year are owed to the other co-owners, not the developer.

If consumers are given an exit option, the remaining owners/consumers would have to be shielded in some way from having to bear a proportionately higher proportion of the operating costs. Taking a page from the regulation of the sale of securities, consumers might be better protected by regulating the sale of real estate timeshares themselves, such as by limiting the sale of fractional ownerships to sophisticated investors only.

While the law already provides the possibility of relief to co-owners via a successful application to the courts for an order for partition and sale of the development as a

whole, organizing a critical mass of co-owners, each of whom own only a fraction measured in hundredths, makes this infeasible. For each bedroom or unit in the development there could be 50 owners or more, for example.

Another way to regulate and protect consumers might be to limit the division of interests to larger proportions. This could be accomplished by prohibiting the sales of smaller fractions (for example, by specifying a maximum number of co-owners).

Recognizing that either of these options means reducing the affordability of real estate timeshares, perhaps the only practical means of protecting consumers is to strengthen disclosure obligations, as noted in Proposal #8(a) above.

Question #8(c): If adopted, should the rule allowing consumers to surrender their timeshare at a limited cost apply to timeshares bought before the new provision comes into force (e.g., if the provision comes into force in 2022, timeshare owners who bought earlier than 2012 could use the remedy)?

☐ **Yes**

☐ **No**

x **Other – Please Explain Below**

Explanation and Additional Comments:

PBO notes that it is likely that developers will have used a single-purpose corporate vehicle to sell the units in a real estate-based timeshare, which will no longer exist once the developer has sold off 100% of the interest in the property. This limits the value of this rule even as it affects timeshares bought after the new provision comes into force. As demonstrated above, permitting the surrender except to a party who assumes an ongoing obligation to contribute to operating costs is detrimental to the remaining co-owners.

Strengthened Basic Consumer Rights

The expansion of commerce online means consumers are more often subject to written contract terms. Purchases that once generated no more paper than a receipt at the cash register come with a set of contractual terms and conditions when done online. This

makes it more important for the CPA to have clear limits on what businesses can do with the 'boilerplate' contract terms in consumer contracts. Most of these rules are in Part II of the CPA (Consumer Rights and Warranties).

9. Protecting Consumers' Right to Review Business Performance

The ministry has received complaints that a small number of businesses try to control what consumers say about them with 'anti-disparagement' clauses in contracts that try to stop a consumer from publishing negative reviews. Some contracts go further and state that the business can bill the consumer if it considers the consumer to have disparaged them. In doing so, they try to remove the need to prove anything in a court by claiming the business is the sole judge of the dispute.

Online media are creating many new opportunities for businesses and consumers to interact. In addition to being able to shop online, this includes new ways for consumers to share their opinions online. This not only promotes competition but helps consumers make informed decisions and avoid problems.

The CPA's provisions forbidding or nullifying some unfair contract terms do not currently address with this issue.

The ministry is considering whether a new CPA should protect against contract terms that limit consumers' rights to make fair comments. Consumers have never been free to libel or spread malicious information to harm a business, and reforms would not protect consumers if they libel a business. However, a reformed CPA could protect consumers' rights to make fair comments.

Proposal #9: Forbid contract terms that prohibit consumers from publishing fair reviews of the business or its goods or services or impose charges on consumers for the contents of such reviews.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

10. Prohibiting Contracts Misleading Consumers About Rights

Consumers are not always aware of all their rights which means they can be misled by vague waiver clauses telling them that the business makes no guarantees or has no liability if a product fails.

The CPA currently nullifies certain waivers and other contract terms as being overly one-sided. For example, a business cannot sell a consumer a good or service and at the same time disclaim any responsibility for its quality. The CPA guarantees consumers the benefits of implied warranties and conditions in all sales or leases of goods and services, such as a warranty that goods are fit for their intended purpose.

This protects the application of basic promises consumers are entitled to assume are part of all contracts even if a business does not expressly make them. Key examples are in CPA sections 7, 8 and 9 For example, a consumer also has the right to go to an Ontario court to enforce their rights under the CPA, despite any contractual term forcing arbitration of disputes or claiming another jurisdiction must hear disputes. A consumer also can start or be part of a class action, despite any contractual term to the contrary.

These provisions do not prevent consumers from agreeing to settle a dispute instead of suing the business. Nor are consumers prevented from agreeing to use arbitration to settle a dispute after it arises, when the consumer knows what they are agreeing to arbitrate or settle.

The existence of these protections is not obvious to consumers, who may rely on businesses as their first source of information. A consumer may believe clauses saying, “all disputes must be arbitrated” would apply to them. Contracts may try to make waivers technically correct by using language such as “except where prohibited by law” or “to the extent permitted by law”. If consumers are not familiar with the law, they may assume that the waiver applies to their contract.

To address this concern, the ministry is considering amendments to the CPA that could clearly prohibit terms that appear to waive important consumer rights. A waiver inapplicable in Ontario could have to clearly indicate it does not apply in Ontario or Canada.

Business should only address such issues in contracts in a way that is comprehensible and clear to consumers. A consumer should be able to understand any “boilerplate” contract term without having to get legal advice.

Proposal #10(a): Prohibit contract terms that suggest a consumer has waived any CPA legal rights, such as the right to join a class action and the right to bring a court action under the CPA.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

Beyond the issue of consumer protection, this is an issue of access to justice. PBO favours any reform that preserves meaningful opportunities for low-income Ontarians to seek legal redress.

Proposal #10(b): Require waivers that are not applicable in Ontario to clearly exclude Ontario or Canada on their face to avoid consumers being misled.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

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11. Forbidding Dollar Limits on Implied Warranty Claims

Another kind of contract term the ministry has seen used is one which tries to limit a business's monetary liability under implied warranties such as the warranty that services are of a reasonable acceptable quality.

The CPA guarantees consumers certain warranties and conditions when they buy or lease goods or services. The Act "deems" these warranties and conditions into all contracts, even if the business does not expressly promise them. However, the CPA does not address the use of monetary limits of liability for breach of these warranties or conditions.

A business breaching an implied warranty may create a serious problem for a consumer that costs them more than the price of the contract, for example, defective work that results in a flooded basement or unexpected home repair costs.

Courts have demonstrated a willingness to uphold consumer claims against businesses in such cases but also uphold contractual limits on consumer claims against businesses for damages caused by failures to meet implied warranties, such as leaks that damage a basement.

The ministry is considering amendments to the CPA to strengthen its implied warranty provisions by ensuring that they cannot be subject to dollar limits on claims over them.

This proposal is not about exposing businesses to increased or unlimited liability. It is intended to only invalidate contractual limits and ensure courts can consider proper awards in cases where there has been a breach of implied warranties and conditions.

Proposal #11: Forbid contract terms that limit the dollar value of claims for breach of implied warranties and conditions.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

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12. Preserving Consumer Rights When Contracts Change Hands

The CPA protection for consumers' rights and remedies when contracts change hands, through assignment or otherwise, is limited in scope – the protection only applies to loans and not to other types of contracts which may be assigned.

If a lender assigns a consumer's debt to another business, the second business has no greater rights and is subject to the same obligations, liabilities and duties as the original lender. This is set out in section 83 of the CPA. Part of the rule's intent is to ensure that assignments do not weaken CPA rights, such as cooling-off periods and remedies for non-disclosure or unfair practices.

The assignment of credit contracts is routine in many business operations. However, assignment of other types of consumer contracts, such as leases of goods or extended warranties, also takes place. In a time of economic stress when businesses may be reorganizing or changing hands, it is important to emphasize that such transfers do not diminish consumer rights.

The ministry is considering if the CPA should explicitly extend the current assignment protection for credit contracts to all consumer contracts. This would better protect consumers in any ongoing contract, such as a lease or an extended warranty.

Similarly, the law could require parties to any credit or similar arrangement that is assigned to take steps to ensure there is no duplicate reporting of debts or obligations, such as to credit reporting agencies or in registry systems (e.g., Notices of Security Interests in the Land Registry System).

Proposal #12(a): Make explicit in the CPA that consumer rights and business obligations to consumers are unchanged by assignment of contracts of any kind, or consumer rights under them.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

PBO has observed significant consumer confusion around assignment. We encourage reform that promotes clarity and continuity of contractual rights and obligations.

As detailed further under Proposal #7(a) above and "Other Suggestions" below, PBO would like to see this made clear particularly in the case of NOSIs, where assignees often disclaim responsibility for unfair business practices engaged in by the original supplier. The CPA should make clear that assignees are responsible for honouring cancellation requests and related requests for removal of NOSIs based on the practices of any assignors.

In addition, consumers should be entitled to receive notice of an assignment. That notice should identify the original contract holder, attach a copy of the contract, and provide the date of the assignment and full contact details for the assignee. As suggested above under Proposal #7(a), notice should also be given when an assignee registers a NOSI.

Proposal #12(b): Require the discharge of any related Notice of Security Interest in the Land Registry System when a contract is assigned, to prevent duplicate reporting of assigned obligations.

☐ **Agree**

☐ **Disagree**

x **Other – Please Explain Below**

Explanation and Additional Comments:

In PBO's experience, the registrations resulting from assignment of the supplier's rights are notices of assignment of the original notice of security interest rather than duplicates. PBO has not encountered duplicate registrations in the review of a significant number of registrations relating to consumer contracts and believes the presence of registrations of notices of assignment of a notice of security interest may be misinterpreted by consumers. While it is true that the original notice is not expunged without the co-operation of the latest assignee in the chain, discharge of a notice of assignment of notice of a particular security interest has the effect of discharging all related registrations. In other words, dealing with the latest registration should effectively deal with all earlier related registrations.

Stronger and Clearer Rights to Remedies

13. Remedies for Unfair Practices During Ongoing Contracts

The CPA's consumer remedy against unfair practices such as misleading consumers is not as useful in long-term contracts such as leases and subscriptions as it is in simple sales. As more consumers are entering into longer-term contracts, this weakness becomes more important to address.

The CPA prohibits using unfair practices to convince consumers to enter agreements and prohibits using such practices during a contract, such as misleading a consumer about their termination rights during the life of a contract.

However, the CPA remedy for consumers must be used by giving notice to the business within one year of entering the contract. This may be of no help to a consumer if the unfair practice does not take place until after the first year of the contract. For example, a consumer has no access to a CPA remedy if a business misrepresents termination rights 18 months into a three-year contract unless a court decides to disregard the requirement for the consumer to provide notice within one-year of entering into the contract.

The ministry is considering amendments to the CPA that could expand access to the remedy to cover unfair practices such as misrepresentation during the life of a contract. The remedy would then be available until the later of one year after entering the contract or one year after the unfair practice took place (subject to a court's ability to disregard the notice requirement).

Proposal #13: The CPA remedy for unfair practices should be applicable in respect of unfair practices that occur after entering a contract. It should be available until the later of one year after entering the contract and one year after the unfair practice took place.

- x **Agree**
- ☐ **Disagree**
- ☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal and notes the following common unfair practices that occur after execution and during administration of consumer contracts:

i) In the case of an assignee, disclaiming responsibility for the unfair business practices of the supplier notwithstanding that cancellation/rescission under the CPA is binding on an assignee.

ii) Altering the terms of the contract after signature (for example, filling in spaces left blank or adding the name of a homeowner who was not present). We have heard many complaints about this practice by consumers who did not receive a copy of the contract at signing, and were later sent a copy with inaccurate information in handwriting other than their own, in response to an attempt to cancel. (PBO also suggests imposing an onus on suppliers to prove the delivery and content of contracts, as a means of targeting this practice, explained further under “Other Suggestions”.)

iii) Not effectively responding to or creating records of verbal attempts to cancel by consumers. PBO has observed that suppliers regularly respond to phone calls from consumers by telling them that someone will call them to discuss the matter. No one calls, but the promise of a response delays attempts by the consumer to take further steps, sometimes nudging the consumer outside of the 1-year notice period under the CPA. (PBO also suggests requiring suppliers to provide standardized information in response to cancellation inquiries to further address this issue, as explained further under “Other Suggestions”.)

iv) Suggesting to the consumer that a failure to exercise their rights during a cooling-off period means they have no other cancellation rights. Again, we have seen this tactic used regularly to confuse and delay consumers from making a formal cancellation request within the 1-year notice period set by the CPA.

v) Demanding a fee to buy-out an equipment rental agreement that exceeds the original retail value less amounts received under the contract and is in excess of any imputed lease rate of interest collectible under the contract.

vi) Removing and disposing of the consumer’s existing equipment before the expiry of the cooling-off period, or at all, without compensation for its value or express written consent of the consumer, and without advising the consumer of the impact of this on their cancellation or rescission rights under the CPA. This is particularly troubling given the practice among suppliers of misleading consumers about the state or condition of their current equipment in an attempt to force a sale. This issue is also discussed further under “Other Suggestions” below.

Additional Suggestion: Applying Discoverability to Unfair Practices

The Ministry should also consider importing the concept of discoverability into the statutory remedies for unfair practices. Civil limitations generally run from the date a claim is discovered, rather than the date it took place. The unfair practices remedy could be made available "until the later of one year after entering the contract and one year after the unfair practice took place *or was discovered"*. This would be applicable, for example, in the case where a supplier offers to pay a rebate throughout the course of a multi-year agreement, but stops making payments at the end of the first year. This is when the consumer realizes that the promise of a rebate was not for the term of the agreement; by this point, however, the consumer is beyond their statutory right to cancel the agreement. Basing the limitation period on the discovery of the claim would provide a remedy for consumers in this situation.

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14. Enhanced Recovery if Consumers Forced to Sue for a Remedy

The ministry finds that businesses do not always comply when consumers use their remedies under the CPA. For some smaller claims, a business may be counting on the consumer being unlikely to pursue civil remedies.

The CPA gives the consumer a right to sue when businesses do not honour rescission and recovery claims, statutory cancellations such as for cooling-off periods, or demands for refunds of money in respect of unsolicited goods and services or other charges prohibited by the CPA.

In all these cases, the business must issue a refund within 15 days of the consumer giving notice. If they disagree with the applicability of the consumer's rights, then the ministry or the courts may have to be involved.

The ministry is considering amendments to the CPA that could promote business compliance with remedies and make remedies pursued by consumers through civil action more useful. This would be accomplished if businesses were to incur greater risks in the form of increased damages if they do not honour requested remedies. The CPA could increase the amount of the consumer's claim if they are forced to sue to enforce payment to three times the refund the business failed to make.

Proposal #14: The CPA would provide that if a consumer is required to sue a business for its failure to refund money as required under the CPA, the amount that the consumer can claim in such an action would be three times the amount of the required refund that the consumer has not received.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO strongly agrees with this proposal.

The magnitude of this problem is hard to overstate. PBO has observed that failure to comply when consumers exercise CPA rights is far more than an occasional or even frequent problem. Instead, we are concerned that this failure is fundamental to the business plans of corporations that thrive on weak and delayed assertion of rights.

In particular, given the strategic advantage of the NOSI in many cases, it is in the financial interests of suppliers to simply drag their feet and refuse to acknowledge a cancellation unless and until a consumer initiates court proceedings.

Disincentives to this type of conduct are badly needed. Enhancing court awards for those consumer who seek redress in the courts would be an important part of an effective solution. Ideally, this would be combined with measures that do not require court involvement, such as expanded Ministry enforcement powers.

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15. Continuing to Improve Ministry Enforcement Powers

The CPA's enforcement tools have not kept up with changes in the marketplace. Other tools are potentially available to assist the ministry in enforcement and bring actors who contravene the law into compliance.

The CPA currently provides the ministry with a range of tools to promote compliance with the law. It also mandates a public record of enforcement actions. These powers and responsibilities are set out in Parts X and XI of the CPA and its general regulation.

The government has moved to improve enforcement tools in the CPA through the *Rebuilding Consumer Confidence Act, 2020* (Schedule 3 of Bill 159).

- Amendments (not yet in force) added the ability to use Administrative Penalties to promote compliance with the CPA.
- Amendments now in force also clarified that Orders and Undertakings can specify the amount of a refund a business must provide under the CPA.

The details of Administrative Penalties would be set out in regulations under the CPA. The government has conducted initial consultations on the use of such penalties but has decided to wait to implement this new tool as part of the overall reform of the CPA. One goal in reforming the CPA is to make it clearer and more appropriate for the use of such penalties.

The ministry is considering other reforms to further improve enforcement tools. Currently, compliance orders can only order persons who are contravening the CPA to come into compliance. Modern businesses carry out many activities using other businesses as intermediaries, for example online platforms and billing services. Particularly in cases where a business contravening the law is hard to find or is in another jurisdiction, it may be useful if compliance orders could also apply to such intermediaries. For example, by permitting the ministry to order a billing service to stop delivering bills on behalf of a business whose billing practices are in contravention of the CPA.

The intent would not be to make an intermediary responsible for another business's misconduct but to put the intermediary on notice that they must stop facilitating the misconduct. As with such orders in general, subject businesses would have appeal rights.

Proposal #15: Extend the Director's order-making power to cover any business facilitating another business's contravention of the CPA.

x **Agree**

☐ **Disagree**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

PBO agrees with this proposal.

Looking Forward – Revising CPA Regulations

An improved CPA would, if developed and passed, continue to use regulations to set out more specific obligations and provisions needed to implement the Act.

Proposals such as those under theme #1, Clearer Consistent Rules for Consumer Contracts, would require further consultation on reforming the current regulations to achieve the intended outcomes and result in significant consolidation of the current rules.

Other issues that regulation reform could examine include:

- **Improved door-to-door sales rules.**

  Consumers continue to experience problems with door-to-door selling and contracts they enter in their homes. The CPA lists goods and services which cannot be the subject of contracts entered at a consumer's home unless the consumer invited the business to attend their home for that purpose. Regulatory reform could consider the best way to make this ban effective.

- **Improved disclosure and other rules governing specific contracts, such as those for timeshares, personal development services and motor vehicle repair.**

- **Use of administrative penalties.**

  The CPA includes authority (not yet in force) to impose administrative penalties for contravention of designated provisions of the Act or regulations. Regulations would set out which provisions are subject to such penalties and the amounts.

  Regulation development under an improved CPA would include proposing the use of this enforcement tool for a broad range of requirements (beyond those proposed as part of the government's initial consultation earlier this year).

Do you have suggestions for reform to CPA regulations?

x **Yes**

☐ **No**

☐ **Other – Please Explain Below**

Explanation and Additional Comments:

Lowering the bar for inclusion of businesses on the Buyer Beware List, perhaps based on the number of substantiated complaints, could make the list more effective.

Ensuring that all remedies are clearly and effectively extended to be exercisable against assignees of direct agreements is also important.

Other Suggestions

The government welcomes any suggestions you wish to make concerning consumer protection reform. Please feel free to comment on any additional areas that you feel need specific rules or an existing rule that you believe is either outdated or not strong enough.

Explanation and Additional Comments:

PBO submits the following additional suggestions:

I. Harmonise and Strengthen Remedies

The CPA currently offers two different categories of remedies that allow a consumer to choose to end a contract under certain conditions:

- "Rescission", or alternatively "cancellation", under Part III of the CPA for unfair practices, and
- "Cancellation" under Part IX of the CPA for most other situations, including non-disclosure.

This is in addition to section 43.1, which renders a contract void automatically, without an election by the consumer, if it relates to a direct sale of a prohibited item.

Navigating the finer distinctions among these remedies is confusing even for lawyers, particularly given that the reasons for the distinctions are sometimes unclear and the terminology does not mirror common usage. In particular, cancellation under Part IX appears to unwind a contract just like rescission does at common law (to "cancel, as if they never existed" the relevant agreements: section 95), although the term "cancellation" in common usage often means cancellation only of future obligations.

These distinctions are well beyond the reach of most consumers.

PBO suggests that these remedies be harmonized into a single cancellation or voided contract remedy that applies whenever a supplier's conduct entitles a consumer to end a contract.

PBO notes the following inconsistencies between the Part III remedies and the Part IX remedy:

i) Victims of unfair practices are responsible for value of equipment. The cancellation remedy in Part IX (s 93) provides that the consumer has no obligation under a consumer agreement that is not made in accordance with the CPA (unless this is an inequitable result). This is not the case with the remedies under Part III.

The CPA appears to intend to attach severe consequences to contractors engaging in unfair business practices (Part III), and actually prohibits persons from engaging in unfair business practices. However, the Part III cancellation remedy allocates the value of goods supplied to the account of the consumer where the goods are not returned (s 18(2)), while the cancellation remedy in Part IX (s 93) or the nullification remedy in connection with restricted types of direct agreements (s 43.1), do not.

In practice, unfair business practices commonly occur in door-to-door transactions for the supply of substantial goods that are impractical to return either because of their bulk or because the offending supplier has removed a critical piece of the infrastructure of the consumer's home (e.g. the furnace) in order to install the goods. PBO assumes it was not the legislators' intent to relieve the consumer from any obligation regarding the value of goods supplied in circumstances of, for example, a breach of disclosure requirements, but not in circumstances of a breach of the unfair business practice provisions of the CPA.

ii) Suppliers under Part IX cancellation remedy lose right to repossession unless they give notice. Under the cancellation remedy in Part IX (s 96(2) and related regulations), the consumer is relieved from the obligation of returning the goods supplied if the supplier has not met the notice requirements set out in the regulations demanding that the consumer facilitate repossession. There is no such relief available for the rescission/cancellation remedy under Part III, which on its face permits the consumer to retain the goods without financial obligation, but in fact indirectly charges the value of the goods to the consumer, as set out above, insofar as the value of retaining the goods offsets damages owed to the consumer by the supplier. The supplier thus does not have to take any proactive steps to

secure this benefit when the cancellation is due to an unfair business practice, but does when the cancellation is due to non-disclosure.

iii) Victims of unfair practices are not entitled to trade-in value. Another anomaly between Part III and Part IX occurs in practice with the supply of higher value, bulkier equipment. Under the cancellation remedy in Part IX (s 96), the supplier is obligated to account for the value of goods traded in. The only practical economic difference between equipment taken as a trade-in and equipment replaced by a contractor exerting unfair business practices in a typical door-to-door equipment lease, is that the consumer is not given credit in the latter case for the value of equipment the supplier has convinced them to replace. It is submitted that extending Part III remedies to expressly include a credit to the consumer for the value of goods replaced by the supplier and installation costs is consistent with the CPA's regime. Consumer rights in relation to goods given as "trade-in" should apply *mutatis mutandis* to goods replaced by the supplier without credit. Remedies for fixtures replaced with goods supplied under contracts subject to section 43.1 (prohibited) or contracts rescindable for unfair business practices are less accessible to consumers under current provisions of the CPA than if the supplier had given the consumer credit for the value on a trade-in.

iv) Inconsistency Regarding Implied Financing Charges in Leases. The regulations regarding disclosure requirements stipulate that where the lease value (i.e. the retail value) of goods is not disclosed, the consumer's obligations under the lease are limited to paying the lease value, ignoring the implied financing charge. While this result is a logical compromise, it is difficult to reconcile with section 93 of the CPA, which seems to provide that the consumer has no obligation under such a lease because the lease has not been made in compliance with the CPA. A preferred approach, in keeping with the perceived impact of this information on consumer decision-making, would be to amend the regulation to express that it is only in exceptional cases of non-disclosure of the retail value of the goods, as determined by a court pursuant to section 93, that a consumer would have any obligation under the lease, and, in such cases, the consumer's obligation would be limited to payment of the retail value of the goods.

II. Extend Disclosure Obligations to Related Finance Agreements

PBO recommends that the CPA be amended to extend the disclosure obligations currently applicable to direct agreements to cover related finance agreements.

Sometimes the only evidence of an agreement for the supply of a direct agreement product, such as a water heater, is a financing agreement from which it can be inferred that the consumer has purchased the water heater from the representative at the door, and the supplier representative has obtained the consumer's signature on a third-party agreement for which the consumer seems to have been instantly approved. Although these financing agreements will stand or fall with the related product agreement under the terms of the CPA, consumers often face additional hurdles attempting to cancel when they cannot identify or locate the supplier or a copy of the original supply contract. Further, we cannot be sure that a contract for the supply of the product itself was ever signed or delivered to the consumer. As stand-alone agreements, these financing agreements raise concerns in terms of disclosure obligations, and merit the extension of the same protections applicable to a direct agreement.

Similarly, PBO recommends the extension of disclosure requirements applicable to direct and future performance agreements to cover related finance agreements concerning the financing of any goods marketed together with future services, regardless of the price to the consumer of the services, where the supplier represents the lender at the point of sale. PBO has assisted a growing number of consumers who have been sold, for example, face creams containing gold, or a machine for facial treatments, in conjunction with free services, where there is no record of the goods purchased or the identity of the vendor, other than vague references in the finance agreement. Again, without the purchase agreement to facilitate enforcement, the consumer faces difficulty attempting to exercise basic consumer rights such as enforcing implied warranties or rescinding the related finance agreement based on unfair business practices by the supplier.

At minimum, finance agreements that are separate from related supply agreements should be required to identify the product, the supplier, the price, and the date the supply contract was entered into. Alternatively, the financing company could be required to keep (and if a dispute arises, to produce) a copy of a related agreement that satisfies the terms of the CPA, which it should be able to obtain as a matter of course if the supplier is representing the lender in the transaction.

III. Extend the Focus of Enforcement to Assignees/Finance Companies

PBO's clients are rarely disputing issues with the actual supplier of a purchase cost plus lease. They are dealing with one in a chain of "assignees". Although the

Ministry has identified the role of this type of business as that of a finance company, and despite these businesses self-identifying in NOSI documents as mere “assignees” of the agreement securing the debt, with the exception of one such company, a Schedule 1 lender, these businesses seem to be closely tied to the suppliers.

The listing of these “finance companies” as the largest creditor (by orders of magnitude) in bankruptcy filings of door-to-door suppliers provides insight into how a finance company that is closely related to an unscrupulous supplier might be used as a vehicle to shield door-to-door profits from judgments for monetary damages, whether obtained through class actions or individual party litigation.

Looking at the statements of claim used in collection litigation by these finance companies, they seem to avoid expressly claiming to be “assignees” of the supply agreement. The form of agreement used by one source of equipment supply in particular, identifies no legal entity as the supplier. The only legal entity properly identified in the contract (that is, other than by a business style alone) is the finance company, although no indication of their role as supplier or finance company is given. In collection litigation launched against consumers, this supplier/finance company routinely claims to be merely in the finance business and not in the business of door-to-door sales.

PBO has observed that with the exception noted above, these finance companies are engaging in unfair business practices at the same high rate as the suppliers (by direct agreement) of products sold under purchase cost plus leases. However, through lack of awareness, consumers are not naming the finance company in complaints to the Ministry. The focus of consumer protection enforcement activity should be extended equally to these finance companies.

IV. Strengthening Enforcement by Creating Presumptions

As noted above under Proposal #7(b), one of the limitations on the Ministry’s ability to enforce compliance with the CPA arises in the context of disputed factual accounts of what happened. When the breach is not apparent on the face of the contract and the supplier denies the consumer’s allegations, the Ministry’s hands may be tied. While there is no way to completely eliminate factual disputes, they can be reduced by the introduction of certain presumptions that place the onus on

the suppliers to prove their compliance with the CPA in the ordinary course of business.

Example 1: Require suppliers to prove that a contract was provided. PBO regularly hears from consumers who report that they were not provided with a copy of the contract at the time of a direct sale. When the consumer attempts to exercise cooling-off or cancellation rights on this basis, the supplier invariably insists that a copy of the contract was provided. This leads to a disputed-fact situation. This situation is further compounded in many cases, when the consumer later obtains a "copy" of the contract from the supplier, and reports serious irregularities with the version provided to them, such as forged signatures or fields filled in after-the-fact with incorrect information. Again, suppliers routinely dispute such claims.

Introducing an onus and a presumption could easily prevent both issues. If a transaction is conducted door-to-door or in-person, the supplier should be required to provide an additional copy of the contract(s) by some traceable means, preferably email (as email creates a record of the attachment itself), or registered mail if the consumer expressly declines email. If the supplier fails to do so, it should be presumed that the supplier did not provide the contract to the consumer. This would also allow the Ministry to make a determination as to the consumer's right to cancel on the basis that a contract was not provided, without having to adjudicate a factual dispute. Suppliers who are well-intentioned should not object to this, since providing a copy by email protects them against accusations of non-disclosure by consumers.

Example 2: Require suppliers to provide specific information when a consumer asks about cancellation. The Ministry has suggested in this consultation process that unfair practices be extended to cover conduct during the life of a contract. PBO agrees with this and has noted above under Proposal #13 that one common practice is for suppliers to respond to complaints or queries by (falsely) telling consumers that there are no cancellation rights after the cooling-off period has passed. PBO anticipates that factual disputes over discussions like this will be commonplace if unfair practices are extended to the post-execution stage of the contract. This could be addressed by requiring all suppliers in the direct sales or lease plus cost context to provide a prescribed form (similar to the Consumer Complaint Notice) whenever a consumer asks about cancellation. That form would set out the grounds on which a contract can be cancelled under the CPA. Again, the onus would be on the supplier to prove that it sent the required form, and a

failure to do so would result in a presumption that the form was not provided and that an unfair practice thus occurred.

V. Access to Justice and the Creation of a Consumer Protection Legal Support Centre

PBO is honoured to serve thousands of low-income consumers who have nowhere else to turn in order to assert their legal rights. Each and every time we do this, we are simultaneously increasing consumer protection and access to justice in Ontario. These two imperatives are deeply intertwined and mutually reinforcing. We submit that now is the time for the Ministry to take a bold step toward full access to justice for vulnerable consumers.

Ontario has a chance to be a world leader on this issue by **creating a consumer protection legal support centre**. The centre could be established through amendments to the *Consumer Protection Act*. For recent, relevant precedent, the Ministry should examine the amendments to the *Human Rights Code* that created the Human Rights Legal Support Centre. Part IV.1 of the Code establishes the Centre, defines its objectives, identifies the services it will provide, creates a Board of Directors, identifies funding arrangements, and ensures strong reporting. These components are easily adaptable to the consumer protection area.

The bedrock of this proposal is that consumers need individualized, tailored legal services in order to enjoy the full benefit of the law. While legal information, complaint mechanisms and Ministry enforcement tools are all essential pieces of the puzzle, they must be accompanied by direct legal services to consumers who need to assert or defend their rights. PBO sees this every single day. Without it, access to justice will remain an illusion.

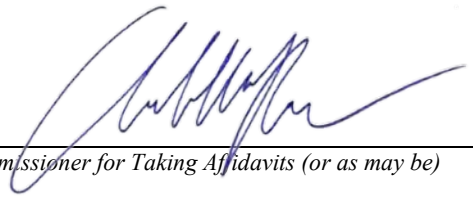
While the legal support centre we propose would likely become an independent agency of the Ontario government, there is a vital opportunity to mandate partnerships with the private bar. This could be achieved through PBO's proven ability to engage the legal profession in service of the public good. PBO's work with the Ministry has already produced enormous benefits to consumers by leveraging millions of dollars of free legal services. Scaling that effort into a robust support centre would be a truly game-changing endeavour. The mechanism is simple: we submit that the amendments should require a percentage of the centre's budget to be used for organizing pro bono legal services for consumers. By harnessing the

goodwill of the legal profession, Ontario would achieve a profound return on its investment in consumer protection.

Thank you for your time and we look forward to your response.

PBO is grateful to the Ministry for including us in this process. Thank you for considering our submissions.

This is Exhibit "M" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Proposal

Consultation Paper on Modernizing the Consumer Protection Act, 2002

Regulation Number(s):

N/A

Instrument Type:

Proposal

Bill or Act:

Consumer Protection Act, 2002

Summary of Proposal:

The Ontario government is considering how to improve the Consumer Protection Act (CPA/the Act). The CPA is the primary piece of legislation that sets out rules for consumer protection in Ontario. It governs most personal and household transactions by consumers, including buying furniture in a store, shopping for clothes online, buying goods sold door-to-door, and renovating homes. The CPA's rules support a fair and competitive marketplace where consumers make their own choices without being subject to unfair business practices.

In 2019, the Government of Ontario announced the Rebuilding Consumer Confidence Strategy, which included the first comprehensive review of the CPA in 15 years. The Ministry of Public and Business Service Delivery (the ministry) is continuing the CPA review process and examining how to update the Act to strengthen protection for consumers, adapt to changing technology and marketplace innovations, and streamline and clarify requirements to improve consumer and business understanding and compliance. Updating the CPA will enhance consumer protection and reduce burden for the retail community in general, while addressing specific problems more effectively than the current law.

This Consultation Paper contains many of the proposals included in the 2020 consultation paper. The paper also includes proposals that have been updated to reflect feedback from respondents to the previous consultation, as well as some new proposals.

The paper expands on previous consultation proposals and addresses:
o Broad consumer protection and empowerment, including consolidated contract disclosure rules, protections and remedies against unfair practices, stronger consumer rights, and opportunities to make it easier for consumers to unsubscribe or exit a contract;
o Sector-specific protections, including exit options for timeshare owners, stronger protections for consumers in long-term leases, and improved rules to address issues relating to the use of Notices of Security Interest by some businesses.

In addition to the proposals in this paper, changes to the CPA would include streamlining the structure of the Act and regulations to make it easier for consumers and businesses to understand their rights, responsibilities, and obligations.

We welcome your responses to the questions in this paper and any additional comments or suggestions on the modernization of the CPA. Please provide examples or evidence to support your suggestions, where possible.

You may download this paper and submit your completed responses by March 17, 2023. You can submit comments by email to consumerpolicy@ontario.ca or by mail to the address provided.

Analysis of Regulatory Impact:

The proposals in this consultation paper are under consideration for a new Act. If the ministry receives approval to proceed with the proposals, the following are anticipated impacts:

• The new CPA would protect consumers with clearer requirements to enable improved compliance by business and strengthen enforcement, providing greater confidence for consumers.
• Most businesses providing goods and services directly to consumers would be impacted by a new Act. Rules that apply to the maximum number of businesses are general rules related to the prohibited use of unfair practices, for which there are no costs to comply.
• In some cases, proposals would reduce burden for businesses and support competition by supporting a level playing field with consistent rules, targeting bad actors, and avoiding unnecessary regulatory burden for good actors.
• Some changes could result in short-term costs for some businesses; however, these changes are important for the longer-term benefit of modernizing the act and better protecting consumers. Businesses would be consulted on the specifics of regulations and on the appropriate amount of time required to bring their operations into compliance.
• To implement legislative proposals, regulations would need to be developed. The ministry would provide baseline and projected costs during the regulatory development phase and consultation, as it is at that stage that the precise nature of the requirements would be known.
• The new statute would better align with the evolving marketplace and is intended to bolster consumer confidence and support economic growth.

Further Information:

Modernizing Consumer Protection in Ontario

Proposal Number:

23-MGCS001

Posting Date:

February 6, 2023

Comments Due Date:

March 17, 2023

Contact Address:

Consumer Protection Act Review
Manager, Consumer Policy Unit
Ministry of Public and Business Service Delivery
56 Wellesley Street West - 6th Floor
Toronto, ON, M7A 1C1

|

This is Exhibit "N" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

Modernizing Consumer Protection in Ontario

Strengthening the Consumer Protection Act

Submissions by Pro Bono Ontario

March 2023

How to Participate

The ministry welcomes responses to the questions in this paper and any additional comments or suggestions on the modernization of the *CPA*.

Your comments will help to enhance the *CPA* and make it more comprehensive, modern, and responsive to businesses and consumer concerns.

Responses to questions and additional comments can be included in the text boxes provided throughout the document. There is no word limit on any responses. Please provide examples or evidence to support your suggestions, where possible.

A summary list of all the consultation questions found throughout this paper is provided in the Appendix.

You may download this paper and submit your completed responses by March 17, 2023. You can submit comments by email to consumerpolicy@ontario.ca or by mail to:

Consumer Protection Act Review
Manager, Consumer Policy Unit
Ministry of Public and Business Service Delivery
56 Wellesley Street West – 6th Floor
Toronto, ON, M7A 1C1

Please provide your name and contact information, including an email address.

Name/Organization (if applicable)

Pro Bono Ontario

Pro Bono Ontario (PBO) is a registered charity whose mandate is to harness the skills and commitment of volunteer lawyers to address the unmet civil law problems of low-income Ontarians to help them lead secure, healthy, and productive lives. PBO delivers on this mission by developing and directly managing pro bono programs that enable lawyers to provide high-quality legal services to those who cannot afford a lawyer or qualify for government-funded assistance. The majority of PBO's clients are assisted through the Free Legal Advice Hotline (the "Hotline"). Since the Hotline launched in 2017, staff and volunteers have answered almost 16,000 calls in the area of consumer protection and debt.

In 2018, PBO entered a fee for service agreement with the Ministry of Public and Business Service Delivery (the "Ministry"), wherein PBO provides legal assistance to consumers whose issues could not be resolved through the Ministry's complaints process. As of writing, PBO has provided assisted 1811 clients referred by the Ministry. These clients present us with several, often intersecting problems. The top five are:

Door-to-Door Sales and/or NOSI Issues	29%
Home Renovation Issues	18%
Consumer Contract Issues	15%
Vehicle Repair or Purchase Issues	10%
General Consumer Complaints	9%

Note: The remaining 19% constitute clients seeking assistance with all other consumer and debt matters

Our clients are typically individuals living at the intersection of multiple dimensions of vulnerability. For example, roughly 47% of consumers calling about door-to-door sales and NOSI issues are senior citizens. Our submission is based on our extensive experience assisting Ontarians who depend on the Consumer Protection Act (CPA) to create meaningful and enforceable consumer rights.

Contact Information

Lynn Burns
Executive Director
lynn@probonoontario.org
416-977-4448 ext. 925

Adil Munim
Staff Lawyer
adilm@probonoontario.org
647-660-7582

Please also check a box to indicate whether you are commenting primarily as a:

☐ Business
☐ Business Association
☐ Consumer
☐ Consumer Association
☐ Academic
☒ **Legal Organization**
☐ Other – You may enter your answer here

Thank you for taking the time to review this paper. If you have any questions about this consultation, please email consumerpolicy@ontario.ca.

Privacy Statement

Please note that unless agreed otherwise by the Ministry of Public and Business Service Delivery, all submissions received from organizations in response to this consultation will be considered public information and may be used, disclosed and published by the ministry to help the ministry in evaluating and revising its proposal. This may involve releasing any response received to other interested parties. The ministry will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization.

Responses from individuals who do not show an affiliation with an organization will not be considered public information. The ministry may use and disclose responses from individuals to help evaluate and revise the proposal. The ministry may also publish responses received from individuals. Should the ministry use, disclose, or publish individual responses, the ministry will not disclose any personal information such as an individual's name and contact details without the individual’s prior consent, unless required by law. The ministry may use your provided contact information to follow up with you to clarify your responses.

If you have any questions about the collection of this information, please contact the ministry by email - consumerpolicy@ontario.ca.

Appendix

Summary of Questions

Broad Consumer Protection and Empowerment

A. Continued Proposals
Summary Questions

1.1) Do you support/continue to support the proposals described in the "Broad Consumer Protection and Empowerment" section? Please indicate your answer (yes, no, or no opinion) by using the checklist below.

Consolidating Contract Disclosure Rules	☒ Yes	☐ No	☐ No Opinion
Contract Amendment Rules: Improving Consumer Rights	☒ Yes	☐ No	☐ No Opinion
Unfair Practices: Strengthening Protections	☒ Yes	☐ No	☐ No Opinion
Unfair Practices: Improving Remedies	☒ Yes	☐ No	☐ No Opinion
Consumer Rights and Prohibited Contract Terms	☒ Yes	☐ No	☐ No Opinion
Deterring Businesses From Refusing to Provide Statutory Refunds	☒ Yes	☐ No	☐ No Opinion
Compliance Orders on Businesses Facilitating Contraventions	☒ Yes	☐ No	☐ No Opinion

If you have specific comments related to any of the proposals, please leave a detailed comment in response to Question 1.2 below.

1.2) Do you have any specific concerns or comments on any of the proposals described in the "Broad Consumer Protection and Empowerment" section?

Consolidating Contract Disclosure Rules

PBO agrees with the Ministry's proposal to combine contract disclosure rules into a single set of core rules. We often see a number of agreements that fit into multiple existing categories (e.g. personal development service agreements that are entered

into online or by phone) so we believe that simplifying the categories and the disclosure rules that apply to them will be helpful.

Pre-Contract Disclosure Requirements

PBO generally supports the broad provisions proposed for greater disclosure before and after entering into a contract. Greater disclosure at the outset enables consumers to make informed decisions. However, PBO believes there are certain risks that should be considered.

Disclosure requirements may encourage suppliers to create standard-form acknowledgements that a consumer can sign to indicate that they have received all the documents in their prescribed form. Suppliers would then simply indicate that consumers *must* sign those documents, not affording them any opportunity to consider the implications. This already occurs with prohibited contracts under s. 43.1 of the *CPA* (consumers are often told by suppliers to sign and agree that they invited the supplier to their home when they never made any such invitation). This creates a situation wherein the consumer has little to no idea about the legally required disclosure requirements but has seemingly agreed and acknowledged that the supplier has met all its duties. This protects suppliers, not consumers.

Additionally, PBO would like to emphasize that disclosure requirements are often ignored by suppliers. In these instances, a consumer's only option is to try and exercise their right to cancel under the *Consumer Protection Act* (*CPA*). Unfortunately, a supplier that has not adhered to disclosure requirements is also unlikely to respect a consumer's cancellation. Accordingly, PBO suggests that any new disclosure requirement provisions be accompanied by greater consequences for suppliers for failure to disclose. For example, where a supplier is notified of their failure to meet the disclosure requirements, they could be given 10 days to deliver a contract that meets the disclosure requirements. If they fail to do so, the contract would be void. Similarly, the consumer should be given the right to a cooling-off period once proper disclosure is made (i.e., 10 days after the supplier meets the legally mandated disclosure requirements). While this may seem like an added responsibility for suppliers, PBO believes that it is necessary to ensure fairness in the marketplace.

Contract Amendment Rules: Improving Consumer Rights

PBO generally agrees with the Ministry's proposals to strengthen rules that govern contract amendments and continuation.

PBO recommends that these changes be accompanied by provisions that clarify what would happen if a supplier failed to meet the new contract amendment/continuation rules. Ideally, the new provisions would outline a process through which the consumer

could cancel without incurring any charges due to the supplier's failure to notify them of amendments or obtain their consent for amendments.

Additionally, PBO recommends that 'permitted contract-end charges' be defined clearly to prevent the risk of suppliers charging unreasonable, unexplainable, or unfair amounts. Suppliers should be required to outline a reasonable, pre-defined contract-end charge in the terms of the original contract (e.g., for a contract with monthly payments, a consumer who exits a contract after being notified of amendments could be required to pay the supplier 50% of one monthly payment).

Unfair Practices: Strengthening Protections

PBO strongly agrees with the Ministry's proposals in this area.

Unfair Practices: Improving Remedies

PBO strongly agrees with the Ministry's proposals in this area.

We briefly reiterate one of our suggestions from the previous consultation round, which is that we believe that *CPA* remedies should be harmonized. Currently, consumers are entitled to either 'rescission' (for unfair business practices under Part III) or 'cancellation' (for other *CPA* violations under Part IX). The distinction between these two remedies is confusing even for lawyers – especially where a consumer has rights that are grounded in different parts of the *CPA* (e.g., unfair business practices *and* failure to deliver a contract). PBO suggests that the amendments to the *CPA* very clearly outline both the remedy available and the effect of that remedy. Ideally, the same remedy would be available for all *CPA* violations to prevent confusion about applicable obligations for parties when a consumer exercises their *CPA* rights.

Consumer Rights and Prohibited Contract Terms

PBO agrees with the Ministry's proposal to clearly prohibit certain contract terms.

PBO suggests that the Ministry introduce punitive consequences for businesses that would deter them from clearly violating these, and other, provisions of the *CPA*. For example, the amendments could introduce clear punitive damages awards where these matters are taken to court. These types of deterrents are important because there are some businesses that continue to engage in *CPA* violations despite numerous complaints, despite consumers exercising their rights, and despite fines/charges laid by the Ministry. The marketplace can only be fair where businesses are held accountable for their actions.

Deterring Businesses from Refusing to Provide Statutory Refunds

PBO agrees with the Ministry's proposal to give consumer's the right to recover three times the refund amount where a business fails to do so.

PBO recommends that suppliers be notified of these changes well in advance. This will ensure that these provisions deter suppliers, rather than leaving the burden with consumers to inform suppliers of their rights under the *CPA* after they have been violated. PBO also recommends that this right be extended to any assignees that take over the original contract.

There are some situations where even three times a refund amount may not be sufficient. This is particularly true for long-term contracts for HVAC equipment. Consumers may exercise their right to cancel and only be entitled to a refund for the few months that they paid under the contract. For example, if the monthly contract price was $100, and the consumer paid for three months before cancelling under the *CPA*, the consumer's claim would be limited to $900. This amount is extremely unlikely to deter a business that has registered a NOSI on someone's home worth thousands of dollars.

This is further complicated by the ambiguity around what amounts to a "refund" in HVAC cases in which a business has removed and disposed of the consumer's existing equipment (usually fully functional) and installed their own. PBO proposes that suppliers should also be liable for three times the replacement costs of any equipment they removed and did not return and reinstall, or should be required to transfer full ownership of the installed equipment to the homeowner (free of payments and NOSIs).

Compliance Orders on Businesses Facilitating Contraventions

PBO strongly agrees with the Ministry's proposals in this area.

PBO suggests that these proposals clarify that *any* intermediary (e.g. loan companies, financiers, co-suppliers, online platforms, etc.) could face a compliance order for the actions of the business dealing directly with the consumer. This will ensure that intermediaries do more due diligence before accepting these contracts. PBO has seen many cases where financiers allege that they were not part of the original transaction and then completely ignore a consumer's *CPA* rights because they face no consequences unless taken to court.

B. Revised and New Proposals
Summary Question

2) Do you support the revised and new proposals described in the "Broad Consumer Protection and Empowerment" section? Please indicate your answer (yes, no, or no opinion) by using the checklist below.

If you have any specific concerns or comments regarding any of the revised and new proposals, please leave a detailed comment outlining your feedback in each proposal's corresponding text box below.

Price Escalation Clauses ☒ Yes ☐ No ☐ No Opinion

PBO strongly agrees with the Ministry's initial proposal to allow price escalation clauses only where the consumer explicitly consents to them in writing OR if the contract also gives the consumer the right to cancel cost-free any time. PBO believes this issue is key to protecting consumers and should be addressed in legislation, rather than through regulation, to provide stable protection for consumers.

PBO recommends that the rules around price escalation clauses mirror the rules that the Ministry has proposed for contract amendments. A notable element of the Ministry's proposal is the concept of notice to consumers. PBO believes that to maintain ongoing fairness for consumers, it is important that suppliers provide notice of upcoming price increases *even where a consumer initially consented to a price escalation clause.*

PBO has observed that pricing increases have been used by some suppliers (and assignees) to regain access to consumer's bank accounts, despite the consumer having validly cancelled their contract and stopped payment under pre-authorized debit arrangements. It seems that banks are interpreting requests to stop pre-authorized payments as only applicable to the dollar amount initially specified by the consumer. As a result, suppliers (and assignees) are able to debit other amounts after alleged price increases. A written notice of all price increases would provide consumers with an opportunity to refresh their stop payment instructions.

Additionally, PBO recommends that, in addition to written consent, price escalation clauses should require the supplier to disclose the maximum amount payable over the lifetime of the contract, inclusive of any future price escalations. For example, a supplier that includes a price escalation clause of "up to 3.5% annually" should be required to disclose to the consumer, prior to the consumer entering the contract, what the total amount payable over the lifetime of the contract will be if the supplier escalates the price at the maximum rate of 3.5% per year. Consumers can only make informed decisions if they are aware of the full obligations of a consumer contract.

Better Rules for Delivering Required Information to Consumers	☒ Yes	☐ No	☐ No Opinion

PBO agrees with the Ministry's proposal to require that necessary disclosures by suppliers be delivered to consumers in a manner likely to come to the consumer's attention. PBO recommends that the *CPA* or its regulations be amended to require that necessary disclosures be delivered to consumers in writing, immediately after an agreement is entered, via a method selected by the consumer (e.g., paper copy or digital copy).

As noted above, PBO expresses concern that suppliers will continue to ignore new disclosure requirements. PBO recommends that any new disclosure requirement provisions be accompanied by greater consequences for suppliers for failure to disclose.

C. Emerging Issues and New Challenges

Question - Unsubscribing From or Exiting a Subscription-Based Contract

3.1) Are there any requirements that you think the ministry should consider for subscription- or membership-based contracts to address business practices that create barriers for consumers who wish to exit such contracts?

PBO agrees with the Ministry's proposal to make it easier to exit subscription-based contracts.

PBO recommends that the *CPA* also implement clear timelines for businesses to respond to a cancellation. For example, in addition to permitting a consumer to cancel by e-mail, mail, or over the phone, businesses should be required to respond to the cancellation within 5 days, providing an acknowledgement of the cancellation and a guarantee that the consumer will not be billed further and that their account will be closed. Without a timeline and responsibility for businesses, consumers may continue to be billed and be required to take further steps themselves. Without a timeline, the issue of contracts being easier to enter than they are to exit would not be resolved.

Summary Questions: Emerging Issues and New Challenges

3.2) Do you have any additional concerns related to the "Broad Consumer Protection and Empowerment" section?

Extended Application of Cooling-Off Periods

PBO believes that cooling-off periods should apply to certain consumer transactions that occur at retail locations. PBO has assisted consumers that have been roped into sales pitches at storefronts and have entered into contracts for financing or leasing of consumer goods (most often, beauty/skincare devices). In some of these situations, clients report that the 'storefront' was operated under an entirely different name than the registered business name. Currently, there is no cooling-off period for contracts entered into at the supplier's place of business or at a marketplace. PBO believes that the *CPA* should provide a 10- day cooling-off period for consumer contracts entered into at a storefront that create a payment obligation over time (e.g., a financing agreement or a leasing agreement). This cooling-off period would (a) ensure consumers are protected from high-pressure sales tactics irrespective of where they occur, and (b) deter businesses from engaging in such tactics.

3.3) Are there any emerging issues, new challenges, or economic considerations that have arisen related to general consumer protections and contract rules which the ministry should know about?

Consumers Do Not Have Enough Information About Their Rights

PBO often assists consumers that have no prior knowledge of their rights or options. In many instances, suppliers and business have misled consumers about their rights (e.g. telling consumers there is absolutely no right to cancel a contract). Consumers deserve to have greater access to information about their rights, which includes making the *CPA* easier to understand but may also require targeted outreach to vulnerable segments of the consumer population (e.g. seniors, newcomers, etc.).

Consumers Face a Marketplace That is Not Transparent

Many consumers seeking to exercise their legal rights face challenges when (a) trying to identify the legal, registered name of a business or (b) serving that business with a legal claim. These businesses seem to rely on the complicated and opaque system to evade lawsuits.

Currently, the Ontario Business Registry (OBR) allows consumers to conduct free searches for businesses. However, PBO has found that in some instances, businesses are not using a registered business name when interacting with consumers. This makes it impossible to determine which business is legally responsible in the consumer's matter.

The OBR is also largely inaccessible for consumers. Even if a consumer manages to locate a business name, they are required to pay a fee of $8 to access a full report that provides the business's registered address. While this may seem nominal, for many of PBO's clients this can be a very real barrier.

PBO recommends that the OBR be updated to include address information for all businesses, similar to the federal corporations database. Ideally, all information for a business' directors would also be available (this is important as the Rules of Small Claims Court allow for service on directors of a corporation where regular service is unsuccessful).

If implemented, these recommendations would greatly increase access to justice for consumers. They would also create a fairer and more transparent marketplace with greater accountability, as businesses would not be able to shield themselves from the law by making themselves difficult to locate.

Consumer Contracts Are Not Clear Enough

Many consumers have found themselves in consumer contracts that they have not fully understood. Contracts can be confusing, poorly organized, reliant on technical language, entirely composed of 'fine print', etc. This does not promote a fair marketplace where consumers can make informed decisions. PBO recommends that all contracts, including any terms and conditions, be in 12-point font for all types of agreements. PBO also recommends a requirement that contracts be in plain language that the average, reasonable consumer would be able to understand and contain a *brief* summary of key elements such as periodic and lifetime cost, length of contract, whether termination without penalty or payment is available, and how to terminate, in a highlighted region on the front of the contract.

Consumers are Being Asked for Digital Signatures

The use of digital signatures reflects the reality of the modern marketplace – almost all transactions are done online. However, PBO has seen that many consumers have been asked for digital signatures with little or no understanding about what documents are actually being signed. Consumers are simply told to 'sign' on an iPad or supply a digital signature. In some cases, the consumer's signature appears on documents they have not seen before. This occurs across a variety of industries.

PBO recommends that the Ministry consider introducing additional requirements for suppliers seeking to obtain digital signatures. For example, prohibitions on using digital signatures on any documents that were not reviewed in full by the consumer. Additionally, suppliers could be required to obtain signatures on an additional form that provides key contract details. This form could outline, in plain language, the total cost, the term of the contract, and other important factors along with a clear acknowledgement that the consumer understands that their signature is being obtained for a [type of agreement] agreement of [number of pages] pages. This may act as an additional safeguard to allow consumers to understand the transaction.

Sector-Specific Protections

Questions - Stronger Consumer Protection in Long-Term Leases

4.1) Does the proposed definition of purchase-cost-plus leases adequately capture the contracts in need of additional regulation?

PBO is uncertain that the proposed definition captures all contracts in need of additional regulation.

PBO has seen that consumers dealing with problematic long-term contracts have signed either (a) a lease/rental agreement for equipment or (b) a loan agreement. Suppliers use both types of contracts interchangeably, making it difficult to ascertain which provisions of the *CPA* are applicable. PBO recommends that the new definition be all-encompassing, rather than limited to 'leases', as suppliers may evade the new disclosure requirements by structuring their contracts as 'loan agreements' or 'credit agreements' rather than leases. Although all of these contracts practically function the same way, this technicality has previously enabled suppliers to create confusion and evade *CPA* requirements. Additionally, suppliers relying on loan agreements often use concepts that consumers do not understand and that create further confusion for consumers – such as 'term' versus 'amortization'.

Accordingly, PBO proposes the following definition:

"Purchase-cost-plus lease" means any contract (whether labelled 'lease' or otherwise), under which:

- goods are supplied to a consumer for use over a fixed-term;
- where ownership of the goods does not pass to the consumer; and
- where the total amount payable exceeds 90 per cent of the estimated retail value of the goods.

This would capture any contracts that have the same effect as a long-term lease. Ideally, any contract that imposes long-term, burdensome obligations on consumers should be subject to the same rules – irrespective of how the contract document is labelled or structured.

4.2) Is the proposed option to purchase on termination generally consistent with best practices in the industry?

PBO supports the Ministry's proposals to limit termination costs for long-term contracts. As noted above in Q4.1, PBO believes there should be no distinction between 'leases' and 'loans' for agreements that are essentially long-term rentals of equipment.

It is difficult to say whether the option to purchase, generally, is consistent with 'best practices' in the industry. From PBO's perspective, this particular industry (long-term contracts for home equipment) is rife with predatory suppliers that actively refuse to honour a consumer's legal rights. However, PBO believes that allowing consumers to purchase the equipment upon termination (for the fair market value of the equipment at the time of purchase which accounts for asset depreciation) only, *not* the value of any alleged maintenance fees, interest rates, etc.) may introduce a level of fairness to this industry that consumers desperately need.

4.3) Do you have any suggestions for requirements pertaining to the allowable buyout cost schedule that the ministry should consider when developing regulations?

PBO reiterates its suggestion from Q 4.1 that these proposals should not be limited only to 'leases'. Connecting the termination cost to the value of the equipment may prompt suppliers to structure all of these 'leases' as loan agreements. In that way, suppliers could then take the position that the value of the loan (and thereby the termination cost) is not connected to the value of the equipment at all and demand that the consumer pay out the full value of the loan on termination. PBO expresses serious concern that this is already occurring and will only continue if the proposed amendments do not capture *all* long-term contracts for the temporary use of goods where ownership does not pass to the consumer.

Furthermore, PBO recommends that 'reasonable costs' be defined with greater clarity or limited to a prescribed amount (e.g. $500). PBO has seen many suppliers callously ignore their *CPA* obligations, demanding whatever amounts they can from vulnerable,

low-income consumers. Any permitted contract-end charges should be limited in order to prevent suppliers from unfairly collecting from consumers.

PBO also recommends that any long-term contracts where ownership of goods does not pass to consumers be accompanied by a clear, bolded notice that indicates that the agreement is not a 'rent-to-own' agreement. Consumers are often unaware that they will not own the equipment at the end of a long-term contract. These types of contracts should also specify, and provide proof, of the estimated retail value of the equipment. Otherwise, suppliers could overstate the estimated retail value.

Summary Questions

5.1) Do you support/continue to support the proposals described in the "Sector-Specific Protections" section? Please indicate your answer (yes, no, or no opinion) by using the checklist below.

Protecting Consumers of Contract-Breaking Services	☒ Yes	☐ No	☐ No Opinion
Exit Option for Timeshare Owners	☒ Yes	☐ No	☐ No Opinion
Stronger Consumer Protection in Long-Term Leases	☒ Yes	☐ No	☐ No Opinion

If you have specific comments related to any of the proposals, please leave a detailed comment outlining your feedback in response to Question 5.2 below.

5.2) Do you have any specific concerns or comments regarding any of the proposals described in the "Sector-Specific Protections" section?

<u>Protecting Consumers of Contract-Breaking Services</u>

PBO generally supports the Ministry's proposals in this area. However, PBO proposes that additional provisions be introduced to further protect consumers. One of the primary issues with contract breaking agreements is that they are extremely vague – offering little to no clarity about the services being provided to the consumer. PBO recommends that contract breaking contracts be required to contain certain prescribed information, including:

- The identification number of the contract(s) the consumer wants to exit;
- The names of all parties to the contract(s);
- The date(s) on which the contract(s) were signed;

- The methods that the consumer has approved for the contract breaker to complete their services (e.g. writing letters, filing complaints with the Ministry, negotiating with other parties, etc.); and
- A clear notice that a contract breaker will not, as part of the agreement for contract breaking services, initiate legal proceedings for the consumer (any legal proceedings should be the subject of a retainer agreement governed by the *Law Society Act*).

While these requirements may seem to create a greater burden for businesses, the reality is that consumers are likely only seeking contract breaking services where they are unable to exit contracts themselves. Accordingly, the consumer transaction requires a greater deal of trust. PBO has seen a number of vulnerable and low-income consumers that have been roped into contract breaking services by the promise that someone can relieve the ongoing stress and anxiety caused by the original contract. Businesses seeking to offer contract breaking services are undertaking to be advocates for consumers and should be required to uphold a high standard of service. Alternatively, the provision of these services should be limited to legal professionals (i.e., lawyers and paralegals), whose professional conduct is highly regulated.

Exit Option for Timeshare Owners

PBO generally supports the proposed exit option for timeshare owners. PBO also recommends that additional regulations be introduced to facilitate greater disclosure to consumers considering a timeshare purchase.

Stronger Protection in Long-Term Leases

Leases versus Loans

PBO believes the biggest area of concern is that suppliers are continuously adapting their contracts to evade *CPA* requirements. All of the Ministry's current proposals, while useful, are limited to 'leases'. However, PBO has seen that suppliers are increasingly obtaining consumer signatures on loan agreements rather than leases. As noted above, the Ministry must ensure that any new regulations capture *every* type of contract that acts as a long-term lease, irrespective of how it is structured. Suppliers are using leases, financing agreements, or loan agreements to engage in the same activity – charging consumers every month for equipment that costs far less than the supplier has stated AND registering a NOSI on title reflective of the value of the alleged agreement, not the value of the equipment.

Cooling-Off Periods

PBO believes that cooling-off periods are crucial for any long-term contracts. However, cooling-off periods are not always effective. Notably, in situations where consumers are dealing with long-term contracts for HVAC equipment, suppliers almost always install their equipment within 1-2 days of obtaining the consumer's signature. This renders the cooling-off period meaningless as the consumer has not been given any true opportunity to actually 'cool-off' after a high-pressure sales pitch.

Even in situations where suppliers remove their equipment following a cancellation during a cooling-off period, they very rarely return the consumer's original equipment. This means the consumer must now incur more expenses just to be put back into their original state.

Accordingly, PBO recommends that a cooling-off period for long-term contracts (including purchase-cost-plus leases) be accompanied by a prohibition on installation during the cooling-off period. This is imperative for consumers to be able to make informed, thoughtful decisions in the marketplace. Alternatively, PBO recommends that the cooling-off period be accompanied by provisions that require the supplier to return/replace/or reimburse for any equipment that was removed or destroyed during the cooling-off period. Where a supplier fails to do so, the consumer could be entitled to keep the new equipment installed in their home during the cooling-off period.

PBO cautions against any form of written consent by consumers to have a supplier install equipment during the cooling-off period as this could result in the unexpected and unfair waiver of consumer rights.

The Misleading Nature of 'Service/Maintenance'

Most of the long-term contracts that PBO sees have been entered on the basis that the supplier has promised ongoing service and/or maintenance of the equipment for the full term of the agreement. Unfortunately, in our experience, these promises for service/maintenance are never fulfilled by suppliers. When consumers call with an issue, the supplier either promises to make repairs but never takes any action or convinces the consumer to enter a new contract for a replacement. Consumers are therefore charged a tremendous amount for 'service' or 'maintenance', when neither of these are available but simply used as a hook to upsell customers.

Suppliers then rely on their promise for 'service/maintenance' to charge consumers much more than market value because they have grossly exaggerated the price of the package of goods/services that the consumer is actually receiving. Furthermore, suppliers often register NOSIs for an amount that integrates the promise for 'service/maintenance', despite the fact that service/maintenance cannot legally be subject to a security interest. In this way, suppliers obtain a massive benefit by

integrating a promise into their contracts that is never fulfilled – all at significant cost to the consumer.

PBO recommends that for any long-term contracts that purport to offer service/maintenance of equipment, the supplier be required to outline the terms of that service/maintenance. At a minimum, the terms should specify how consumers can request service, what is covered by the service, and the timeframe in which the supplier will respond to service requests. Similarly, long-term contracts that purport to offer service/maintenance should be required to disclose what amount of each monthly payment is attributable to the equipment and what amount is attributable to the service/maintenance. Finally, as noted in our submissions below, suppliers should not be able to register NOSIs for amounts that include the 'service/maintenance' component of any consumer contract.

Questions - Notices of Security Interest

6.1) Would the clearer requirements to discharge NOSIs support improved compliance by businesses?

PBO believes that the clearer requirements to discharge NOSIs may support improved compliance by businesses. In our experience, most businesses engaging in this type of behaviour (e.g. long-term contracts and NOSIs) tend to ignore rescission letters completely. Businesses rely on the fact that consumers have little recourse other than a court action. This proposal places a clear (and fair) obligation on businesses to discharge a NOSI where a contract has been cancelled.

However, PBO expresses concern that this requirement will be ignored by suppliers. Suppliers that face no repercussions for failing to adhere to the *CPA* have no reason to comply with these provisions. This is especially true where the registration of a NOSI essentially ensures that the supplier will receive some payout by the consumer – whether that is the total amount payable, or a reduced amount reached during a settlement.

PBO recommends that punitive measures be introduced for businesses that fail to discharge NOSIs within 15 days. These measures must be automatic, unlike compliance orders or formal charges that require investigations. A failure to discharge within the prescribed period should trigger an automatic response against the supplier. This could be a daily fine of $500 for each day that the supplier fails to remove the NOSI.

PBO also recommends that the Ministry consider clarifying the effect of a cancellation/rescission notice sent by consumers. Suppliers currently take no action upon receiving such notices because they only give rise to the consumer's right to commence an action in court. The burden is left entirely on the consumer. PBO believes that cancellation/rescission of a contract under the *CPA* should be effective upon notice to the supplier. This notice should describe a valid reason to cancel supported by an account of facts, even if the supplier disagrees with those facts. The onus should be on the supplier to sue at court for recovery if there is a factual dispute. Suppliers are taking advantage of the fact that the current *CPA* places a great deal of responsibility on the consumer, resulting in a great imbalance in the marketplace.

6.2) Do you expect the proposed alternative process to be a significant improvement for consumers over the current requirement to seek a court order?

PBO believes that the proposed alternative process will be an improvement for consumers. There are, however, some considerations PBO believes will be important to allow this process to function effectively.

Costs

This should be a cost-free process for consumers. For example, consumers should not be required to pay a Teraview licensee to register the discharge of a NOSI. The burden of NOSI removal should not fall to the consumer that was merely a victim in a scam.

Volume

There are currently hundreds of consumers throughout the province that are dealing with an improper NOSI on their title. The Ministry must be prepared to receive complaints from *all* of these consumers. The reality is that the suppliers engaging in these practices have little consideration for the law. Until they receive a formal court order, the businesses may not take any action. In fact, they may continue to threaten consumers with demands for payment. This creates significant risk for consumers who need NOSIs removed immediately to renew a mortgage or sell their property.

Similarly, the Ministry should be prepared for *every* request to be appealed by the suppliers. As noted above, these businesses have little respect for the law. They will likely push back and rely on any measures possible to continue to extort money from vulnerable consumers. There are even suppliers that continue to engage in the same dubious practices despite having been charged/fined by the Ministry.

High volume and slow processing times will not remedy the issue for consumers. PBO recommends that measures be introduced to ensure that the Ministry's alternative process is not overburdened. These measures include dedicated staff, clear processing timelines, limited opportunity for businesses to slow the process, etc. Additionally, greater consideration should be placed on the responsibility of suppliers. Consumers should not have to shoulder the entire burden of NOSI removal because suppliers have taken advantage of them.

Transparency

It is imperative that this process be accompanied by a high degree of transparency. Consumers should be aware of the steps involved, given clear timelines (including strict deadlines for the appeal process and decisions made by the Director), and provided reasons where a business's appeal is successful. Ideally, consumers would also have the right to participate in the appeal process.

6.3) Do you support the ministry's proposal to leave NOSI assignment rules unchanged?

PBO does not support the Ministry's proposal to leave NOSI assignment rules unchanged but understands the need to balance the interests of all parties – including assignees. Further comments have been provided under Qs 6.5 and 6.6.

6.4) Apart from what has been proposed to better protect consumers, should the ministry take further action to protect consumers from the potential negative impacts that may result from consumer contracts that create a security interest?

a) How can this be best achieved?
b) Do you support the ministry's proposed regulation-making authority that governs the use of security interests or liens in respect of consumer contracts?

A. PBO recognizes that security interests may be used to help suppliers protect their interest in their equipment in the event that a consumer defaults on payment or sells the property. However, there are many more ways that consumers could be better protected against the negative impacts of contracts that create a security interest.

For example, the Ministry could develop and maintain an approved registry for suppliers that are permitted to offer consumer contracts that create a security interest. Any contracts by suppliers not in the registry could be deemed void, or the terms giving rise to a security interest could be deemed void. Additionally, any supplier's violations of the *CPA* could result in them being removed from the registry. This would also go a long way to counteracting the problem of suppliers changing names and contact information in an attempt to evade service or avoid recognition once they have been exposed through news articles or negative reviews.

Additionally, the Ministry could create a requirement that any consumer contract that creates a security interest be accompanied by an informed consent form completed and filed with the Ministry itself. This should be a written or online form completed by the consumer while the supplier is neither present nor on the phone with them.

Suppliers should be required to disclose and explain that they will be registering a NOSI, including what the implications are for the consumer. Consumers deserve to have a greater understanding of the full implications of any consumer contract as this increases fairness in the marketplace. Currently, consumers operate under the assumption that a NOSI is a lien, which is inaccurate.

PBO also recommends that clear prohibitions be introduced for NOSIs for certain equipment (such as security cameras, HEPA filters, etc.) below a specific dollar value. Suppliers should not be able to register a NOSI for a $200 piece of equipment. Furthermore, suppliers could be prohibited from registering NOSIs altogether unless the consumer has defaulted on payments. Registration of a NOSI prior to a payment default is premature and allows suppliers to extort consumers.

Another ongoing issue with NOSIs that must be addressed is the confusion they create on parcel registers. Registrations should be clearly regulated to prevent non-descript assignments, multiple NOSIs for the same equipment, and vexatious registrations. NOSIs that fail to meet a set of basic requirements should be removable at the property owner's request. It should be the responsibility of the supplier to then prove that it holds a valid security interest.

PBO also believes that greater awareness is imperative to protect consumers. The Consumer Beware List, as well as clear information about the risk of NOSIs and long-term contracts, should be well-publicized.

These are only a few suggestions that PBO believes could greatly improve the situation for consumers. Currently, suppliers are taking advantage of outdated legislation, a slow judicial remedy process, and the innocence of the province's

most vulnerable consumers. Consumers deserve much more protection against well-resourced suppliers that seek to undermine their rights.

B. PBO supports the Ministry's proposed regulation-making authority that governs the use of security interests or liens in respect of consumer contracts.

6.5) Should the secured party (e.g., the business that supplied the goods) be required to notify the consumer when it registers a NOSI in the Land Registry System?

a) If yes, should there be requirements as to when this occurs?

Yes, PBO believes that businesses should be required to notify consumers when they either register or assign a NOSI. This notice should be delivered within 10 days of the registration or assignment in a form prescribed by the Ministry. This would help ensure that consumers can address a NOSI well before the sale of their home or the refinancing of their mortgage. Many suppliers rely on consumers being unaware of a NOSI until they try to sell their home. At that point, consumers are under immense pressure to close on the sale and end up paying out the suppliers in full (despite having validly cancelled their contracts under the *CPA*).

This notice requirement, for both registration and assignment, would also give consumers information about assignees. PBO has made more detailed remarks about this in Q 6.6.

6.6) In the case of a contract assignment, should the business or assignee be required to notify the consumer when an assignment occurs?

PBO strongly believes that businesses should be required to notify consumers when a contract assignment occurs. The notice should, at minimum, identify the original contract holder, include a copy of the original contract, provide the date of assignment, and provide full contact details for the assignee. This notice should be provided within 10 days of assignment.

PBO has seen many situations where consumers have no information about which business is the current contract holder. Once contracts are assigned, the original contract holder sometimes dissolves, becomes inactive, and/or becomes unresponsive to the consumer's communications. This makes it difficult for consumers to identify who to contact for support or maintenance. It also makes it

extremely challenging for consumers to exercise their legal rights because they cannot identify where to send rescission letters or where to serve legal claims. A notice requirement ensures that consumers are always aware of the current contract holder. Not only does this create a fairer, more transparent marketplace but it also ensures that consumers are not denied access to justice.

PBO also believes that the Ministry should clarify the obligations of assignees, including their obligation to honour a cancellation or rescission based on unfair business practices of the assignor. In some situations, PBO has seen that assignees refuse to respect a consumer's rescission under the *CPA* because they were not present at the time of contract signing and/or have no knowledge of the *CPA* violations. This is unreasonable and unfair as consumers should not be denied their legal rights simply because the contract changed hands.

6.7) Should the total value of the registered NOSI be limited to the estimated retail value of the equipment only (i.e., the value of the equipment, but not services)?

a) If yes, how should the estimated retail value of the equipment be determined?

PBO strongly believes that the total value of a registered NOSI should be limited to the estimated retail value of the equipment only.

Currently, suppliers are able to register NOSIs for the total amount payable under a 'lease agreement' or a 'loan agreement', suggesting that this value reflects 10 years of service and maintenance. However, a security interest attaches to personal property only. It does not attach to other services rendered, interest, or fees. Accordingly, suppliers should be limited to collecting only the true value of the equipment through the registration of a NOSI. If a supplier seeks to be compensated for default under a lease/loan agreement, they should be required to pursue this through the court system – not through the Land Titles system.

PBO has also seen suppliers register NOSIs for $1. Despite this, they allege that the consumer owes them the total amount payable under the agreement before they discharge the NOSI. This practice is dangerous as it completely undermines the purpose of NOSIs altogether.

The estimated retail value of the equipment should reflect its fair market value on the date that the consumer contract is signed. Although the real value of the equipment will decrease over time, suppliers should be entitled to register a NOSI for the original market value for the duration of the contract. Assuming there are no *CPA* violations or contract breaches, this will allow suppliers to protect their interests while dissuading consumers from ignoring their payment obligations under valid contracts.*

PBO also recommends that all NOSIs for consumer contracts be accompanied by expiration dates that reflect the terms of the contract.

If the total value of a NOSI is limited to the estimated retail value of the equipment only, this may allow for the creation of an alternative dispute mechanism for NOSI removal. Similar to the provisions under the *Repair and Storage Liens Act*, consumers could pay the disputed amount into court (e.g., the retail value listed on the NOSI, not thousands of dollars as arbitrarily chosen by the supplier for 'service' and 'interest'), have the NOSI removed, and then follow the dispute process whereby a supplier would have to prove that the original contract and therefore the NOSI were not rescinded or in violation of the *CPA*.

**This reflects an ideal scenario where a long-term contract is entered into by a consumer who (a) understands all the terms of the contract, (b) has accepted the risk of having a NOSI on their home, (c) has agreed to the full term of the contract for the total amount payable, and (d) has not had their CPA rights violated/ignored.*

Emerging Issues and New Challenges
Summary Questions

7.1) Do you have any additional concerns related to the "Sector-Specific Protections" section?

The Danger of Continuing to Allow Suppliers to Register NOSIs

PBO understands that NOSIs, if registered and used properly, can be effective for suppliers to retain their interest in the equipment that they own. However, PBO expresses serious concern that it is currently too easy for suppliers to take advantage of NOSIs. Notably, suppliers are relying on NOSIs as if they are liens – which they are not. Homebuyers are *not* obligated to assume the previous property owner's equipment leases. While a homeowner may want to assume this lease for certain equipment, such as a furnace, they are not required to do so. As a result, the supplier should simply be removing the equipment and discharging the NOSI prior to the sale of a home. Any of the remaining obligations under the lease should be enforced at court under a contract dispute, not through the use of a NOSI as leverage.

Ultimately, this may be less pertinent as more and more suppliers structure their long-term contracts as loans rather than leases.

7.2) Are there any emerging issues, new challenges, or economic considerations about specific sectors, products or services that you would like to inform the ministry about?

HVAC Suppliers Continue to Use Predatory Tactics

Since the government's 2017 prohibition on the door-to-door sale of HVAC equipment, PBO has noticed that suppliers have employed a number of new tactics to secure 'invitations' to consumers' homes. A common tactic is a social media advertisement that offers a 'free home energy assessment' or a 'free smart home thermostat'. Consumers sign up for these 'free' services, the supplier arrives at their home, and they are pressured into signing a contract for HVAC equipment. PBO recommends a prohibition on these deceptive forms of advertisement.

Similarly, HVAC suppliers often seem to have knowledge about consumers who already have HVAC contracts (with other businesses) and repeatedly target those consumers. The most vulnerable consumers (seniors, newcomers to Canada, etc.) are often the victims of these tactics. It is not uncommon for PBO to hear from individuals who were sold 4 or 5 different unwanted items after a series of visits from different suppliers and now find themselves subject to $30,000 to $40,000 in NOSIs. PBO recommends that these predatory tactics be prohibited, i.e. a prohibition on the targeted selling of HVAC equipment where a consumer has not specifically requested new equipment. It should be much harder for businesses in a fair, transparent marketplace to sell consumers goods/services that they do not actually need.

Long-Term HVAC Contracts and Mortgage Fraud

PBO has observed that in some instances, consumers with long-term HVAC contracts are approached by businesses that promise to not only get consumers out of their contracts, but also to renovate their homes, or make improvements like installing insulation. On the basis of these offerings, the businesses manage to secure a mortgage on the consumer's home. In at least one instance, PBO has seen a consumer who has received a foreclosure notice under this fraudulent mortgage scheme. In all of these instances, the consumers are seniors, they have a number of NOSIs on their title for HVAC and other equipment, and they have little to no understanding of the mortgage documents that were signed. It is apparent that the businesses already knew of the existing NOSIs on the consumer's title, despite the consumer never having contacted the business. This large scheme – involving private businesses, lawyers, and other intermediaries – poses an immense threat to the livelihoods of seniors. PBO recommends the Ministry take greater measures to limit the predatory sales of HVAC equipment to prevent more seniors from being defrauded out of their homes.

Contracts for Moving Services

PBO continues to see many consumers facing issues with contracts for moving services. Moving companies employ tactics to take advantage of a consumer's position and secure payment that is in clear excess of 10 per cent of the original estimate. These companies are able to do this because consumers are often in a high-pressure situation to either pay the company or have their goods be sold/destroyed. Unfortunately, given the speed at which these companies conduct these unfair practices, the current *CPA* provisions are not sufficient to protect consumers.

PBO recommends prohibitions on weight estimates and advance payment (other than a fixed, one-time deposit of $500) for moving services before goods are delivered into the consumer's home. PBO also recommends requiring fixed fees on an established, Ministry-approved, table of cost per square foot and a requirement that any moving truck have its square footage certified and displayed prominently for consumers. Alternatively, PBO suggests greater consequences be introduced for moving companies that fail to adhere to their *CPA* obligations.

This is Exhibit "O" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

Policy

Consultation on Issues Related to Notices of Security Interest (NOSIs)

Regulation Number(s):

n/a

Instrument Type:

Policy

Bill or Act:

n/a

Summary of Proposal:

A NOSI is a tool that businesses can use to ensure their priority to remove their financed or leased equipment from a property in certain circumstances. By registering a NOSI on the land registration system, a business effectively notifies a purchaser or mortgagee of the business' interest in the fixture and can avoid any surprises or disputes over interests in the fixtures on the property.

However, the ministry is aware that some consumers are adversely affected by having a NOSI on title, the effect of which usually arises when they try to sell their home or access additional financing.

In many cases, consumers are not aware that a NOSI has been registered on title to their home until they are in the midst of a home sale or mortgage refinancing, with tight timelines adding to the high pressure to resolve the situation expeditiously. Whether selling or refinancing a home, the discharge of a NOSI is usually required for the transaction to proceed, unless, in the case of a sale, the purchaser agrees to assume the contract (e.g., lease for the fixture). In those cases, the sale would move forward and the NOSI would stay on title.

Where the discharge of a NOSI is required to discharge the NOSI in order to complete the sale or refinancing of the property, certain suppliers use the discharge of the NOSI as leverage and unfairly pressure the consumer to negotiate a buyout of the contract in its entirety, including services, and not just for the value of the equipment. This can result in exorbitant payouts.

The ministry has developed a consultation paper, which sets out explanations of topics being considered to address the issues relating to NOSIs, as well as probing questions. The ministry is seeking feedback from stakeholders, including consumers, businesses, law enforcement, and legal experts, on the current challenges and opportunities related to NOSIs, and to identify potential solutions that could enhance consumer protection and promote a fair and competitive economy.

The ministry welcomes responses to the questions in this paper and any additional comments or suggestions related to NOSIs. Please include feedback and responses in the text boxes provided throughout the document. There is no word limit on any responses. Please provide examples or evidence to support your suggestions, where possible.

You may submit comments by December 1, 2023 directly through this Regulatory Registry page or download this paper and submit your completed responses by mail to:

NOSI Consultation
Manager, Business Law and Burden Reduction Unit
Ministry of Public and Business Service Delivery
56 Wellesley Street West - 6th Floor
Toronto, ON, M7A 1C1

Please provide your name and contact information, including an email address.

Thank you for taking the time to review the paper. If you have any questions about this consultation, please email businesslawpolicy@ontario.ca.

Analysis of Regulatory Impact:

The government is committed to supporting consumers and to engage with stakeholders to collaborate on potential solutions to address the issues caused by the misuse of NOSIs.

Specific burdens will be identified after the consultation process if proposals are developed and put forward.

Privacy Statement
Please note that unless agreed otherwise by the Ministry of Public and Business Service Delivery, all submissions received from organizations in response to this consultation will be considered public information and may be used, disclosed, and published by the ministry to help the ministry in evaluating and revising its proposal. This may involve releasing any response received to other interested parties. The ministry will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization.

Responses from individuals who do not show an affiliation with an organization will not be considered public information. The ministry may use and disclose responses from individuals to help evaluate and revise the proposal. The ministry may also publish

responses received from individuals. Should the ministry use, disclose, or publish individual responses, the ministry will not disclose any personal information such as an individual's name and contact details without the individual's prior consent, unless required by law. The ministry may use your provided contact information to follow up with you to clarify your responses.

The collection of this information is authorized pursuant to the ministry's responsibility for the Consumer Protection Act, 2002 and the Personal Property Security Act. Please note that the ministry is subject to the Freedom of Information and Protection of Privacy Act (FIPPA) and may disclose the information you or your organization provides in accordance with FIPPA.

If you have any questions about the collection of this information, please contact the ministry by email - businesslawpolicy@ontario.ca.

Further Information:

 Consultation Paper on Issues Related to Notices of Security Interest - Fall 2023 (Download Adobe Reader)
 Personal Property Security Act
 Consumer Protection Act, 2002
 Land Titles Act

Proposal Number:

23-MPBSD012

Posting Date:

October 17, 2023

Comments Due Date:

December 1, 2023

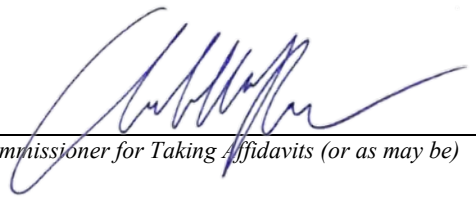
Contact Address:

Ministry of Public and Business Service Delivery
56 Wellesley St. W. - 6th floor
Toronto, ON
M7A 1C1

Comment on this proposal via email

|

This is Exhibit "P" to the Affidavit of Karen Whibley of the City of Toronto, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

Ontario

Notices of Security Interest
Consultation Paper
Fall 2023

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Introduction

Background

Ontario's Personal Property Security Act (PPSA) governs security interests in personal property, including the rights and interests of creditors and debtors where personal property is used as security for a loan or lease. Sometimes, the personal property that is used as security is attached to real property (land or buildings) and becomes part of it. This type of personal property is called a "fixture". For example, a furnace or an air conditioner that is installed in a house is a fixture. Fixtures are unique because they exist in both personal and real property law. For example, hot water heaters that are housed in a warehouse could be considered a chattel or personal property, however, once affixed or installed in a home they are now considered to be a "fixture".

Due to a fixture's unique nature, a secured party with an interest in the fixture is entitled to register a Notice of Security Interest (NOSI). The purpose of a NOSI is to signal to anyone else who has an interest in the land, or subsequently obtains an interest in the land, that a fixture on the land is subject to a security interest. For this reason, a NOSI is registered in the Land Registry System (land registry). When a NOSI is registered, it means that if the borrower or lessee (e.g., the consumer) defaults (such as failing to make payments on the loan or lease affiliated with the fixture), the lender or lessor (e.g., the business) that has priority can remove and sell the fixture to recover the debt, subject to certain parameters.

A NOSI must be registered in the land registry through an authorized Teraview user, using a specific form (Teraview is the secure portal used to access and submit registrations in Ontario's land records database). The party registering a NOSI must pay a fee to register. When registered, the information contained in the NOSI form then appears in the land registry system and can be searched by authorized users for a fee.

A NOSI is commonly, but incorrectly referred to as a lien. It is not a lien as it does not provide its holder with an interest in the land nor the right to any proceeds from a sale of the land.

Used properly, a NOSI is a legitimate tool that businesses can use to ensure their priority to remove their financed or leased equipment in certain circumstances. By registering a NOSI on the land registration system, a business effectively notifies a purchaser or mortgagee of the business' interest in the fixture and can avoid any surprises or disputes over interests in the fixtures on the property.

The Problem

The ministry is aware that some consumers are adversely affected by having a NOSI on title, the effect of which usually arises when they try to sell their home or access additional financing.

In many cases, consumers are not aware that a NOSI has been registered on title to their home until they are in the midst of a home sale or mortgage refinancing, with tight timelines adding to the high pressure to resolve the situation expeditiously. Whether selling or refinancing a home, the discharge of a NOSI is usually required for the transaction to proceed, unless, in the case of a sale, the purchaser agrees to assume the contract (e.g., lease for the fixture). In those cases, the sale would move forward and the NOSI would stay on title.

Where the consumer is required to discharge the NOSI in order to complete the sale or refinancing of the property, certain suppliers use the discharge of the NOSI as leverage and unfairly pressure the consumer to negotiate a buyout of the contract in its entirety, including services, and not just for the value of the equipment. This can result in exorbitant payouts.

Objective and Scope of this Consultation

The Ministry of Public and Business Service Delivery is commencing this consultation to gather feedback to support the development of new approaches that could be appropriately scoped to address some of the consumer harms associated with the improper use of NOSIs, as outlined above.

In 2020-2021 and 2023, the ministry published consultation papers on the Regulatory Registry and held several stakeholder roundtables on modernizing the Consumer Protection Act, 2002 (CPA) and strengthening protection for consumers. As part of those consultations, the ministry sought feedback on some potential proposals to help address issues associated with NOSIs. The feedback received at that time reflected the need for a more comprehensive approach beyond the scope of the CPA proposals. As a result, this consultation will more deeply explore issues related to the use of NOSIs and how they affect consumers.

The ministry is seeking feedback from stakeholders, including consumers, businesses, law enforcement, and legal experts, on the current challenges and opportunities related to NOSIs, and to identify potential solutions that could enhance consumer protection and promote a fair and competitive economy.

Among other things, the ministry is seeking feedback related to:

1. **Clarifying "fixtures" –** Clearly outlining what a NOSI can, or cannot, be registered for on the Land Registry, by clarifying the meaning of "fixture" under the Personal Property Security Act.
2. **Limiting the duration of a NOSI registration –** Reducing the possibility that NOSIs are registered indefinitely by requiring certain NOSIs to include an expiry date which cannot exceed a certain number of years from the date of registration (e.g., an expiry date not longer than five years from the date of registration), subject to renewals.
3. **Notice requirements –** Reducing surprises for consumers by requiring businesses to provide notice to consumers when a NOSI has been, or will be, registered, and to provide them with certain additional information.
4. **Notice of assignment –** Ensuring consumers know if a NOSI has been assigned by requiring businesses to provide consumers with notice if a NOSI has been assigned to a third party.
5. **Limiting the amount of a NOSI registration or eliminating the value field –** Limiting/capping or eliminating the amount shown on the NOSI registration to potentially disincentivize their misuse.
6. **Limiting the amount to be paid to a secured party to retain a fixture in certain circumstances –** Limiting the amount that a secured party can demand as a condition of releasing a fixture, in certain circumstances, which may make NOSIs easier to deal with.
7. **Scoping requirements for NOSIs under the PPSA –** Ensuring that any new restrictions or requirements are appropriately scoped to the most problematic NOSIs, without creating any unnecessary burden on businesses.
8. **Alternative means of discharging NOSIs –** Making it easier for consumers to seek a discharge of NOSIs, in certain circumstances.
9. **Limiting who can register a NOSI –** Reducing the risk of registrants abusing the registration system by placing restrictions on who can register a NOSI.
10. **Adding or enhancing available offences –** Punishing bad actors who misuse NOSIs to deter further bad action.
11. **Enhanced education about NOSIs –** Promoting awareness of NOSIs, including consumer and business rights and obligations.
12. **Operational enhancements –** Requiring additional information (to be provided by a business) that can be screened to ensure the NOSI meets the requirements under the PPSA.

The topics presented in this consultation paper are intended to represent a comprehensive approach to addressing the issues related to NOSIs, which, when done collectively, and along

with other ideas/suggestions brought forward during this consultation, may have more impact than if individual proposals were to be implemented in isolation.

The ministry is mindful that issues related to NOSIs can be expansive and complex and may require working with partners and other sectors to make an impact on areas outside of the ministry's mandate. For example, the ministry is aware of media reports of homeowners being persuaded by predatory businesses to use a high-interest mortgage to discharge the NOSIs. This can put the homeowner in a precarious situation since, unlike a NOSI, a mortgage gives rise to an interest in the land and increases the risk of the consumer losing their home in the event of a default. However, the ministry's authority is limited to its mandate and legislation within its purview, including the CPA, the PPSA, the Land Titles Act, and the land registry system. While the ministry may collaborate with other partners, there are components of the NOSI issue that are outside of the scope of the ministry's purview and outside the scope of this paper, including mortgages and fraud committed in connection with NOSIs.

How to Participate

The ministry welcomes responses to the questions in this paper and any additional comments or suggestions related to NOSIs.

Please include feedback and responses in the text boxes provided throughout the document. There is no word limit on any responses. Please provide examples or evidence to support your suggestions, where possible.

A summary list of the consultation questions found in this paper is provided in **Appendix B**.

You may submit comments by **11:59 pm on December 1, 2023** through Ontario's Regulatory Registry or download this paper and submit your completed responses by mail to:

NOSI Consultation
Manager, Business Law and Burden Reduction Unit
Ministry of Public and Business Service Delivery
56 Wellesley Street West – 6th Floor
Toronto, ON, M7A 1C1

Please provide your name and contact information, including an email address.

Name/Organization (if applicable)

Contact Information

Please also check one of the following boxes to indicate whether you are commenting primarily as a:

☐ Business

☐ Business Association

☐ Consumer

☐ Consumer Association

☐ Academic

☐ Legal Organization

☐ Law Enforcement

☐ Other – You may enter your answer here:

Thank you for taking the time to review this paper. If you have any questions about this consultation, please email businesslawpolicy@ontario.ca.

Section A: PPSA Legislative Rules

Topic 1: Clarifying "Fixtures"

Issue:

Under the PPSA, a creditor (e.g., a business) who has a security interest in a fixture may register a NOSI on the land registry. However, the PPSA does not define what a "fixture" is. The PPSA provides that "building materials" do not constitute fixtures, but it does not define "building materials".

Instead, there has been extensive case law that has attempted to define a "fixture"; however, the rules stemming from those cases are complex and generally depend on specific circumstances.

The ministry has learned that some businesses may be exploiting the lack of clarity about what a "fixture" constitutes and may be registering NOSIs for items that may not be considered fixtures (for example, some NOSIs have been registered for 'renovations' including plumbing or electrical upgrades).

Potential Solution and Impact:

The ministry is exploring how to clarify what constitutes a "fixture" which, in turn, would help clarify what a NOSI could be registered for. This could reduce the number of NOSIs registered for items that are arguably not fixtures, such as plumbing or electrical updates.

Questions:

1. Should Ontario add a definition of "fixture" to the PPSA? Why or why not?
    a) What are the potential benefits or drawbacks, and possible impacts?
    b) Please provide a proposed definition for "fixture", along with an example and rationale. See, for example in **Appendix A**, a definition of "fixture" from the Yukon PPSA, the only jurisdiction in Canada that provides a definition of fixture.

2. All Canadian jurisdictions, with the exception of Ontario, define "building materials" in their PPSA. For example, British Columbia (B.C.) defines "building materials" to include goods attached to a building that their removal would necessarily involve the dislocation or destruction of some other part of the building. See the full definition in **Appendix A**.

a) Should the PPSA be amended to define "building materials"? What are the potential benefits or drawbacks?
b) If yes, should the proposed definition of "building materials" mimic the one from B.C.? Do you have a proposed definition for "building materials" that is different than the one from B.C.? Please provide, along with an example and your rationale.
c) If you are supportive of incorporating B.C.'s definition of "building materials" into the PPSA, do you think this should be supplemented with additional information (e.g., adding, through regulation, a list of prescribed goods that, for certainty, would become a "building material" once affixed to real property, such as roofs)?

3. Is there an alternative approach not mentioned above that would be preferable?
    a) If so, why would this be a better alternative?
    b) What are the benefits and drawbacks and potential impacts of this alternative approach?

Please include your responses here.

Topic 2: Limiting the Duration of NOSI Registrations

Issue:

The PPSA currently requires that all NOSI registrations for consumer goods include an expiry date; but there are no restrictions on what that date must be. This requirement is also not always adhered to in the land registry system upon registration (i.e., no date is being provided).

Without an expiry date, it may be difficult for consumers or prospective home purchasers to know whether a NOSI is current. In some cases, an obligation under a security agreement may have been fulfilled (i.e., paid) long before, but the business failed to discharge the NOSI, and the consumer has trouble tracking down the supplier to demand a discharge.

The ministry is also aware that some NOSI registrations have an expiry date that is past what someone could reasonably assume to be the duration of the underlying contract (e.g., 50 years).

Potential Solution and Impact:

The ministry is exploring ways to limit the "duration" of certain NOSI registrations, which could create a means by which NOSIs could effectively cease to be in effect if not intentionally renewed.

If a NOSI expires and the supplier does not renew it or have it discharged, then a consumer may apply, through a Teraview licensee, to delete the NOSI. This could result in significantly less burden for the consumer, relative to the current state which requires a consumer to obtain a court order for a NOSI discharge, in many cases where the supplier does not comply with a request to discharge the NOSI.

Questions:

1. Previously, where the collateral included consumer goods, the PPSA included a requirement that NOSI registrations must have an expiry date that could not be more than five years past the registration date (a "five-year cap"). Do you support re-establishing this rule? Why or why not.
    a) Would a different time period be more appropriate (i.e., longer or shorter than five years?) Please explain.
    b) Should the supplier be able to renew or extend the NOSI registration? Why or why not.
    c) If the supplier can extend, should they be able to only if they extend the registration prior to the expiry date (i.e., if the expiry date has passed, the supplier would be barred from extending), or should they be able to extend so long as the security interest remains active? How long should the supplier be able to extend?
    d) If a business could renew the registration, should the consumer be notified of the renewal?
    e) What, if any, additional burden would re-introducing an expiry cap for consumer goods, and the possibility for renewal, have on business?

2. If the ministry were to institute an expiry cap and a NOSI expired and the supplier did not renew it, then the consumer could apply, through a Teraview Licensee, to have the NOSI removed from title, which is expected to be a less burdensome process for the

consumer as compared with the current state. In your opinion, would this result in less burden for the consumer? Do you have a recommendation to streamline the process further that the ministry should consider?

3. Besides re-instituting an expiry cap, are there any other ways the ministry could consider limiting the duration of NOSIs? For example, should the ministry consider limiting the duration of the underlying security interest (e.g., in certain circumstances, a fixture cannot be used to secure an obligation for longer than five years)?

Please include your responses here.

Topic 3: Notice Requirements

Issue:

Currently, the PPSA does not require businesses to provide notice to consumers when a NOSI is registered on title, although some businesses include a clause in the fine print of the contract stating that they "may" register a NOSI.

One key aspect of the problem with NOSIs is that consumers may not be aware that a NOSI is on title of their property until they are in the midst of trying to sell or re-finance their home. In these situations, consumers are often dealing with tight timelines, which creates pressure to resolve the situation expeditiously.

Potential Solution and Impact:

The ministry is exploring whether to require the secured party (i.e., the business or supplier) to provide the debtor (i.e., the consumer) with written notice of a NOSI registration, either:

- before the NOSI is registered and potentially as a condition that must be met in order to register the NOSI,

- after it has been registered (i.e., within a certain number of days of the NOSI being registered),
- or in both circumstances.

Notice of a NOSI registration could alert the consumer to the existence of the NOSI prior to the point of sale/refinancing of the house, and potentially reduce the vulnerability that arises from the pressure of trying to resolve the NOSI under urgent circumstances. Providing confirmation that notice was given could be made a requirement for businesses to register a NOSI, and this added step may help to deter bad actors from using NOSIs inappropriately, given the added burden.

Additionally, the ministry is considering requiring prescribed language for inclusion in a notice, to support accurate, clear, and accessible communication of the existence of the NOSI and what it means for the consumer (e.g., contact information for the business, information included in the NOSI registration (where applicable), an explanation of what a NOSI is and what it means for the consumer/business when on title), as well as requiring the notice to be provided in a prescribed format (e.g., separate from the contract to avoid any messaging being included in the fine print and therefore less visible to consumers).

Questions:

1. In your opinion, should NOSIs have notice requirements? Why or why not?

2. If notice is required, should written notice be provided to the consumer *before* a NOSI has been registered, *after* the NOSI has been registered, or *in both circumstances*? Why or why not?
    a) How long after the registration should a supplier be required to provide notice of the NOSI (e.g., within a set number of days after the registration (for example, within 30 days of the registration))?
    b) If notice is required to be sent *before* a NOSI can be registered, should the supplier be required to demonstrate it has fulfilled this step before it can register the NOSI? If so, how?
    c) Should a business be required to provide notice of the NOSI to consumers at other times, such as prior to the NOSIs expiry date, or if they extend or renew the NOSI? If so, why?

3. To support the sharing of accurate, clear, and accessible information, the ministry is considering specifying what information would need to be included in the notice provided to the consumer (whether before or after the NOSI has been registered). Is there specific

information that, in your opinion, would be important to include in the notice (please provide the type of information and a rationale for why it should be included)? For example:

a) Should the business be required to provide a copy of the NOSI registration to the consumer (when notice is provided after registration has taken place)?
b) Should the name and contact information of the business be required? Other information?
c) Should an explanation of what a NOSI is, does, and the consequences of it be required? And should the notice be required in a specific format?

4. In many Canadian jurisdictions with notice requirements in place, consumers may waive their right to be notified about the NOSI. If the ministry pursued notice requirements for NOSIs, do you think that consumers should be able to waive the right to receive notice? Why or why not?

5. Are there other approaches to requiring notice of the registration of a NOSI that the ministry should consider? Please explain.

Please include your responses here.

Topic 4: NOSI Assignments

Issue:

A supplier may assign their interest in a contract to a third party, which means that the business transfers its rights and obligations under a contract to another party (i.e., business).

When a business assigns their interest in a contract to a third party, they will typically assign the associated security interest to that same party and register an assignment of the NOSI in the Land Registry. However, there are currently no requirements to notify the debtor (i.e., consumer) of that assignment. This means that the initial business that registered the NOSI may effectively transfer its security interest associated with the NOSI to another business, without

the consumer being informed of the transaction. This can lead to the consumer being unaware that a new business holds the security interest, and that they now need to reach out to that new business when seeking to have the NOSI removed (or otherwise engage with the business).

Additionally, consumers may be unaware of the practice of assigning a security interest, or what this practice means. In many cases, the consumer is still dealing with the original supplier regarding any issues related to the equipment (e.g., servicing, etc.).

Consumers often only become aware that the security interest associated with a NOSI has been assigned when they attempt to terminate the underlying contract and are told by the original supplier that they now must deal with the new company (or assignee).

Potential Solution and Impact:

Similar to the general notice requirements outlined above, the ministry is exploring changes that would require a consumer to be notified of the assignment of the security interest associated with a NOSI either before the assignment takes place, within a certain number of days of the assignment taking place, or under both circumstances.

This could provide the consumer with relevant information about the party to whom the security interest associated with the NOSI was assigned. If the ministry requires the notice to include specified information, this could help raise consumer awareness of their rights and obligations with respect to NOSIs.

Questions:

1. If the ministry were to mandate notice of an assignment of a security interest associated with a NOSI, should that notice be provided *before* the assignment, *after* the assignment, or under both circumstances? Why or why not? Please provide any reasons.
   a) When would a business have to provide notice (e.g., a set number of days prior to the assignment, within a set number of days after the assignment)?
   b) *who* should be responsible for providing the notice (i.e., the assignor, the assignee, other)?

2. The ministry is considering specifying some of the information that would have to be included in the notice, to support the sharing of accurate, clear, and accessible information with the consumer. Is there any information that, in your opinion, would be important to include in the notice (e.g., details of the assignment, the name and contact information of

the new business, a copy of the registered assignment (where applicable))? Please provide the information and a rationale for why it should be included.

3. Is there anything else the ministry should consider with respect to the assignment of a security interest associated with a NOSI? If offering an alternative, please include a discussion of the rationale and the risks associated with your proposal.

Please include your responses here.

Topic 5: Limit or Eliminate the Amount/Value on a NOSI Registration

Issue:

Currently, there is an area marked "consideration" on the NOSI registration form. The secured party can enter a value in this field that reflects the amount secured by the NOSI.

Based on the ministry's review of NOSI filings, it was found that the amount entered in this field may vary. Sometimes, it appears to reflect the value of the collateral and, other times, it may reflect the entire obligation owed by the consumer under the contract with the business, including amounts such as service or installation fees.

The amount listed in the consideration field can be inconsistent or very high, and the ministry has heard that businesses sometimes use the high amount that is registered to intimidate homeowners and pressure them into paying exorbitant fees to pay off the amount listed to have the NOSI removed from title. This can be especially problematic in scenarios where the amount listed does not reflect the actual balance owed by the consumer.

Potential Solution and Impact:

The ministry is exploring limiting the amount/value that can appear in the consideration field of a NOSI or eliminating the consideration field altogether. Doing so may assist in reducing the ability of bad actors to intimidate consumers by pointing to what appears to be excessive

financial obligations associated with the NOSI and demanding large payments to eliminate the perceived debt and discharge the NOSI.

Questions:

1. Should the ministry consider **removing** the "consideration" field from the NOSI registration form altogether?
    a) What issues would be addressed by eliminating the consideration on the NOSI form?
    b) Could issues be created by eliminating the consideration on the NOSI form (e.g., do homebuyers rely on this field for anything? Would businesses be negatively affected in some way? Any other repercussions)?

2. Alternatively, should the ministry consider **limiting/capping** the amount that could appear in the consideration field of the NOSI registration, effectively "limiting" the amount of a NOSI registration?
    a) If so, what should be the limit (e.g., a certain value, the value of the collateral, etc.)?

3. Are there any other approaches the ministry should consider related to limiting the amount of a NOSI registration? Please describe. For example, should the actual obligation that can be secured be limited if a fixture is used as collateral? Why or why not?

Please include your responses here.

Topic 6: Limit the Amount to be Paid to a Secured Party to Retain a Fixture in Certain Circumstances

Issue:

As outlined above, the amount in the consideration field on the NOSI form is sometimes very high and used by the secured party to intimidate the consumer into paying excessive amounts to discharge the NOSI. Issues with the consideration field in the NOSI form can be compounded if a party acquiring a subsequent interest in land (e.g., a mortgage provider or a subsequent purchaser) sees the high amount and demands that the NOSI be removed, so that the purchaser can obtain "clean title" or a priority position.

In other cases, if the homeowner defaults under the contract which is the basis for the NOSI, a party with a subsequent interest in the land that is subordinate to the security interest (like a mortgage provider) may wish to retain the fixture.

Potential Solution and Impact:

The ministry is considering ways to limit the amount to be paid by a person having an interest that is subordinate to the security interest to a secured party in order to retain the goods upon default by the consumer in certain circumstances. This could have the effect of reducing the harmful effects of NOSIs, as it may make it more difficult for bad actors to leverage high pressure situations if the amount to be paid in these circumstances is limited.

For example, the ministry could consider implementing something similar to provisions in the PPSA legislation of several Canadian provinces. Such provisions enable a person having an interest in the land that is subordinate to the security interest (e.g., a home purchaser) to retain the goods by paying the lesser of the amount of obligation owed by the debtor and the market value of the goods if they were removed by the secured party in certain circumstances.

Questions:

1. In your opinion, should the ministry consider limiting the amount that a person having an interest in the land that is subordinate to the security interest (e.g., a mortgage provider or a home purchaser) may pay to retain the fixture? Why or why not?
    a) If so, what should the limit be (e.g., the lesser of the amount secured by the security interest and the market value of the goods)?
    b) Under what circumstances should this be allowed? Please explain. For example, should this option only be possible if the debtor has defaulted on the security

agreement, the secured party has given the required notice and a person having an interest that is subordinate to the security interest (e.g., a mortgage provider or home purchaser) wants to retain the fixture?

2. Should the ministry consider broadening this idea to limiting the amount that a secured party can demand as a condition of discharging the NOSI? Why or why not?
    a) If so, what should the limit be, and why (e.g., the lesser of the market value of the goods on the date the NOSI is discharged and the outstanding amount of the secured obligation, or some other amount)?
    b) If so, under what circumstances should this be allowed and who should be entitled to seek a discharge by paying the limited amount (e.g., any interested person, including the debtor and in all circumstances, or only in certain situations)?
    c) During the winter 2023 Consumer Protection Act consultation, the ministry proposed a change to the CPA that, if introduced and passed, would introduce a buy-out cost schedule for termination costs that a consumer would have to pay to terminate certain long-term leases (e.g., a hot water heater rental). If introduced and passed, would this complement a proposal to limit the amount required to retain the fixture, or make this proposal unnecessary (because with the underlying contract or related contract that provided for the security interest associated with the NOSI could be addressed)?

Please include your responses here.

Section B: Other Overarching Topics

Topic 7: Scoping Requirements for NOSIs under the PPSA

Issue:

Currently, the PPSA includes specific requirements for NOSIs that are applicable only where the collateral is "consumer goods" (under the PPSA, "consumer goods" are goods that are used or acquired for use primarily for personal, family or household purposes). For example, a NOSI registration that includes a consumer good must set out an expiration date, and the secured party is required to register a certificate of discharge of a consumer NOSI within 30 days after all obligations under the security agreement have been performed or forgiven.

Potential Solution and Impact:

The ministry is exploring how to appropriately scope any new requirements or restrictions placed on NOSIs so that they are only applicable to the types of NOSIs that affect consumers (e.g., homeowners). This could reduce consumer harms while limiting any potential burden on business as a result of new requirements or restrictions.

Questions:

1. If you are supportive of the potential solutions outlined in Section A,
    a) Do you think that any new restrictions or requirements suggested in that section should apply to *all* NOSIs, or just the types of NOSIs that affect consumers? Please list the topics set out in Section A and indicate whether the new restrictions or requirement should apply to *all* NOSIs or just the types of NOSIs that affect consumers.
    b) If you think that any new requirements or restrictions should apply to all NOSIs, please set out the reasons (e.g., are you aware of problems related to commercial NOSIs to which the topics set out in Section A would apply)?

2. How would you propose to distinguish between the types of NOSIs (i.e., commercial NOSIs and those that affect consumers)? For example, should the ministry establish a new category of "residential NOSIs" and limit any new restrictions or requirements to NOSIs placed on residential property only?

Please include your responses here.

Topic 8: Alternative Means of Discharging a NOSI

Issue:

Currently, NOSIs can generally be discharged only by the secured party filing a certificate of discharge in the land registry or by a court order issued upon application (e.g., by the consumer).

This creates a situation in which debtors (i.e., consumers) have few options if secured parties refuse or fail to register the certificate of discharge. It generally results in the need to engage in a court process to obtain an order to remove the NOSI.

Potential Solution and Impact:

The ministry is exploring alternative NOSI discharge processes that could make it easier for consumers to have a NOSI discharged, without necessarily having to go to court.

This could involve allowing debtors, under certain specific circumstances, to file a discharge statement (through a Teraview licensee) to have a NOSI removed from title.

Other provinces have similar discharge processes in place and, generally, those provinces first require the debtor to request that the secured party cancel the NOSI and, if this does not occur within a certain amount of time:

- The debtor can then submit specified information to the land registrar, including a sworn statement indicating that they, among other things, did write to the secured party.
- The registrar must then make the appropriate entry in the land register to discharge the NOSI unless the registrar has received a court order not to make the entry.

- If the secured party wishes to dispute the claim, then the onus is on the secured party, rather than the debtor, to pursue court action.

Questions:

1. Should the ministry consider an alternative discharge process as described above? Why or why not?

2. If the ministry pursues an alternative discharge process as outlined above, under what circumstances should a consumer be able to seek a discharge through those means?
    a) For example, consider the approach taken in B.C., which generally only enables the consumer to seek a discharge, as described above, in limited circumstances such as those listed below (see s. 49(10) of B.C.'s PPSA for further context). Should the ministry only consider enabling an alternative NOSI discharge process in limited circumstances such as the following:
        i) Where all the obligations of the underlying contract have been performed,
        ii) The secured party has agreed to release part, or all of the collateral described in the notice,
        iii) The description of the collateral includes an item or kind of property that is not collateral under a security agreement between the parties,
        iv) The security agreement to which the notice relates no longer exists, or
        v) The item or kind of property described in the notice is not affixed to the land.

3. Alternatively, should the ministry consider broader grounds upon which a consumer may be able seek a discharge, such as enabling a consumer to seek a discharge if any provisions of the PPSA have been violated or there is otherwise non-compliance with the PPSA or any applicable Land Registry bulletins (e.g., including any of the potential new requirements discussed in Section A)? Please explain.
    a) If the ministry were to consider even more extensive grounds upon which a consumer can initiate a discharge, beyond non-compliance with the PPSA or Land Registry bulletins, what should those grounds be?

4. Under the approach taken in B.C., before a consumer can submit specified information to the registrar regarding a cancellation of a NOSI, they must first write to the secured party demanding that the NOSI be cancelled and provide the secured party with 40 days to respond. Should Ontario consider a similar approach?
    a) If so, how much time should the secured party have to respond?

5. Under the approach taken in B.C., provided that the consumer has provided the Land Registry with the appropriate documents (a true copy of the demand to cancel the NOSI and an applicable sworn statement), then the Land Registry must make the appropriate entry unless they receive a court order that says otherwise (note that, in Ontario, a consumer would have to submit this information through a Teraview licensee and not directly to the Land Registry). This effectively reverses the onus in these situations by requiring a secured party to go to court to maintain their NOSI. Should Ontario also consider this approach? Why or why not?

6. Currently under the PPSA, if a secured party does not discharge a NOSI from title within a specified timeframe when required to, they are liable to the person making the demand, or the debtor, for $500 and any damages resulting from the failure. Is this an adequate way for consumers to recoup losses or damages because of the failure to provide a discharge? If not, is there another amount that you would propose? Please explain.

7. What are the risks to business if, under the approach outlined above, they are required to seek a court order to maintain their NOSI registration?

Please include your responses here.

Topic 9: Place Restrictions on Who can Register NOSIs

Issue:

Currently, only those authorized by the Director of Land Registration may register electronic documents in the Electronic Land Registration System, which requires meeting certain standards and criteria, including providing proof of:

- Identity
- Financial resources
- Good character/accountability

The Teraview user criteria noted above is relatively limited and could provide the opportunity for bad actors to register NOSIs without strict accountability (for example, if their in-house staff are registering NOSIs directly).

Potential Solution and Impact:

Limiting authorization to individuals who meet additional standards, or only to certain professionals such as lawyers, could strengthen the security and integrity of the Teraview system and help to protect consumers. This could reduce the ease by which exploitative NOSIs could be registered in the first place.

Limiting NOSI registration to lawyers only could potentially decrease the number of exploitative NOSIs being registered as lawyers are held to professional ethical standards, and those who improperly register NOSIs may be at risk of disciplinary action from the Law Society of Ontario (LSO), their governing body. There are precedents of lawyers who are facing disciplinary action associated with NOSIs. A Notice to the Profession was issued on August 16, 2023, that warned licensees against such practices.

Questions:

1. Should only certain professionals such as lawyers be allowed to register NOSIs? Why or why not?
   a) If limited to lawyers, should paralegals also be allowed to register NOSIs? Why or why not.

2. If the ministry restricted who may register NOSIs, should that requirement be scoped to only include the types of NOSIs affecting consumers? Please explain (for more context refer to Topic 7: Scoping Requirements for NOSIs Under the PPSA).

3. Is there an alternative approach to restricting who may register NOSIs not mentioned above? If so, why would this be a better alternative?

Please include your responses here.

Topic 10: Adding or Enhancing Available Offences

Issue:

The Consumer Protection Act includes requirements and related offences that may address issues with the underlying contract that are related to problems experienced by consumers with NOSIs. However, there are generally no targeted offences for the NOSI itself in the CPA or in the PPSA (which is the Act where the right to register a NOSI arises).

Potential Solution and Impact:

In extreme cases involving the inappropriate use of NOSIs, action may already be taken against the perpetrator. For instance, there are precedents of lawyers facing disciplinary action associated with NOSIs and a Notice to the Profession was issued warning licensees against such practices which can act as a deterrent. The Financial Services Regulatory Authority of Ontario (FSRA) is also aware of instances where its licensees are involved in harm arising from the inappropriate use of NOSIs. FSRA takes incidents of suspected fraud or non-compliance seriously and has issued Notices of Proposal on August 22 and September 8 to sanction licensees who failed to meet their obligations when dealing in mortgages for older vulnerable adults who were subject to NOSIs. The subjects of the enforcement action have all requested hearings before the Financial Services Tribunal.

FSRA has previously warned consumers about door-to-door scams and published Guidance for detecting and preventing mortgage fraud to reinforce the existing requirement that licensed firms should not commit or facilitate fraud. The Guidance also sets out minimum expectations to the mortgage brokering sector on how to prevent and address fraud.

The ministry is considering adding or enhancing available offences to better target the misuse of NOSIs that is occurring in the marketplace. The ministry is also considering adding or amending penalties to appropriately penalize the individual or corporation responsible for an offence related to the inappropriate use of NOSIs (such as minimum fines).

Adding or enhancing offences targeting the misuse of NOSIs, along with adding or amending penalties, could help deter harmful behaviour by bad actors related to NOSIs, increase business accountability, and impact behaviour in the marketplace to the benefit of consumers. It is important to note that prosecutions of offences are conducted in the broader public interest and would not result in compensation or damages for affected consumers.

Questions:

1. If the ministry were to add or enhance available NOSI offences, what risks or considerations should the ministry keep in mind (i.e., what are examples of harmful business practices or instances of NOSI misuse that could be targeted with additional or enhanced offences)?

2. If the ministry were to add or amend penalties related to added or enhanced offences what should the penalty be? What risks or considerations should the ministry keep in mind related to any added or amended penalties proposed?

3. What penalties should businesses face for failing to discharge a NOSI?

Please include your responses here.

Topic 11: Enhanced Education and Awareness of NOSI Issues

Issue:

Businesses register NOSIs to notify third parties that they have a security interest in a fixture on the land. This is a legitimate business practice which ensures that if the consumer defaults or fails to make payments as required under the contract, the business can remove and sell the fixture to recover the debt.

However, the ministry is aware of bad actors who register NOSIs against title of consumers' property and misuse them to exploit consumers for financial gain. As outlined previously, consumers may not be aware that a NOSI has been registered on their property, what effect the NOSI has, or what rights it gives the business that registered it. As a result, consumers may be manipulated into paying exorbitant amounts to remove the NOSI.

Both consumers and businesses may be unaware of the requirements associated with registering and discharging NOSIs, further complicating the issue.

Potential Solution and Impact:

Promoting greater consumer awareness about NOSIs could help consumers to better understand their rights and the obligations of businesses. Such awareness initiatives would be in addition to consideration of requirements for business to provide consumers with notice and information about NOSIs registered on their property. This could help support consumers if issues arise related to NOSIs.

By further promoting consumer protection awareness, including general information about NOSIs, through multiple channels, the ministry would be in a better position to offer advice and guidance that could assist consumers when they sign contracts or buy goods and services, including fixtures, from suppliers.

Questions:

1. What are the benefits if the ministry provides consumers with information specific to NOSIs? Please explain.
    a) To whom should awareness information be targeted? (e.g., consumers, businesses, or professions involved in transactions related to NOSIs, such as lawyers and real estate agents?
    b) What information would most benefit consumers (e.g., general information about NOSIs – what they are, how they work; how to discharge a NOSI; or when NOSIs apply, etc.)?
    c) What information would most benefit businesses (e.g., business obligations related to NOSIs)?

2. What would be the best way to receive information about NOSIs and consumer rights:
    - ☐ Receive a newsletter or other information by email
    - ☐ Read a blog on the Ontario government's website
    - ☐ Join a Facebook group
    - ☐ Participate in social media surveys
    - ☐ Watch YouTube videos
    - ☐ Television commercials
    - ☐ Join an online chat or Townhall Meeting in my local community with the Minister of Public and Business Service Delivery
    - ☐ Get a brochure/pamphlet when making a purchase/buying a house/signing a contract
    - ☐ Read online articles on my local media feed or through Google or another search engine
    - ☐ Visit a local trade show booth

Are there any other ways the ministry could inform consumers/businesses to help address this issue?

3. To best determine the type of information consumers feel is important to receive about NOSIs, please share your story/experience with NOSIs on title. What were the circumstances under which you learned about the NOSI?

Please include your responses here.

Topic 12: Additional Operational Changes

Issue:

As noted throughout this paper, the ministry understands that issues associated with NOSIs are complex and may require a multi-faceted approach to address consumer harms. Much of what has been explored in this paper would likely require some legislative or regulatory changes, which could take time to implement. Additionally, legislative changes alone may have relatively limited impact if implemented in isolation.

Potential Solution and Impact:

While operational changes may be required to implement the topics outlined throughout this paper, the ministry could consider additional operational changes that may help to reduce consumer harms.

For instance, the current NOSI registration form, which is completed by Teraview Licensees to register a NOSI, requires the following fields to be filled in by the registrant:

1. name of the secured party
2. consideration (or value)
3. description of the item
4. signature

5. name of the person submitting the form (e.g., the secured party's lawyer)

The ministry could consider amending the NOSI registration form, to require additional/alternative information.

The ministry could also explore options such as property monitoring (in which homeowners sign up to be notified by the land registry system when there is a registration of any type, including NOSIs, on their property), which could enable consumers to receive information about registrations on their title more easily.

Questions:

1. Should the NOSI registration form completed by Teraview Licensees to register the NOSI be changed to require additional/alternative information? If so, what information should be included on the NOSI registration form?

2. Is there anything else the ministry should consider that could represent an operational change, to the land registry system or otherwise, to help address this issue? Please explain.

Please include your responses here.

Topic 13: Any Additional Suggestions

Questions:

1. Besides the topics and ideas raised in this consultation paper, should the ministry consider any other approaches to address the consumer harms that may arise from the inappropriate use of NOSIs?

Please include your responses here.

Conclusion

The issues related to the inappropriate use of NOSIs are complex and require a comprehensive approach to address the consumer harms that can sometimes arise from the misuse of NOSIs. The ministry is aware that a comprehensive approach would likely include changes to legislation, collaboration with other regulators, agencies, or sectors and intervention at multiple stages of the NOSI issue (i.e., prior to the NOSI being registered, at registration, and at the time of discharge).

As outlined throughout this consultation paper, the ministry is exploring a variety of potential new requirements intended to support consumers impacted by the inappropriate use of NOSIs, which, if implemented together, could collectively reduce the inappropriate use of NOSIs by bad actors in the future. At the same time, the ministry intends to minimize the impact to businesses using NOSIs legitimately to carry out their daily business practices.

Currently, a consumer may only discover a NOSI on title when attempting to sell their home. Under pressure to complete the sale, the consumer could be vulnerable to bad actors using the registration of the NOSI to demand large sums of money as a condition of clearing title and facilitating the sale of the consumer's home.

The ministry is seeking solutions that would address such issues. For example, in the future, **the consumer** could be aware of the NOSI because they received clear, accessible and timely notice of its registration. The consumer may also understand how much it would cost to discharge the NOSI, and the ways in which they can seek to discharge the NOSI. They may also have a right to additional damages if the NOSI isn't properly discharged.

The business could be required to use a lawyer to register the NOSI and re-register the NOSI after only a few years. Additionally, the business may no longer be able to include a high value on the NOSI that they can use to coerce a consumer into paying an exorbitant payout, or register a NOSI for the items they used to (such as plumbing or electrical upgrades).

These added requirements may deter bad actors from misusing NOSIs.

The Ministry is grateful for your contributions that will support the development of new approaches to address some of the consumer harms associated with the improper use of NOSIs, as outlined above.

With your feedback, the ministry will be further in identifying potential solutions that could enhance consumer protection and promote a fair and competitive economy.

Privacy Statement

Please note that unless agreed otherwise by the Ministry of Public and Business Service Delivery, all submissions received from organizations in response to this consultation will be considered public information and may be used, disclosed, and published by the ministry to help the ministry in evaluating and revising its proposal. This may involve releasing any response received to other interested parties. The ministry will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization.

Responses from individuals who do not show an affiliation with an organization will not be considered public information. The ministry may use and disclose responses from individuals to help evaluate and revise the proposal. The ministry may also publish responses received from individuals. Should the ministry use, disclose, or publish individual responses, the ministry will not disclose any personal information such as an individual's name and contact details without the individual's prior consent, unless required by law. The ministry may use your provided contact information to follow up with you to clarify your responses.

The collection of this information is authorized pursuant to the ministry's responsibility for the Consumer Protection Act, 2002 and the Personal Property Security Act. Please note that the ministry is subject to the Freedom of Information and Protection of Privacy Act (FIPPA) and may disclose the information you or your organization provides in accordance with FIPPA.

If you have any questions about the collection of this information, please contact the ministry by email – businesslawpolicy@ontario.ca.

Appendix A

Key Terms, Explained

Building Materials (taken in part from B.C.'s PPSA) – materials that are incorporated into a building and includes goods attached to a building that their removal would necessarily involve the dislocation or destruction of some other part of the building.

Debtor – A debtor is a person who owes payment or performance of an obligation that is secured by a security interest in personal property which includes fixtures. A debtor can be a borrower, a lessee, or any other person who receives credit or value in exchange for granting a security interest in personal property to the secured party. In context of this paper, the debtor is typically a consumer.

Fixture – Fixtures are goods that attach to land and become part of the real property (e.g., water heaters, etc.). Fixtures are unique because they can change from personal property and become part of real property once they attach to a structure or to the land.

- Yukon PPSA's definition - Goods that are installed on or affixed to real property in such a manner or under such circumstances that they would, but for this Act, become in law fixtures to the real property, but does not include building materials.

NOSI – A Notice of Security Interest (NOSI) is a registration on the Land Registry that gives notice to third parties that a lender or lessor has an interest in a fixture on the land. Once registered, every person dealing with the fixture is deemed to have knowledge of the security interest.

Security Interest – A security interest in personal property arises under a security agreement and means that an interest in personal property has been provided to secure payment or performance of an obligation and includes true leases with a term of more than a year and is governed by the Personal Property Security Act. For example, a security interest may arise when financing a car. In exchange for providing the financing, the financing company may obtain a security interest in the car, which provides them with certain rights. This is called a "secured transaction". If the borrower defaults on the car payments, the financier may be able to take possession of the car and sell it and apply the proceeds of the sale to satisfy the amounts owing.

Secured Party – A secured party is a person who has a security interest in personal property, which includes fixtures, to secure payment or performance of an obligation. A secured party can be a lender, a lessor, a seller who provides financing, or any other person who provides credit or value in exchange for a security interest in personal property. In the context of this paper, the secured party is typically the business that entered into a contract with the consumer.

Teraview – Teraview is a secure online portal that provides access to data in the Government of Ontario's land records database, and is used by lawyers, paralegals, title searchers, search houses, title insurers, financial institutions and government. Through Teraview, an authorized user may perform searches, create and submit title documents for registration, view and print instruments, plans, official parcel registers and search for writs of execution quickly and easily, without having to visit a ServiceOntario Office.

Appendix B

Consultation Questions – Summary List

Topic 1 – Clarifying "Fixtures"

1. Should Ontario add a definition of "fixture" to the PPSA? Why or why not?
    a) What are the potential benefits or drawbacks, and possible impacts?
    b) Please provide a proposed definition for "fixture", along with an example and rationale. See, for example in **Appendix A**, a definition of "fixture" from the Yukon PPSA, the only jurisdiction in Canada that provides a definition of fixture.

2. All Canadian jurisdictions, with the exception of Ontario, define "building materials" in their PPSA. For example, British Columbia (B.C.) defines "building materials" to include goods attached to a building that their removal would necessarily involve the dislocation or destruction of some other part of the building. See the full definition in **Appendix A.**
    a) Should the PPSA be amended to define "building materials"? What are the potential benefits or drawbacks?
    b) If yes, should the proposed definition of "building materials" mimic the one from B.C.? Do you have a proposed definition for "building materials" that is different than the one from B.C.? Please provide, along with an example and your rationale.
    c) If you are supportive of incorporating B.C.'s definition of "building materials" into the PPSA, do you think this should be supplemented with additional information (e.g., adding, through regulation, a list of prescribed goods that, for certainty, would become a "building material" once affixed to real property, such as roofs)?

3. Is there an alternative approach not mentioned above that would be preferable?
    a) If so, why would this be a better alternative?
    b) What are the benefits and drawbacks and potential impacts of this alternative approach?

Topic 2 – Limiting the Duration of NOSI Registrations

1. Previously, where the collateral included consumer goods, the PPSA included a requirement that NOSI registrations must have an expiry date that could not be more than five years past the registration date (a "five-year cap"). Do you support re-establishing this rule? Why or why not.

a) Would a different time period be more appropriate (i.e., longer or shorter than five years?) Please explain.
b) Should the supplier be able to renew or extend the NOSI registration? Why or why not.
c) If the supplier can extend, should they be able to only if they extend the registration prior to the expiry date (i.e., if the expiry date has passed, the supplier would be barred from extending), or should they be able to extend so long as the security interest remains active? How long should the supplier be able to extend?
d) If a business could renew the registration, should the consumer be notified of the renewal?
e) What, if any, additional burden would re-introducing an expiry cap for consumer goods, and the possibility for renewal, have on business?

2. If the ministry were to institute an expiry cap and a NOSI expired and the supplier did not renew it, then the consumer could apply, through a Teraview Licensee, to have the NOSI removed from title, which is expected to be a less burdensome process for the consumer as compared with the current state. In your opinion, would this result in less burden for the consumer? Do you have a recommendation to streamline the process further that the ministry should consider?

3. Besides re-instituting an expiry cap, are there any other ways the ministry could consider limiting the duration of NOSIs? For example, should the ministry consider limiting the duration of the underlying security interest (e.g., in certain circumstances, a fixture cannot be used to secure an obligation for longer than five years)?

Topic 3 – Notice Requirements

1. In your opinion, should NOSIs have notice requirements? Why or why not?

2. If notice is required, should written notice be provided to the consumer *before* a NOSI has been registered, *after* the NOSI has been registered, or *in both circumstances*? Why or why not?
    a) How long after the registration should a supplier be required to provide notice of the NOSI (e.g., within a set number of days after the registration (for example, within 30 days of the registration))?
    b) If notice is required to be sent *before* a NOSI can be registered, should the supplier be required to demonstrate it has fulfilled this step before it can register the NOSI? If so, how?

c) Should a business be required to provide notice of the NOSI to consumers at other times, such as prior to the NOSIs expiry date, or if they extend or renew the NOSI? If so, why?

3. To support the sharing of accurate, clear, and accessible information, the ministry is considering specifying what information would need to be included in the notice provided to the consumer (whether before or after the NOSI has been registered). Is there specific information that, in your opinion, would be important to include in the notice (please provide the type of information and a rationale for why it should be included)? For example:
    a) Should the business be required to provide a copy of the NOSI registration to the consumer (when notice is provided after registration has taken place)?
    b) Should the name and contact information of the business be required? Other information?
    c) Should an explanation of what a NOSI is, does, and the consequences of it be required? And should the notice be required in a specific format?

4. In many Canadian jurisdictions with notice requirements in place, consumers may waive their right to be notified about the NOSI. If the ministry pursued notice requirements for NOSIs, do you think that consumers should be able to waive the right to receive notice? Why or why not?

5. Are there other approaches to requiring notice of the registration of a NOSI that the ministry should consider? Please explain.

Topic 4 – NOSI Assignments

1. If the ministry were to mandate notice of an assignment of a security interest associated with a NOSI, should that notice be provided *before* the assignment, *after* the assignment, or under both circumstances? Why or why not? Please provide any reasons.
    a) When would a business have to provide notice (e.g., a set number of days prior to the assignment, within a set number of days after the assignment)?
    b) *who* should be responsible for providing the notice (i.e., the assignor, the assignee, other)?

2. The ministry is considering specifying some of the information that would have to be included in the notice, to support the sharing of accurate, clear, and accessible information with the consumer. Is there any information that, in your opinion, would be important to include in the notice (e.g., details of the assignment, the name and contact information of

the new business, a copy of the registered assignment (where applicable))? Please provide the information and a rationale for why it should be included.

3. Is there anything else the ministry should consider with respect to the assignment of a security interest associated with a NOSI? If offering an alternative, please include a discussion of the rationale and the risks associated with your proposal.

Topic 5 - Limit or Eliminate the Amount/Value on a NOSI Registration

1. Should the ministry consider **removing** the "consideration" field from the NOSI registration form altogether?
    a) What issues would be addressed by eliminating the consideration on the NOSI form?
    b) Could issues be created by eliminating the consideration on the NOSI form (e.g., do homebuyers rely on this field for anything? Would businesses be negatively affected in some way? Any other repercussions)?

2. Alternatively, should the ministry consider **limiting/capping** the amount that could appear in the consideration field of the NOSI registration, effectively "limiting" the amount of a NOSI registration?
    a) If so, what should be the limit (e.g., a certain value, the value of the collateral, etc.)?

3. Are there any other approaches the ministry should consider related to limiting the amount of a NOSI registration? Please describe. For example, should the actual obligation that can be secured be limited if a fixture is used as collateral? Why or why not?

Topic 6 - Limit the Amount to be Paid to a Secured Party to Retain a Fixture in Certain Circumstances

1. In your opinion, should the ministry consider limiting the amount that a person having an interest in the land that is subordinate to the security interest (e.g., a mortgage provider or a home purchaser) may pay to retain the fixture? Why or why not?
    a) If so, what should the limit be (e.g., the lesser of the amount secured by the security interest and the market value of the goods)?
    b) Under what circumstances should this be allowed? Please explain. For example, should this option only be possible if the debtor has defaulted on the security agreement, the secured party has given the required notice and a person having an interest that is subordinate to the security interest (e.g., a mortgage provider or home purchaser) wants to retain the fixture?

2. Should the ministry consider broadening this idea to limiting the amount that a secured party can demand as a condition of discharging the NOSI? Why or why not?
    a) If so, what should the limit be, and why (e.g., the lesser of the market value of the goods on the date the NOSI is discharged and the outstanding amount of the secured obligation, or some other amount)?
    b) If so, under what circumstances should this be allowed and who should be entitled to seek a discharge by paying the limited amount (e.g., any interested person, including the debtor and in all circumstances, or only in certain situations)?
    c) During the winter 2023 Consumer Protection Act consultation, the ministry proposed a change to the CPA that, if introduced and passed, would introduce a buy-out cost schedule for termination costs that a consumer would have to pay to terminate certain long-term leases (e.g., a hot water heater rental). If introduced and passed, would this complement a proposal to limit the amount required to retain the fixture, or make this proposal unnecessary (because with the underlying contract or related contract that provided for the security interest associated with the NOSI could be addressed)?

Topic 7 – Scoping Requirements for NOSIs Under the PPSA

1. If you are supportive of the potential solutions outlined in Section A,
    a) Do you think that any new restrictions or requirements suggested in that section should apply to *all* NOSIs, or just the types of NOSIs that affect consumers? Please list the topics set out in Section A and indicate whether the new restrictions or requirement should apply to *all* NOSIs or just the types of NOSIs that affect consumers.
    b) If you think that any new requirements or restrictions should apply to all NOSIs, please set out the reasons (e.g., are you aware of problems related to commercial NOSIs to which the topics set out in Section A would apply)?

2. How would you propose to distinguish between the types of NOSIs (i.e., commercial NOSIs and those that affect consumers)? For example, should the ministry establish a new category of "residential NOSIs" and limit any new restrictions or requirements to NOSIs placed on residential property only?

Topic 8 – Alternative Means of Discharging a NOSI

1. Should the ministry consider an alternative discharge process as described above? Why or why not?

2. If the ministry pursues an alternative discharge process as outlined above, under what circumstances should a consumer be able to seek a discharge through those means?
    a) For example, consider the approach taken in B.C., which generally only enables the consumer to seek a discharge, as described above, in limited circumstances such as those listed below (see s. 49(10) of B.C.'s PPSA for further context). Should the ministry only consider enabling an alternative NOSI discharge process in limited circumstances such as the following:
        i) Where all the obligations of the underlying contract have been performed,
        ii) The secured party has agreed to release part, or all of the collateral described in the notice,
        iii) The description of the collateral includes an item or kind of property that is not collateral under a security agreement between the parties,
        iv) The security agreement to which the notice relates no longer exists, or
        v) The item or kind of property described in the notice is not affixed to the land.

3. Alternatively, should the ministry consider broader grounds upon which a consumer may be able seek a discharge, such as enabling a consumer to seek a discharge if any provisions of the PPSA have been violated or there is otherwise non-compliance with the PPSA or any applicable Land Registry bulletins (e.g., including any of the potential new requirements discussed in Section A)? Please explain.
    a) If the ministry were to consider even more extensive grounds upon which a consumer can initiate a discharge, beyond non-compliance with the PPSA or Land Registry bulletins, what should those grounds be?

4. Under the approach taken in B.C., before a consumer can submit specified information to the registrar regarding a cancellation of a NOSI, they must first write to the secured party demanding that the NOSI be cancelled and provide the secured party with 40 days to respond. Should Ontario consider a similar approach?
    a) If so, how much time should the secured party have to respond?

5. Under the approach taken in B.C., provided that the consumer has provided the Land Registry with the appropriate documents (a true copy of the demand to cancel the NOSI and an applicable sworn statement), then the Land Registry must make the appropriate entry unless they receive a court order that says otherwise (note that, in Ontario, a consumer would have to submit this information through a Teraview licensee and not directly to the Land Registry). This effectively reverses the onus in these situations by requiring a secured party to go to court to maintain their NOSI. Should Ontario also consider this approach? Why or why not?

6. Currently under the PPSA, if a secured party does not discharge a NOSI from title within a specified timeframe when required to, they are liable to the person making the demand, or the debtor, for $500 and any damages resulting from the failure. Is this an adequate way for consumers to recoup losses or damages because of the failure to provide a discharge? If not, is there another amount that you would propose? Please explain.

7. What are the risks to business if, under the approach outlined above, they are required to seek a court order to maintain their NOSI registration?

Topic 9 – Place Restrictions on Who Can Register NOSIs

1. Should only certain professionals such as lawyers be allowed to register NOSIs? Why or why not?
    a) If limited to lawyers, should paralegals also be allowed to register NOSIs? Why or why not.

2. If the ministry restricted who may register NOSIs, should that requirement be scoped to only include the types of NOSIs affecting consumers? Please explain (for more context refer to Topic 7: Scoping Requirements for NOSIs Under the PPSA).

3. Is there an alternative approach to restricting who may register NOSIs not mentioned above? If so, why would this be a better alternative?

Topic 10 – Adding or Enhancing Available Offences

1. If the ministry were to add or enhance available NOSI offences, what risks or considerations should the ministry keep in mind (i.e., what are examples of harmful business practices or instances of NOSI misuse that could be targeted with additional or enhanced offences)?

2. If the ministry were to add or amend penalties related to added or enhanced offences what should the penalty be? What risks or considerations should the ministry keep in mind related to any added or amended penalties proposed?

3. What penalties should businesses face for failing to discharge a NOSI?

Topic 11 – Enhanced Education and Awareness of NOSI Issues

1. What are the benefits if the ministry provides consumers with information specific to NOSIs? Please explain.
    a) To whom should awareness information be targeted? (e.g., consumers, businesses, or professions involved in transactions related to NOSIs, such as lawyers and real estate agents?
    b) What information would most benefit consumers (e.g., general information about NOSIs – what they are, how they work; how to discharge a NOSI; or when NOSIs apply, etc.)?
    c) What information would most benefit businesses (e.g., business obligations related to NOSIs)?

2. What would be the best way to receive information about NOSIs and consumer rights:
    - ☐ Receive a newsletter or other information by email
    - ☐ Read a blog on the Ontario government's website
    - ☐ Join a Facebook group
    - ☐ Participate in social media surveys
    - ☐ Watch YouTube videos
    - ☐ Television commercials
    - ☐ Join an online chat or Townhall Meeting in my local community with the Minister of Public and Business Service Delivery
    - ☐ Get a brochure/pamphlet when making a purchase/buying a house/signing a contract
    - ☐ Read online articles on my local media feed or through Google or another search engine
    - ☐ Visit a local trade show booth

    Are there any other ways the ministry could inform consumers/businesses to help address this issue?

3. To best determine the type of information consumers feel is important to receive about NOSIs, please share your story/experience with NOSIs on title. What were the circumstances under which you learned about the NOSI?

Topic 12 – Additional Operational Changes

1. Should the NOSI registration form completed by Teraview Licensees to register the NOSI be changed to require additional/alternative information? If so, what information should be included on the NOSI registration form?

2. Is there anything else the ministry should consider that could represent an operational change, to the land registry system or otherwise, to help address this issue? Please explain.

Topic 13 – Additional Suggestions

1. Besides the topics and ideas raised in this consultation paper, should the ministry consider any other approaches to address the consumer harms that may arise from the inappropriate use of NOSIs?

Appendix C

For Your Information

The Government of Ontario is sharing the potential solutions found in this paper to seek feedback on NOSI issues and the impact of those potential solutions. Your input will be reviewed as Ontario considers ways to address the consumer harms associated with NOSIs.

Please review the "Privacy Statement" section to understand how your comments and feedback may be used.

Please note that nothing in this paper will become law unless it is included in a bill that is passed by the Legislative Assembly of Ontario, or in a regulation approved by the Lieutenant Governor in Council or Minister as applicable.

Once the consultation has closed, the ministry will share updates on the status of any proposals as appropriate.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CROWN CREST CAPITAL MANAGEMENT CORP., CROWN CREST FINANCIAL CORP., CROWN CREST FUNDING CORP., SIMPLY GREEN HOME SERVICES INC., SIMPLY GREEN HOME SERVICES CORP., AND CROWN CREST CAPITAL TRUST

Court File No. CV-23-00709183-00CL

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(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF KAREN WHIBLEY

(SWORN NOVEMBER 15, 2023)

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto ON M5G 1Z8

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Mohsen Seddigh (LSO # 70744I)
mseddigh@sotos.ca
Maria Arabella Robles (LSO # 87381F)
mrobles@sotos.ca

Tel: 416-977-0007

BLANEY McMURTRY LLP
Barristers and Solicitors
Suite 1500 - 2 Queen Street East
Toronto, ON M5C 3G5

David T. Ullman (LSO#42357I)
dullmann@blaney.com

Tel: 416-596-4289

Lawyers for the Class Action Plaintiffs