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TO: **Canadians for Properly Built Homes**
ATTN: Dr. Karen Somerville, President
P.O. Box 11032, Stn "H"
Ottawa ON K2H 8Z0

February 28, 2021

Dear Dr. Somerville:

RE: *Consumer Protection Act, 2002* – Used and Potentially Damaged Furnaces

I am writing to provide you with my letter of opinion on the following issue:

> *Is it legal for Ontario builders to sell used and / or potentially damaged furnaces in newly built homes without disclosing to their customers that the furnace was used by the builders for construction heat during construction of the house?*

In short, my opinion is that the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A (the "CPA") requires that a builder disclose any material facts about a furnace where the failure to do so would deceive, or have the tendency to deceive, the purchaser. Such a determination is made on an objective basis, i.e., would a reasonable person consider the representation or

omission as being deceptive, or having the tendency to deceive? If so, then the failure to disclose such information would constitute “unfair practice”. “Unfair practice” is expressly prohibited by section 17(1) of the CPA.

The jurisprudence establishes that it is not a viable defence for a builder to claim that his or her representations or omissions were not relied upon by the consumer. Rather, the CPA prohibits “unfair practice”. Whether or not there was reliance by a consumer is irrelevant to the commission of a prohibited act.

Finally, Canadian courts, including the Supreme Court of Canada, have emphasized that the CPA is directed at protecting consumers. Consumers suffer an “informational disadvantage” when it comes to many transactions. Given the mandate of the CPA, the Supreme Court has confirmed that consumer protection legislation “should be interpreted generously in favour of consumers”. That said, the language of section 17(1) of the CPA is express and clear, and it does not leave room for interpretation: “*No person shall engage in an unfair practice.*”

A. The Statutory Framework

Section 17(1) of the CPA states: “No person shall engage in an unfair practice.” Section 14(1) provides that: “It is unfair practice for a person to make a false, misleading or deceptive representation.” Section 14(2) provides examples of representations that are “false, misleading or deceptive”.

The majority of the examples provided under Section 14(2) relate to stated representations rather than omissions or non-disclosure. However, Section 14(2).14 specifically contemplates instances of material non-disclosure that would amount to a “false, misleading or deceptive” misrepresentation. Section 14(2).14 provides the following formulation: “A representation using exaggeration, innuendo or ambiguity as to a material fact **or failing to state a material fact if such** use or **failure deceives or tends to deceive**.” (emphasis added)

The CPA prohibits “unfair practice” (section 17). “Unfair practice” includes making “false, misleading or deceptive” representations (section 14). A representation that fails to state a material fact constitutes “unfair practice” if the omission deceives, or has the tendency to deceive (Section 14(2).14).

The statutory framework of the CPA expressly contemplates that a material fact omission will constitute an unfair practice, and that unfair practice is prohibited. It is my opinion that the failure of a builder to disclose that furnace has been used during the construction of a house may, depending on the facts, constitute “unfair practice” within the meaning of the CPA. As will be discussed below, such a determination is fact-specific by its nature.

B. The Jurisprudence

1. The Objective Standard for Determining Whether there is a “Tendency to Deceive”

The failure to disclose a “material fact” may or may not constitute “unfair practice”. If the omission of the material fact has the “tendency to deceive”, then it will constitute “unfair practice”. The determination of whether an omission has the “tendency to deceive” is made on an objective basis, as Justice Hoy explained in *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College)*, 2008 CanLII 1539 (ON SC).

In *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College)*, 2008 CanLII 1539 (ON SC), Justice Hoy considered a motion to certify a class action. The proposed class action asserted various claims against a private, for-profit career college, including allegations of “unfair practice” under the CPA. The defendant had offered an 18-month, non-accredited program to train prospective dental hygienists. The plaintiffs claimed that the college had failed to disclose that non-accredited graduates would not be automatically eligible to write the national examination required for all prospective dental hygienists.

Justice Hoy determined that: “A failure, ‘to state a material fact if such failure deceives or tends to deceive’ constitutes a false, misleading or deceptive representation. I believe that whether

the failure to state a material fact *tends* to deceive can be determined objectively, by reference to what would be conveyed to a reasonable person." (para. 143, emphasis added)

If a homebuyer purchases a furnace that was used during the construction of the house, then there are a variety of problems that can arise. Some of these problems are described in Damaged during construction - Plumbing & HVAC (plumbingandhvac.ca) (April 27, 2016, by Simon Blake):

- "Drywall dust and other construction debris leaves the new homeowner with what is basically a used furnace that may neither perform as intended nor last as long as it should."
- "'The main problem is dust… Debris gets tossed down the supply and return ducts. It's a mess,' remarked Joe Krebs, contract manager for Applewood Heating and Air Conditioning, Mississauga, Ont."
- "'There have been so many issues with this; the biggest one being that the residential customer is taking over their new home and in actual fact they are not getting a new furnace. Who knows what kind of stress it has been under and for how long?' remarked Warren Heeley, HRAI president."

Where a builder is using the furnace during construction of the house, the subsequent operation of the furnace may be compromised by being clogged with drywall and construction debris. Depending on the nature and scope of the impairment, the failure to disclose the usage of a furnace during construction may constitute a material omission of fact. This will be assessed on an objective standard. Would a reasonable person consider him or herself as being "deceived" by the builder's failure to provide a new, unused furnace? This will depend on the facts of the case, including the state, functionality, and safety of the furnace.

Regardless, it is my opinion that builders who fail to disclose material facts about the state of the furnace being sold are engaging in "unfair practice" if a reasonable person would have required such disclosure. This is not just a function of the statutory terms of the CPA, but also

the common law. See, for example, the Supreme Court of Canada's decision in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC), [1995] 1 SCR 85, in which it was determined that contractors also owe a duty of care to subsequent purchasers of a building to ensure reasonable care in construction. As stated by the Supreme Court:

> 43 I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.
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> (para. 43, emphasis added)

This common law duty of care owed by builders to home-buyers is reflected in part under Section 17 of the CPA in its prohibition against "unfair practice".

2. Reliance on the Misrepresentation is not Required for it to Constitute "Unfair Practice"

A builder may be guilty of "unfair practice" whether or not the consumer relies on the deceptive representation or omission. The Ontario Court of Appeal considered the issue of reliance in the context of the CPA in *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468 (CanLII).

In *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468 (CanLII), the Court of Appeal dismissed an appeal by a defendant college accused of "unfair practice". The college had stated that its program would provide students with the opportunity to complete three industry designations / certifications in addition to the certificate offered by the college. The students were not automatically qualified for the designations, however, and had to take additional courses, write credentialing exams, and pay the requisite fees for the designations.

The defendant college argued on appeal that there was ample information on the internet about the various requirements pertaining to the designations. Additionally, the college argued that, in order for the practice to be considered "unfair practice", each plaintiff must prove that he or she relied on the misrepresentations before being entitled to a remedy.

The Court of Appeal rejected this argument. As the Court of Appeal explained:

> [14] We reject the submission that the program description did not amount to an unfair practice. The trial judge found as a fact that the representation was misleading and that it would be unreasonable to expect students to conduct independent research to verify its accuracy. This finding is entitled to deference and we see no error in the trial judge's conclusion in this regard.
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> [15] As to the reliance issue, we do not view the *CPA* as requiring proof of reliance in order to establish that there has been an unfair practice and that there is entitlement to a remedy under the Act. Section 18(1) of the *CPA* clearly provides that a consumer who enters into an agreement "after or while a person has engaged in an unfair practice" is entitled to any remedy that is available in law, including damages. Proof of reliance is not a prerequisite. […]
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> (paras. 14-15, emphasis added)

Based on the foregoing, it is unnecessary to prove that someone relied on a builder's representations in order to for the representations to be "false, misleading or deceptive". If a builder sells a furnace to a consumer and fails to disclose that the furnace had been used during construction, then it is not a defence that the consumer did not rely on the representation. The failure to disclose a material fact will still constitute "unfair practice".

3. The CPA is to be Interpreted "Generously" in Favour of Consumers

The Courts have given guidance on interpreting the CPA. First and foremost, it is a consumer protection statute, and it should be interpreted "generously" for the benefit of consumers. For example, in *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044 (CanLII), Justice Horkins explained:

> [268] If knowledge becomes a relevant inquiry in determining whether and how the *Consumer Protection Act* applies, then the consumer may be asking himself or herself "is this an unfair practice?" in light of what the consumer has learned as opposed to being able to rely on the fact that unfair practices are prohibited. In this sense, it would

> have the effect of shifting responsibility from the supplier to the consumer and would weaken the rights of the consumer under the *Consumer Protection Act*. Moreover, an inquiry into each consumer's knowledge undermines a legislative intent to place all consumers on equal footing.
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> [269] Two appellate decisions reinforce the remedial and protective intent of the *Consumer Protection Act*. In *Reid v. R.L. Johnston Masonry Inc.*, [2009] O.J. No. 2482, (Div. Ct.), a consumer hired a contractor to fix a leaky basement. She sued for defective workmanship. The parties had an oral contact. There was no signed agreement as required by the *Consumer Protection Act*.
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> [270] At trial, the consumer did not rely on the *Consumer Protection Act*. The court dismissed her claim. On appeal, the Divisional Court permitted the consumer to rely on the Act, allowed the appeal and found in favour of the consumer ordering a refund of the contract price. The court stated that "The Consumer Protection Act, 2002, exists to protect consumers. If the supplier of services does not follow the Act, it runs the risk of being subject to a sanction." (para. 15).
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> [271] Recently the Supreme Court of Canada in *Seidel*, *supra,* emphasized that consumer protection legislation "should be interpreted generously in favour of consumers".
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> (paras. 268-271, emphasis added)

Also see: The Supreme Court of Canada's decision in: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (CanLII), [2011] 1 SCR 531, at para. 37.

Similarly, the Trial Judge in *Ramdath v. George Brown College*, 2012 ONSC 6173 (CanLII) had the following comments about the CPA:

> [36] The main objective of consumer protection legislation, such as the CPA, is to protect consumers. [See Note 10 below] As the Supreme Court noted when discussing the Quebec equivalent: [page545]
>
> > The C.P.A.'s first objective is to restore the balance in the contractual relationship between merchants and consumers . . . This rebalancing is necessary because the bargaining power of consumers is weaker than that of merchants both when they enter into contracts and when problems arise in the course of their contractual relationships. It is also necessary because of the risk of informational vulnerability consumers face at every step in their relations with merchants. In sum, the obligations imposed on merchants and the formal requirements for contracts to which the Act applies are intended to restore the balance between the respective contractual powers of merchants and consumers[.]

> The C.P.A.'s second objective is to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices[.]
>
> (para. 36, emphasis added)

Canadian Courts, including the Supreme Court of Canada, have emphasized that the CPA is targeted at restoring balance to the informational disadvantages consumers face. The CPA exists for the protection of consumers. The CPA is to be interpreted "generously in favour of the consumers", according to the Supreme Court. "Unfair practices" are prohibited. To shift responsibility for preventing "unfair acts" from the supplier to the consumer would go against the intent of the CPA.

Based on the foregoing, Canadian courts, including the Supreme Court of Canada, expressly identify the purpose of the CPA as being to protect consumers. The CPA is to be interpreted and applied towards that mandate. "Unfair practice" is prohibited, and consumers are not expected by the courts to ensure that builders do not engage in "unfair practice". Rather, this is a result that should naturally follow from the CPA's provisions.

If a builder fails to disclose that a furnace may be deficient due to use during construction, then it is not the responsibility of the consumer to ensure that the builder is sanctioned. The prohibition against "unfair practice" should be sufficient to require builders to disclose material facts.

C. Conclusion

In conclusion, it is my opinion that the CPA requires builders to disclose material facts about the furnaces that consumers are buying. The failure to do so would constitute "false, misleading or deceptive" representations and omissions. This, in turn, constitutes "unfair practice", which is prohibited by the CPA.

Based on the jurisprudence reviewed in this opinion, the determination of whether representation or omission is "false, misleading or deceptive" would be determined on the basis of the "reasonable person" standard. Would a reasonable person consider the representation

or omission to be deceptive? It is no defence for a builder to state that his or her representation or omission was not specifically relied upon. The courts will apply a standard of interpretation of the CPA that is "generously" in favour of consumers. Finally, since "unfair practice" is already prohibited by the CPA, the burden of policing "unfair practice" should not be shifted to the consumer. To do so would be contrary to the mandate of the CPA.

I look forward to discussing this opinion with you further should you have any questions or concerns.

Yours very truly,

Brian Moher, Barrister