

# CONTRACTORS WORKING DIRECTLY FOR HOMEOWNERS – THE CONSUMER PROTECTION ACT MAY LIMIT YOUR ABILITY TO CHARGE MORE THAN YOUR ESTIMATE

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In *The Fifth Wall Corp. v. Tonelli*<sup>[1]</sup>, the Ontario Superior Court of Justice held that the Ontario *Consumer Protection Act* (“CPA”) applied to a residential construction contract entered into between a general contractor and a homeowner.

This ruling is significant because contractors contracting directly with homeowners may now be precluded from charging more than 10% over and above any estimate provided in the contract.

This is the first case dealing with this issue directly. This bulletin summarizes the Court’s decision and the key takeaways for builders and homeowners dealing with residential construction contracts.

## Background

The Fifth Wall Corp. (“Fifth Wall”), a builder/general contractor (“**builder**”), was contracted to build a new residential house – their “dream home” – for the defendant homeowners (“**homeowners**”). The contract included a description of the scope of work for the home along with cost-coded line items, each with a specific dollar amount listed in a column titled “budget”.<sup>[2]</sup>

Work on the home proceeded between June 2016 and December 2018. Some changes and extras were performed during that time. The builder’s costs for certain items therefore exceeded the “budget” amounts listed in the contract. By October 2018, the builder asserted changes totalling over \$400,000.<sup>[3]</sup> The homeowners alleged that they were not aware of and did not approve any changes, extras or cost increases that exceeded the budget amounts listed in the contract.<sup>[4]</sup>

Under the *CPA*, a supplier of goods or services is limited to charging only 10% more than an original estimate. A supplier of goods or services may charge beyond this 10% limit only if there is agreement by the consumer to amend the estimate.<sup>[5]</sup>

The homeowners therefore brought a motion for partial summary judgement seeking a declaration that the

*CPA* applied to their residential construction contract (thereby limiting the builder to charging only 10% more than the original estimate for each item of work). If the *CPA* applied, the homeowners also sought an order requiring the builder to pay damages under the *CPA* for the amounts the homeowners had overpaid on the estimates provided by the builder.<sup>[6]</sup>

### **The Court Determines the CPA Can Apply to Residential Construction Contracts**

In deciding whether to grant summary judgment, the Court first considered whether the *CPA* applied to the residential construction contract at issue.

The builder argued that the *CPA* did not apply. It argued that the *CPA* was at odds with the flexible nature of cost-plus construction contracts, which provided security to contractors against being left out-of-pocket for their actual costs spent on labour, materials, and subtrade accounts.<sup>[7]</sup>

The Court disagreed. The Court found that a cost-plus construction contract was not at odds with the *CPA*. Further, the Court found that nothing in the *CPA* or *Construction Lien Act* precluded both acts from applying to the same contract simultaneously. The Court therefore found that the *CPA* can apply to cost-plus contracts concerning residential construction and renovation.<sup>[8]</sup>

The *CPA* applies to all “consumer transactions” if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place. “Consumer” is defined in the *CPA* to mean “an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes.”<sup>[9]</sup>

The Court was satisfied that the homeowners were “consumers” for the purposes of the *CPA*, and that the residential construction at issue was a “consumer transaction”. As such, the Court granted summary judgment that the *CPA* applied to the contract in this case.<sup>[10]</sup>

Unfortunately, there was not sufficient evidence before the Court to determine whether the “budgets” in the contract constituted “estimates” under section 10 the *CPA*, nor whether the parties had agreed to vary any of these “estimates”. The Court therefore directed that those issues be resolved at a later trial.

### **Takeaways**

The *CPA* does not apply to individuals acting for business purposes. As a result, business-to-business construction transactions will remain unaffected by this ruling.

However, this decision is very likely to impact all contractors who contract directly with homeowners (consumers) for the construction or renovation of a residence (or other similar work) in Ontario.

Contractors entering into residential construction, renovation and other similar contracts (particularly cost plus contracts) directly with consumers will now need to be careful when providing “estimates” for the cost of various items of work. If the contractor fails to obtain approval from the consumer for a change to the estimate, the builder may be precluded from charging more than 10% above the original estimate – even if the actual cost of labour and materials far exceeds the estimated price. This cannot be avoided; parties cannot contract out of the CPA.

Feel free to reach out to the authors [Jeremy Rankin](#) or [Sezen Izer](#) with any questions about this article or whether the *Consumer Protection Act* may apply in your case.

[1] *The Fifth Wall Corp. v. Tonelli*, 2022 ONSC 6590 [*Fifth Wall*].

[2] *Fifth Wall* at para 2.

[3] *Fifth Wall* at paras 3-5.

[4] *Fifth Wall* at para 4.

[5] *Consumer Protection Act*, 2002, S.O. 2002, c. 30, s. 10.

[6] *Fifth Wall* at para 7.

[7] *Fifth Wall* at para 19.

[8] *Fifth Wall* at para 23.

[9] *Consumer Protection Act*, 2002, S.O. 2002, c. 30, ss. 1, 2.

[10] *Fifth Wall* at para 28.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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