Toronto Law Journal

The Public Interest in Privacy: The Supreme Court of Canada's Decision in *Sherman Estate v. Donovan*

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In *Sherman Estate v Donovan*,[2] the Supreme Court of Canada considered whether personal privacy and related physical safety concerns can justify an exception to the ordinarily open-court file in probate proceedings. Specifically, the Court considered whether personal privacy and safety concerns can qualify as public interests important enough to justify sealing otherwise open court files. More generally, the Court considered how to reconcile privacy, as a fundamental consideration in a free society, and the open court principle, as protected by the constitutionally entrenched right of freedom of expression.

Writing for a unanimous Court, Justice Kasirer recognized a narrow but highly significant aspect of privacy as being an important public interest for the purposes of the relevant test applicable to confidentiality orders established in *Sierra Club of Canada v Canada (Minister of Finance)*.[3] Legal proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not merely in discomfort or embarrassment, but in an affront to personal dignity. Where this narrower dimension of privacy is shown to be at serious risk, an exception to the open court principle may be justified. According to Justice Kasirer, this dimension of privacy is rooted in "the public interest in protecting human dignity".[4]

But on the facts before the Court in this particular case, the Court agreed with the Ontario Court of Appeal below, which found that neither the alleged privacy risk nor the alleged risk to physical safety was sufficiently serious enough to overcome the strong presumption of open courts.

Background Facts and Proceedings Below

Bernard Sherman and Honey Sherman, a prominent couple in business and philanthropic circles, were found dead in their Toronto home in 2017; their deaths, which continue to be investigated as homicides, generated intense public interest and media scrutiny. The couple's estates and estate trustees sought to limit the media scrutiny and ensure an orderly transfer of the couple's property outside the glow of what they considered the public's morbid fascination both with the couple's (still) unexplained death and the apparently great sums of money involved.

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[2] *Sherman Estate v Donovan*, 2021 SCC 25.
[3] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522.
[4] *Sherman Estate, supra* note 1, at para 7.

Specifically, the estate trustees sought a sealing order to prevent further intrusions of their and the beneficiaries' privacy and safety. They argued that if the information in the court files were to be made open to the public, their privacy would be compromised and their lives would be put in jeopardy as long as the couple's death remained unexplained and those responsible remained at large.

The sealing orders were initially granted upon request, and then subsequently challenged by Keith Donovan, a journalist and one of the respondents on the appeal, along with Toronto Star Newspapers Ltd. The Toronto Star argued that the sealing orders violated not only its constitutional rights of freedom of expression and freedom of the press, but also the attendant principle that the workings of the courts must be open to the public as a means of guaranteeing the transparent and fair administration of justice.

The initial application judge applied the Supreme Court's test from *Sierra Club*.[5] The judge found that both prongs – the privacy/dignity risk, and the safety risk – of that test were met on the facts at bar, and that they "very strongly outweigh" what he characterized as the narrow public interest in the "essentially administrative files" at issue.[6] Loathe to issue an indeterminate sealing order, however, the application judge sealed the files for two years, with the possibility of renewal.[7]

The Ontario Court of Appeal unanimously allowed The Toronto Star's appeal, and lifted the sealing orders.[8] The Court of Appeal noted that the *Sierra Club* test requires the presence of a public interest, and found that the sealing orders sought by the trustees in this case were purely personal and thus lacked any public interest. The Court of Appeal also found that there was no evidence in this case that could warrant a finding that disclosure of the estate files posed a real risk to anyone's public safety.[9]

The Supreme Court Revises the *Sierra Club* Test

The outcome of the appeal turned on whether the application judge should have sealed the estate documents pursuant to the test for discretionary limits on court openness previously established in the Supreme Court's *Sierra Club* decision.[10]

A long line of Supreme Court jurisprudence holds that court openness is protected by the constitutional guarantee of freedom of expression, and is considered essential to the proper functioning of Canadian democracy. Moreover, this principle includes and is considered inseparable from reporting on court proceedings by a free press. The test for discretionary limits on court openness is designed to maintain the strong presumption of openness while

[5] Ontario Superior Court of Justice, 2018 ONSC 4706, 41 ETR (4th) 126.
[6] *Ibid* at paras 31, 33.
[7] *Sherman Estate, supra* note 1 at para 16.
[8] Court of Appeal for Ontario, 2019 ONCA 376, 47 ETR (4th) 1.
[9] *Ibid* at para 16.
[10] *Sherman Estate, supra* note 1 at para 29.

offering sufficient flexibility for courts to protect other, competing public interests where they arise.[11]

But the case at bar raises a challenge to this established analytic framework: Can the protection of privacy, where privacy is a matter of public concern, justify exceptions to the open court principle, including the freedom of the press to report on legal proceedings?[12] Neither the right of privacy nor the open court principle is absolute or without exceptions. Reconciling these two ideas, and determining the role of privacy in the *Sierra Club* test, is thus the crux of this case.[13]

According to Justice Kasirer, while mere embarrassment caused by the dissemination of personal information in court does not justify a limit on court openness, "circumstances do exist where an aspect of a person's private life has a plain public interest dimension."[14] Specifically, personal information disclosed in court "may result in an affront to a person's dignity"; where privacy seeks to protect individuals from this affront, "it is an important public interest relevant under *Sierra Club*."[15]

The novel question under the *Sierra Club* test when risks to dignity are concerned is not whether the information in question is "personal" to the individual affected, but whether, "because of its highly sensitive character, its dissemination [in court] would occasion an affront to their dignity that society as a whole has a stake in protecting."[16]

This analysis must focus on the *impact* – rather than the mere fact – of the dissemination in court of sensitive personal information. The information must also strike at the "core identity" of the individual concerned, that individual's "biographical core," such that its dissemination in court would amount to "an affront to dignity that the public would not tolerate, even in the service of open proceedings."[17]

To accommodate and give effect to this narrow yet highly significant public interest in privacy where a serious risk to personal dignity is at stake, the Court has revised the two-step inquiry under the *Sierra Club* test[18] so as to include a third step. Now, individuals asking a court to exercise its discretion to limit the open court principle must establish that:

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[11] *Ibid* at para 30.
[12] *Ibid* at para 31.
[13] *Ibid*.
[14] *Ibid* at para 32.
[15] *Ibid* at para 33.
[16] *Ibid*.
[17] *Ibid* at paras 34-35.
[18] In *Sierra Club, supra* note 2 at para 53, the Court held that a confidentiality (*i.e.,* sealing) order should be granted only when (1) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

1) court openness poses a "serious risk" to an important public interest (including but not limited to the newly recognized public interest in protecting individuals from affronts to their dignity);

2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[19]

This test now applies to all discretionary limits on court openness, including sealing orders, publication bans, orders excluding the public from a hearing, and redaction orders, subject only to valid legislative enactments.[20]

Justice Kasirer adds that there is no closed list of important public interests for the purposes of this test, but he also reaffirms the Court's guidance in *Sierra Club* that courts must be "cautious" and "alive to the fundamental importance of the open court rule" when identifying important public interests.[21] While it has become trite for the Supreme Court to say of a new – or newly clarified – legal test that it is "fact-based" and necessarily dependent on "context," it is perhaps equally trite to lazily criticize the Court for not providing a comprehensive catalogue of a new test's potential applications,[22] a hopeless and, in any event, not particularly helpful task in a continually evolving social and cultural landscape, including but by no means limited to the ongoing evolution of the Internet and social media.

At the same time, however, Justice Kasirer makes perfectly clear the limits of the Court's ruling by explaining that only "specific aspects of privacy interests can qualify as important public interests under *Sierra Club*."[23]

Justice Kasirer further explains that "rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation […] That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine."[24] This task, Justice Kasirer concludes, "remains a high bar", one that will be successfully reached "only in limited cases."[25]

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[19] *Sherman Estate, supra* note 1 at para 38.
[20] *Ibid.*
[21] *Ibid* at para 42, citing *Sierra Club, supra* note 2 at para 56.
[22] See e.g. Ian MacKenzie, "The Open Court Principle and Privacy: A New Frontier?", *SLAW* (8 September 2021), online: http://www.slaw.ca/2021/09/08/the-open-court-principle-and-privacy-a-new-frontier/, arguing that "[t]he court, unfortunately for those facing requests for confidentiality orders, felt there was no need to provide a catalogue of the range of sensitive personal information that could give rise to a serious risk to a person's dignity."
[23] *Sherman Estate, supra* note 1 at para 49.
[24] *Ibid* at para 61.
[25] *Ibid* at paras 62-63.

Conclusion

Unlike the Ontario Court of Appeal below, the Supreme Court of Canada recognizes in *Sherman Estate* that personal concerns "can coincide with public interests within the meaning of *Sierra Club*."[26] The protection of certain aspects of privacy – in this case, core personal dignity – is important not only to the affected individual but also to society. Because the established jurisprudence on the importance of privacy cannot be directly transposed to the jurisprudence on open court, the Supreme Court in *Sherman Estate* has adapted the *Sierra Club* test so as to accommodate a narrow and specific yet highly significant public-interest dimension of privacy capable of limiting the open court principle.

But as the Court hastens to clarify, "[n]othing here displaces the principle that covertness in court proceedings must be exceptional."[27] As such, the Court has incrementally revised the *Sierra Club* test in order to accommodate a more modern understanding of the public interest in privacy.

[26] *Ibid* at para 48.
[27] *Ibid* at para 63.

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Case Summary of *Corner Brook (City) v Bailey*

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The Supreme Court of Canada's recent decision in *Corner Brook (City) v Bailey*[2] provides much-needed clarity on the law of contractual interpretation in relation to releases. This area of law is an important one, given the prevalence of disputes that settle rather than continue to the judicial process. The interpretation of releases was highly complex, given that these instruments determine a party's ability to sue in the future and that the possible use of evidence from negotiations was long unclear. Yet, as the final section of this summary notes, *Bailey* leaves some questions to be answered vis-à-vis the admissibility of negotiations as part of the surrounding circumstances in contractual disputes – a contentious question in the world of contractual interpretation.

A. The Facts

In this case, Mary Bailey struck David Temple with her husband's car.[3] Mr. Temple, an employee of the City of Corner Brook, sued Mrs. Bailey.[4] Mrs. Bailey, in another action, sued the City.[5] In the context of the latter action, the City and Mrs. Bailey settled. The result of this settlement was a release, by which Mrs. Bailey released the City from liability relating to the car accident.[6] She discontinued her action against the City.[7] Numerous years later, Mrs. Bailey instituted a third-party claim against the City for contribution or indemnity in the action that Mr. Temple brought against her.[8] The issue in this case was whether the above-noted release barred Mrs. Bailey's third-party claim against the City in this action.[9] On the one hand, Mrs. Bailey argued that her third-party claim should not be barred. On the other, the City argued that it was.[10]

B. The Decisions Below

(a) Supreme Court of Newfoundland and Labrador[11]

At first instance, Murphy J found that the released did bar Mrs. Bailey's third-party claim against the City.[12] As a result, he stayed the claim.[13] In making this determination, Murphy J emphasized

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[2] 2021 SCC 29 [*Bailey*].
[3] *Ibid* at para 5.
[4] *Ibid* at para 6.
[5] *Ibid* at para 5.
[6] *Ibid* at para 7.
[7] *Ibid.*
[8] *Ibid* at para 8.
[9] *Ibid* at paras 15ff.
[10] *Ibid.*
[11] 2018 NLSC 177.
[12] *Bailey, supra* note 2 at para 10.
[13] *Ibid.*

that, in interpreting releases, judges must ascertain the parties' intention.[14] To do so, they must first assess the words written in the release. Judges may also assess the factual matrix and context in which the parties signed the release in interpreting the language of the release.[15] Above all, Murphy J found that the interpretation of releases must be conducted from an objective perspective.[16] In this case, the release covered Mrs. Bailey's third-party claim; however, in applying the traditional Blackmore Rule, Murphy J considered what the parties contemplated when they signed the release, in addition to the specific context in which it was signed.[17] In particular, Murphy J observed that Mrs. Bailey had already been served with the Temple action when she signed the release with the City.[18] This – in addition to the parties' correspondence – indicated that she knew the facts underlying the third-party claim when she signed the release.[19] As such, Murphy J concluded that the parties contemplated any and all kinds of claims in relation to the car accident.[20]

(b) Court of Appeal of Newfoundland and Labrador[21]

The Court of Appeal of Newfoundland and Labrador unanimously allowed the appeal on the basis that the Blackmore Rule was subsumed into the principles of contractual interpretation as set out in *Sattva Capital Corp v Creston Moly Corp* and *Ledcore Construction Ltd v Northbridge Indemnity Insurance Co.*[22] The Court of Appeal found that Murphy J made three extricable errors of law in holding that: (1) what was in the parties' contemplation was determinative of mutual intent; (2) it unnecessary to determine what was "specially" in their contemplation; and (3) it was sufficient that the release's broad and general wording covered the third-party claim when the surrounding circumstances actually suggested otherwise.[23] As a result, the Court of Appeal reviewed Murphy J's decision on a correctness standard.[24] It found that the broad language included in the release should be considered in light of the specific references to the Bailey Action, and that the pre-contract exchange of correspondence did not refer to the Temple action or any third-party actions.[25] The Court of Appeal reinstated the third-party notice, finding that the language of the release, its factual matrix, and the exchange of correspondence between the parties indicated that the release should be interpreted as only applying to the Baileys' claims in the Bailey Action.[26]

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[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid* at para 11.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] 2020 NLCA 3 [*Bailey*, NLCA].
[22] *Ibid* at para 12.
[23] *Ibid* at para 13.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

C. The Decision at the Supreme Court of Canada

Rowe J, writing for the Court, reviewed the law governing the interpretation of releases. Notably, he determined that the Blackmore Rule should no longer be referred to because its function has been "subsumed entirely by the approach set out in *Sattva*."[27] Briefly, and to provide context, the Blackmore Rule established that contractual releases were to be interpreted narrowly to apply to the specific dispute that the parties contemplated when forming the contract. This Rule originated in *London and South Western Railway v. Blackmore*, in which the parties settled a dispute with wording that, on its face, released all claims, even if they were not related to the impugned dispute.[28] Later on, a significant claim arose and the House of Lords found that the general words in a release had to be limited to things that were specifically in the parties' contemplation at the time of formation. The Supreme Court's decision confirms Canadian contract law's uniform understanding of contractual interpretation, consistent with the Supreme Court's statement in *Sattva* that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction."[29] As a result, the rule now applicable in Canadian contract law is that "there is no special rule of contractual interpretation that applies only to releases."[30] This finding will provide significant guidance not only to the courts in interpreting the language of releases, but also to parties drafting releases to "wipe the slate clean."[31]

(a) A Release Should be Interpreted in Accordance with Sattva

Rowe J emphasized that a release is a contract and that the general principles of contractual interpretation accordingly apply.[32] The Blackmore Rule, albeit a seminal principle of contract law, has now been overtaken by the rule that "factual context is considered in interpreting contracts."[33] Rowe J emphasized that the Blackmore rule is "entirely consistent with the law of contractual interpretation generally."[34] As such, judges deciding disputes in relation to the scope of releases must assess the surrounding circumstances that the parties knew about at the time of the contract in interpreting the release's language.[35]

(b) Judicial Tendencies to Interpret Releases Narrowly Are a Function of Releases Themselves

Rowe J also noted the tension between the text and context of contracts, which is heightened in the interpretation of releases:

> Sometimes the ordinary meaning of the words and the surrounding circumstances come into tension, and courts must decide whether to rely on the surrounding

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[27] *Ibid* at para 33.
[28] (1870) LR 4 HL 60 [*Blackmore*].
[29] *Bailey*, NLCA, *supra* note 21 at para 34.
[30] *Ibid*.
[31] *Ibid* at para 27.
[32] *Ibid* at para 28.
[33] *Ibid* at para 23.
[34] *Ibid* at para 28.
[35] *Ibid* at para 20.

> circumstances to refine the words, or whether doing so would impermissibly overwhelm the words of the agreement, in which case the words must override.[36]

In assessing this interpretative challenge, Rowe J discussed two key tensions that are important to keep in mind. First, releases are unique in that they tend to be expressed in the broadest terms possible.[37] If applied literally, the release "could prevent the releasor from suing the releasee for any reason, forever."[38] For this reason, Rowe J emphasized that a judicial consideration of the context of the dispute is key to the interpretive exercise: "this context can serve as a limiting factor to the breadth of wording found in a release."[39]

Second, Rowe J noted the key challenge underlying releases – namely, that the parties often must account for risks that are unknown at the time of negotiating the contract.[40] Given this difficulty, he noted that releases often "lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances."[41] Rowe J found that, where courts interpret releases in a narrower manner than in other kinds of contracts, it is because the broad language typically used in releases can conflict with the factual matrix, especially where the claim was not in the parties' contemplation at the time of the release.[42]

A practical takeaway from *Bailey* is that parties need not use excessive verbiage.[43] Rather, they should make the language as clear as possible to indicate the scope of the release and whether it will apply to unknown claims and whether the claims must be connected to a particular area or subject matter.[44] Rowe J further noted that "releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended."[45]

In finding that the Court of Appeal erred in its review of Murphy J's decision (specifically, two of the three extricable errors of law that it identified were actually questions of law and fact), Rowe J found no reviewable error in the conclusion that the release covered Mrs. Bailey's third-party claims against the City.[46] He noted that the parties should not have to provide "every type of claim imaginable one by one" and that "there is no principled reason to require parties to particularize the scope of the release in this fashion."[47]

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[36] *Ibid* at para 35.
[37] *Ibid* at para 36.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid* at para 37.
[41] *Ibid.*
[42] *Ibid* at para 38.
[43] *Ibid* at para 41.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid* at para 51.
[47] *Ibid.*

D. Concluding Thoughts and Future Questions about the Admissibility of Contract Negotiations

Overall, *Bailey* injects clarity into the law pertaining to releases in Canadian contract law. Parties no longer must look to the Blackmore Rule, given that releases are now firmly considered to fall within the purview of *Sattva*. Looking ahead, questions persist about the admissibility of contract negotiations in contractual interpretation disputes and whether the factual matrix should include evidence of negotiations. On the one hand, reviewing such evidence could chill the parties' communications during negotiations. On the other hand, despite the dangers involved, evidence of negotiations could be useful to resolve ambiguities and support inferences concerning the parties' intentions at the time that they made their agreement. While Rowe J acknowledged the longstanding rule that such evidence is inadmissible, he acknowledged the tension between this rule and the need to consider the factual matrix in interpreting contracts.[48] Should negotiations be firmly considered part of the factual matrix in this analytical exercise? This question is one left for another day…

[48] *Ibid* at para 56.

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Consumer Protection in the Home Equipment Rental Financing Industry

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Door-to-door marketing of household equipment for rent, such as air conditioners, hot water heaters, and water softeners, has created a flurry of media coverage, regulatory action, and legal proceedings. This industry exploits loopholes in the laws governing consumer protection, civil litigation and the real property registration system, and has been widely decried as a scam. Yet, in the absence of serious enforcement measures, it continues to flourish in Ontario.

The scam works by locking vulnerable homeowners into disadvantageous rental contracts for home equipment. Door-to-door salesmen target mature suburban neighbourhoods, where the homeowners are likely to be older. When they get the homeowner at the door, they use deceptive marketing tactics and high-pressure sales techniques to get homeowners, many of whom may have language barriers or cognitive impairments, to sign excessively one-sided rental agreements for HVAC or other home equipment of dubious quality.

These rental companies rent out HVAC equipment at massively inflated prices. They then assign the rental contract to an associated financing company who registers a notice of security interest against the house, without telling the homeowner. When the homeowner goes to sell or refinance their house, they are shocked when their lawyer tells them about the notice of security interest. They are even more shocked when the finance company sends the payout statement, demanding payment of $10,000.00, $15,000.00, or even more. All to "buy out" a rental contract for an air conditioner or water softener, the retail value of which may be no more than $2,500.00. In many cases, this is after the homeowner has already paid hundreds or thousands of dollars in rental fees before "buying out" the contract, which makes the disparity between fair retail value and the amounts charged even more obscene.

Media Coverage

Consumer affairs journalists have covered the HVAC rental industry extensively, generating reports with headlines such as “Man still paying off 'predatory' contracts his father signed with HVAC company funded by big financial lender” on cbcnews.ca[1], or “Slick sales pitches trap seniors in costly contracts” in the Toronto Star.[2] “High-pressure scammers dupe Ontario woman

[1] Nicole Brockbank, “Man still paying off ‘predatory’ contracts his father signed with HVAC company funded by big financial lender” (25 March 2019), online: *CBC News* <cbc.ca/news/canada/toronto/home-trust-hvac-rental-contracts-1.5067957>.

[2] Ellen Roseman, “Slick sales pitches trap seniors in costly contracts” (23 January 2018), online: *Toronto Star* <thestar.com/business/personal_finance/advice/2018/01/23/slick-sales-pitches-trap-seniors-in-costly-contracts.html>.

into replacing nearly new furnace" offers the National Post[3], while the CBC has also run stories under the headlines, "High pressure door-to-door furnace sale leaves family steaming over $10K buy-out bill",[4] "Single mom hit with $32,000 bill to break furnace, air conditioner rental contract",[5] and "Woman with dementia locked into 10-year home-heating contract – with a $15K lien on her property".[6] For its part, CTV ran a major feature on the door-to-door home-equipment-rental-financing industry on the programme W5, in a two-part investigative series titled "Energy Trap".[7]

Frustrated homeowners have turned to the courts for relief and have found success. The courts have found these rental contracts to be unconscionable and unenforceable and have granted rescission. In every one of the handful of reported decisions handed down in Ontario so far, the homeowner has been successful. Despite the factual similarities amongst these cases, each judge hearing these cases has provided their own legal analysis, even as they have all reached the same conclusion.

Reported Decisions in Ontario

In *Balagula v Ontario Consumers Home Services*,[8] the homeowner entered into an agreement to sell his house, at which time he discovered the notices of security interest registered on title. He paid out the notices of security interest to the rental company so he could close the sale of his house, and then sued the rental company in Small Claims Court for return of the buy-out monies. Ruling in favour of the plaintiff, the Deputy Judge found that the rental contract was an onerous contract and the unusually onerous provisions of the contract were not pointed out to the homeowner at the time he signed the contract. The rental company was ordered to return the buy-out monies to the homeowner. The appeal by the defendant was dismissed by the Divisional Court.[9]

In *Duncan v Ontario Home Service Inc.*,[10] the homeowner brought a claim in Small Claims Court for rescission of an HVAC rental contract under the *Consumer Protection Act, 2000*. She also

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[3] "'You feel really stupid': High-pressure scammers dupe Ontario woman into replacing nearly new furnace", *National Post* (11 April 2016), online: <nationalpost.com/news/canada/you-feel-really-stupid-high-pressure-scammers-dupe-ontario-woman-into-replacing-nearly-new-furnace>.

[4] Belle Puri, "High pressure door-to-door furnace sale leaves family steaming over $10K buy-out bill" (9 March 2020), online: *CBC News* <cbc.ca/news/canada/british-columbia/simply-green-door-to-door-furnace-sales-1.5484612>.

[5] Sophia Harris, "'I was livid': Single mom hit with $32,000 bill to break furnace, air conditioner rental contract" (26 January 2020), online: *CBC News* <cbc.ca/news/business/home-energy-appliance-rental-crown-crest-furnace-1.5439572>.

[6] Rosa Marchitelli, "Woman with dementia locked into 10-year home-heating contract – with a $15K lien on her property" (19 April 2021), online: *CBC News* <www.cbc.ca/news/business/hvac-contracts-lien-sales-1.5988112>.

[7] "W5 investigates door-to-door furnace sales schemes that victimize Canadians" (1 October 2016), online: *CTV News* <ctvnews.ca/w5/w5-investigates-door-to-door-furnace-sales-schemes-that-victimize-canadians-1.3096100>.

[8] *Balagula v Ontario Consumers Home Services*, 2017 CanLII 152558 (ON SCSM).

[9] *Balagula v Ontario Consumers Home Services*, 2018 ONSC 5398 (Div Ct).

[10] *Duncan v Ontario Home Services Inc.*, 2019 CanLII 131885 (ON SCSM).

sought an order that a notice of security interest be deleted from title to her house. Deputy Judge Hum granted rescission of the contract pursuant to the *CPA*. Notably, though it was requested by the plaintiff, the Deputy Judge specifically declined to address her request that a notice of security interest be ordered to be deleted from title to her house.[11] Though not stated by Deputy Judge, this was likely because she considered the Small Claims Court to lack jurisdiction to make an order affecting the land titles register, by operation of section 97 of the *Courts of Justice Act*.

The case of *Skymark Finance Corporation v Toraman*[12] was typical of the high-handed conduct of the actors in the home equipment rental financing industry. In this particularly jarring case, the plaintiff, who acts as a finance company to equipment rental companies, sued the defendant homeowners for more than $8,000.00 for unpaid rental payments in respect of a rental contract for a water filter. The homeowners were immigrants to Canada with limited abilities in English who had made multiple attempts to get out of the rental contract which had been presented to them by a door-to-door salesman. The Deputy Judge found that the rental company's "door-to-door salesman engaged in both false, misleading or deceptive representations and unconscionable representations." He granted rescission of the contract pursuant to the provision of Part III of the *Consumer Protection Act, 2002* and dismissed the finance company's action.

Notwithstanding these setbacks in court, the door-to-door rental scam continues apace in Ontario, and these cases continue to come before the courts. The most recent decision in this area is in *Utilebill Credit Corp. v Apex Home Services Inc.*[13] This case, brought in Small Claims Court by a self-represented plaintiff homeowner against the rental company and the financing company, had some facts which are not typical of all such cases. In particular, the homeowner had made handwritten amendments to the rental contract before signing it. She inserted handwritten notations to indicate that the entire price of the furnace and air conditioner would be $7,355.00, payable over ten (10) years, with no interest. It was also her position that this was a purchase agreement, not a rental agreement. In other words, she believed she was buying the equipment, while the defendants argued that she was renting the equipment.

The Deputy Judge considered the fact that the pre-printed terms of the contract and the handwritten note of the homeowner were inconsistent and held that the handwritten amendment prevailed. She also held that the contract (had it not been amended) would have been unconscionable, and awarded the plaintiff homeowner $10,000.00 in punitive damages.

Utilebill, the financing company, appealed the award of punitive damages only. Though it overturned some of the Deputy Judge's specific findings, the Divisional Court nevertheless dismissed the appeal, finding that the Deputy Judge had sufficient grounds to award punitive damages.

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[11] *Ibid* at para 72: "I will not deal with Ms. Duncan's claim for discharge of the lien on her property."

[12] *Skymark Finance Corporation v Toraman*, 2020 CanLII 51091 (ON SCSM).

[13] *Utilebill Credit Corp. v Apex Home Services Inc*, 2021 ONSC 4633 (Div Ct).

Class Action against Ontario Energy Group

At least one class action against actors in the home-equipment-rental-financing industry has been certified in Ontario. *Cullaton v MDG Newmarket Inc*[14] was brought against one rental company (MDG Newmarket Inc., operating as Ontario Energy Group) and its financing company (Home Trust Company). Despite vigorous opposition from Home Trust, the class action was certified by the Superior Court in 2019. The class was defined as "All persons in Ontario who are or were at any time party to a lease agreement of equipment with MDG Newmarket Inc. O/A Ontario Energy Group entered into between May 1, 2012 and December 31, 2016." At the hearing of the certification motion, it was estimated that there are approximately 12,500 individuals across Ontario who fall into this class.[15] A proposed settlement of this class action, for $14.95 million, is currently pending court approval.[16]

The Regulatory Response

The regulatory response to this business model has been incremental. One of the last measures taken by the previous Liberal Government in Ontario was to ban door-to-door selling of most HVAC equipment, including furnaces, air conditioners, hot water heaters, and water softeners.[17] The government was clear that this ban was designed specifically to target this business model. These changes came into effect on 1 March 2018. In this author's practice, I have observed that these regulatory changes have not diminished the prevalence of this business model. The actors in this industry have simply switched to renting out equipment or services which are not banned under the regulations. In recent cases I have seen, these companies have registered notices of security interest purporting to secure an interest in electric optimizers, thermostats, doorbell cameras, and even blown-in attic insulation.

The business model is exactly the same, in that it relies on the secretive registration of an instrument on title to the homeowner's house and the subsequent payout of that instrument under the pressure of having to comply with an agreement to sell the property. Though virtually nothing has changed about this business model, the rental and financing companies can genuinely say that they are complying with the regulations, because they have not rented any of the specific types of equipment which are prohibited under O Reg 17/05.

The current provincial government has solicited comments on proposed changes to the *Consumer Protection Act, 2002* which would make it slightly easier for homeowners to have

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[14] *Cullaton v MDG Newmarket Inc.*, 2019 ONSC 6432.

[15] *Ibid* at para 60.

[16] Forman & Company, Press Release, "Proposed Settlement Reached in HVAC Equipment Lease Class Action against Ontario Energy Group and Home Trust Company" (14 June 2021).

[17] *General*, O Reg 17/05, s 35.1.

these "HVAC liens" deleted from title to the property in cases where the homeowner has cancelled the contract during the ten-day cooling-off period.[18]

In its submissions to the government, the Advocacy Centre for the Elderly ("ACE") has accurately summarised the problem with this business model when it said:

> ACE is frequently told by callers that if they knew that a business was going to put a "lien" on their property, they would have never entered into the lease. In addition to [the proposals], which ACE supports, business (sic) must advise consumers that a notice may (or will) be registered on title to the consumer's home before the contract is entered into.
>
> In addition to clarifying the business' 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*, there should be financial penalties for failing to do so.[19]

No timeline has been provided as to when these proposed changes may be implemented.

Conclusion

Despite heavily unfavourable media coverage, strong court decisions (including the awarding of punitive damages), and regulatory responses from the provincial government, actors in the home equipment rental financing industry continue their door-to-door business model. They continue to register notices of security interest against title to the homes where the rented equipment is located without informing the homeowners of the registration. As these elderly homeowners move out of their houses and into long-term care, they and their children are going to be in for an unpleasant surprise when they try to sell the house. They will discover the notices of security interest, the finance company will hold up the sale of the house until they get paid, and the homeowners will wonder how so much of the equity in their house was eaten up by a rented water softener.

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[18] Ontario, Ministry of Government and Consumer Services, *Improving Ontario's Consumer Protection Act: Strengthening Consumer Protection in Ontario*, Consumer Protection Act, 2002 Review Consultation Paper (1 December 2020), online: <ontariocanada.com/registry/view.do?language=en&postingId=35387>.

[19] Letter from Advocacy Centre for the Elderly to Minister of Government and Consumer Services (1 February 2021).

Toronto Law Journal

Franchisee's Claim for Rescission Frozen by Court

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Introduction

In *2364562 Ontario Ltd. et al. vs. Yogurtworld Enterprises Inc.* ("***Yogurtworld***"),[1] the court provided further guidance on the level of detail that franchisors are required to include in a disclosure document provided to prospective franchisees pursuant to Section 5(1) of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c.3 ("*Act*"), in respect of locations that have yet to be identified.

As set forth in the recent decision of the court in *2611707 Ontario Inc. et al v Freshly Squeezed Franchise Juice Corporation, et al.*,[2] pursuant to Section 6(2) of the *Act*, a franchisee can rescind their franchise agreement within two years, if the franchisor failed to provide the prospective franchisee a disclosure document. As the case law has articulated, the failure to provide includes circumstances in which the disclosure document was so deficient that it was tantamount to there being no disclosure document thereby impairing the franchisee's ability to make an informed investment decision.

Background Facts

2364562 Ontario Ltd. (the "**Franchisee**") sought a refund of the development fee it paid to Yogurtworld Enterprises Inc. (the "**Franchisor**") in respect of two franchise agreements (the "**FA's**") it entered into for two Menchie's yogurt franchises together with a multi-unit development agreement dated April 15, 2013 (the "**MUDA**" and with the FA's collectively the "**Franchise Agreements**"), paying $75,000.00 to the Franchisor for such right, which was fully earned by the Franchisor upon the execution of the Franchise Agreements.

The Franchise Agreements:

A) granted the Franchisee two exclusive territories (Pickering/King City);
B) most importantly, imposed on the Franchisee the obligation to secure suitable locations for their Menchie's stores in each exclusive territory;
C) required that the first location be secured within 90 days; and
D) required that both locations be opened within one year.

[1] 2021 ONSC 5112 (not published on CanLii).
[2] 2021 ONSC 2323.

If the Franchisee failed to meet the schedule set forth in (C) or (D), the Franchisor was entitled to terminate the Franchise Agreements and retain the $75,000.00 development fee.

Although the Franchisee was required to find the locations, it did not present any locations to the Franchisor for approval. The Franchisor however did submit locations to the Franchisee for its consideration, all of which were rejected by the Franchisee. The result is that the Franchisee did not secure its first location within the 90-day period set forth in the Franchise Agreements.

The Franchisee requested a change to their exclusive territory as well as an extension. These requests were agreed to by the Franchisor in November 2013. The extension afforded the franchisee until September 30, 2014, being an additional 10 months, to open both locations failing which the Franchisor would terminate the Franchise Agreements and keep the $75,000.00 development fee.

The Franchisee had not secured a location prior to September 30, 2014, being the new extended expiry date. The parties tried to further negotiate changes including a mutual termination or further extension, but no agreement was reached. Ultimately the Franchisor terminated the Franchise Agreements and retained the $75,000.00 fee. The Franchisee commenced legal proceedings.

In its claim, the Franchisee asserted the following disclosure deficiencies (there were also other procedural issues addressed in the litigation which have not been included in this article) which the Franchisee argued afforded it a right to rescind or claim misrepresentation:

A) lack of suitable locations within each territory;
B) that the landlord might require a personal guarantee;
C) the estimates provided were too broad;
D) no earnings projections were provided;
E) since the location was unknown, the Franchisee could not make an informed decision.

The Franchisee also argued that the Franchise Agreements were frustrated because they were not able to find a location within the time frame afforded to them. Finally, the Franchisee asserted that the Franchisor had breached its duty of good faith.

The Decision

All of the foregoing were rejected by the court. In respect of the first and second allegation, the court found that there was no evidence as to either a lack of availability

of locations, or that a landlord had required a personal guarantee in respect of any location (though that would not be at all unusual). In respect of the third allegation, the court held that range of estimates provided were supported by the underlying assumptions for such estimates. In respect of the fourth allegation, the court noted that a franchisor is not required to provide earnings projections.

Finally, in respect of the fifth allegation the court relied on the decision in *Raibex Canada Ltd. v. ASWR Franchising Corp.* (**"Raibex"**).[3] The import of the Raibex decision is that the "uncertainty of costs associated with a yet-to-be-negotiated lease is not a fatal disclosure flaw when there are safeguards in place to protect the franchisee." Following Raibex, the court stated that since the Franchisee had the responsibility for, and control over, the lease negotiations, adequate safeguards were in place to protect the Franchisee, stating as follows:

> "When considered in context, the information disclosed to the plaintiffs was sufficient to enable them to assess the potential costs and risks of establishing and operating a Menchie's franchise location. Business decisions such as this are not made based on perfect information. Informed business decisions can be made based on ranges and assumptions about future costs, which can then be estimated."

The court dismissed the frustration aspect of the claim as well stating that the Franchise Agreements in fact already addressed the issue of what would happen if the Franchisee did not secure a location by the extended date of September 30, 2014.

Finally, the rejected the Franchisee's claim that the Franchisor had breached its duty of good faith stating that: A) the Franchisor had submitted locations to the Franchisee for its consideration; B) the Franchisor had granted a 10-month extension of the agreement; and C) the consequences of the Franchisee not finding a location prior to the expiration date were clearly articulated.

Practice Takeaways

Following the decisions in both Raibex, and now Yogurtworld, it is clear that franchisors are able to issue disclosure documents, and sign franchise agreements, in circumstances in which both the franchisor is finding the location and entering into the lease, and in which the franchisee is itself finding the location and entering into the lease. Of course, franchisors must take care that the requisite disclosure is otherwise provided and that the parameters set forth in both Raibex and Yorgurtworld are met.

[3] 2018 ONCA 62.