



Bill 142, Better for Consumers, Better for Businesses Act, 2023

Recommendations and Comments on the *Consumer Protection Act, 2023*

Submitted to: Standing Committee on Justice Policy

Submitted by: Ontario Bar Association

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BAR ASSOCIATION
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Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide comments to the Standing Committee on Justice Policy on *Bill 142, An Act to enact the Consumer Protection Act, 2023, to amend the Consumer Reporting Act and to amend or repeal various other Acts* (“**Bill 142**”) containing the proposed *Consumer Protection Act, 2023* (the “**Act**”).

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared by a working group composed of members of the OBA’s Business Law, Class Actions Law, and Civil Litigation sections, in addition to members of the Personal Property Security Law subcommittee and other subject-matter experts. Members of these sections include barristers and solicitors in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have deep experience and expertise in dealing with matters related to consumer protection.

Executive Summary

The OBA strongly supports the government’s overall policy goals of modernizing and strengthening consumer protections for Ontarians. The OBA has several recommendations and comments that we think will strengthen Bill 142 while also maintaining contractual fairness and certainty. The following points highlight some of the key recommendations from our submission:



- **NOSI Discharge Mechanisms:** The OBA strongly supports the introduction of the Notice of Security Interest (“**NOSI**”) discharge provisions in sections 60, 88(3), 93, and 104 of the *Act*.
 - This is an important step to protect consumers by providing a mechanism for discharging NOSIs without having to resort to litigation. The OBA intends to participate in the separate consultation on issues related to NOSIs, but also recommends that the provisions related to NOSIs in Bill 142 be strengthened by:
 - Expanding its application to all consumer contracts to avoid the repetition of the same issues that consumers currently face through other types of consumer contracts;
 - Requiring the discharge of any related *Personal Property Security Act* (“*PPSA*”) financing statements; and
 - Requiring the notification of relevant credit reporting agencies so that the consumer’s credit reports are cleaned.
- **Purchase-Cost-Plus Leases (“PCPL”):** The definition of PCPLs in section 1(1) of the *Act* is overly broad. As drafted, provisions related to PCPLs in section 21 will capture virtually all leases and may prove confusing to consumers. In our view, Bill 142 should focus on addressing specific problematic agreements while avoiding impacting legitimate actors and the leasing sector as a whole. The previous *Consumer Protection Act, 2002* (the “**Old Act**”) had provisions that targeted leases for goods that were known to be abused by bad actors (e.g., HVAC-related goods like furnaces, air conditioners, water heaters, etc.). Furthermore, we note that predatory practices are diverging from leases to other forms of consumer contracts, such as loans and financing arrangements, to avoid being captured by new restrictions. Consequently,



any new protections under Bill 142 should focus on specific identified problem agreements, while refraining from targeting *all* leases.

- In terms of the future buyout regulations, the OBA recommends that the provisions specifically mandate the separation of the cost of goods from services, as these are often blended together to intentionally confuse consumers and extract unconscionable sums of money from them. The buyout figure should be based on the present depreciated value of the goods and should not be left to the supplier to determine unilaterally.
- **New Right of Termination:** The OBA recommends the removal of section 54 of the *Act*, which permits the termination of entire agreements that include a prohibited term or acknowledgment referenced in section 14(1). Instead, consumers can rely on the ability to void prohibited terms and acknowledgments, which is included in section 14(2) of the *Act* and mirrors the approach in the *Old Act*. This approach maintains the validity of the underlying agreement, which is the preferable approach for contractual certainty and international businesses.
- **Broad Retroactive Powers:** The OBA recommends the removal of subsections 107(2)-(4), which would permit the retroactive application of regulations and sections of the *Act* that fall under the broad subject area captured in subsection 107(1). The ability to alter fundamental rights and obligations in all existing consumer contracts would have disruptive effects on consumers, suppliers, and the economy as a whole.



Detailed Comments & Recommendations

The OBA provides the following comments and recommendations on the *Act*. References to “bad actors” refer to parties that use deceptive practices to target vulnerable consumers. The submission concludes with an Appendix that contains suggested amendments.

Section 8

The OBA supports the expanded list of false, misleading and deceptive practices in section 8 of the *Act*, and would recommend adding explicit mention of rebates to the list of examples in section 8(2). While the general categories in section 8(2) may be broad enough to capture rebates, it would be beneficial to specifically mention this as reference to such rebates is a common deceptive practice used by bad actors. By way of example, bad actors will tell consumers that they will receive substantial government rebates in order to mislead consumers as to the actual amount they will be paying out of pocket. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 10(3)

The OBA supports the expanded application of the unfair practice provision by including reference to unfair practices that occur *after* a contract is entered into, and even if no contract is entered into.

Section 14

The OBA supports the additional prohibited terms and acknowledgments added to the *Act* in section 14 and believes that the provisions in section 14(2) that deem prohibited terms and acknowledgments to be void provide sufficient protection to consumers. Consequently, as discussed below in relation to section 54, the OBA does not believe that section 54, which permits the cancellation of a contract that contains a prohibited term or acknowledgment, is appropriate or necessary.



The OBA recommends that explicit direction be added to section 14 to ensure that if there is a conflict between the provisions in this section and those in another Act, the provisions in section 14 prevail. This is intended to avoid a scenario that arose under the *Old Act*, where courts found some prohibited terms enforceable under other Acts despite it being a consumer contract. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 16(3)

The OBA recommends adding the exemptions found in section 9 of the General Regulations of the *Old Act*, which exempted compliance with portions of Part III where the supplier has a license under another regulatory regime. One such provision is the exemption that the proposed *Act* would not apply to the supply of goods or services pursuant to an agreement subject to the *Motor Vehicle Dealers Act* or the *Motor Vehicle Dealers Act, 2002*. This permitted the MVDA Director to mandate new provisions during COVID that applied to vehicle sales, financing and lease contracts created outside a dealer's premises. This was only permitted by the explicit exemption in the *Old Act*. The absence of these exemptions from the proposed *Act* would be a considerable change for businesses that are already well regulated by a different regulatory regime. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 19

The OBA recommends that this section permit a consumer contract not made in accordance with the regulations to be “voidable” rather than “void”. By way of example, consider a scenario where the contract continues after an amendment as if it was not void. The consumer continues to pay, and the supplier continues providing the goods or services (both parties are fulfilling their obligations), but at a later date, the consumer sues because it turns out the contract was void. In this event, it may be more equitable to allow the consumer to cancel the contract on notice going forward but restrict restitution or damages, subject to unfair practices. *Suggested amendment(s) are contained in the Appendix to this submission.*



Section 21 (and section 1(1))

The need to refocus the provision with a schedule of exploitative leases.

The OBA cautions against implementing section 21 in its current form, given that the overly broad definition of PCPLs in section 1(1) means that section 21 would apply to virtually all leases. We do not think this was the intent of this provision. The Old *Act* made various attempts to capture what are known to be exploitative leases in certain targeted situations, or goods and services that are favored by bad actors. In our view, it is advisable to refocus this provision on exploitative leases rather than capturing all leases, which risks punishing legitimate actors. We recommend the creation of a schedule of high-risk consumer contracts that can be expanded by regulation to provide the necessary flexibility to adapt to changing tactics used by bad actors. Section 35.1 of the General Regulations of the Old *Act*, despite its more limited application, is a good starting point when considering what could be included in a high-risk consumer contract schedule.

Concerns with the scope of relevant defined terms.

Additionally, the definition of “estimated retail value”, a term used in the definition of PCPLs in section 1(1) is too vague. The reference in part (a) of the definition of “estimated retail value” to “an amount that fairly represents the sum of the price at which the lessor sells the goods and any associated delivery or installation charges” is ripe for abuse, as it unilaterally puts this consideration in the hands of the supplier.

Similarly, the reference in part (b) of the definition of “estimated retail value” to “a reasonable estimate of the sum of the retail price of the goods and any associated delivery or installation costs” is too open-ended. It is unclear who makes this determination, what happens in the event there is no ascertainable retail price (if only available at wholesale as is the case in the exploitative leases) and how a disagreement as to price would be resolved.

Consideration for future buyout schedule.



The introduction of a regulated buyout schedule is a positive addition to the *Act*. We recommend mandating that suppliers separate the cost of goods and services, and that the buyout figure for the goods factor in depreciation and the amounts already paid, excluding the cost of services that would never be provided after termination.

Requirements around a buyout schedule are important as this is a favored tactic by bad actors to pressure consumers into paying unreasonably large sums to terminate their leases (and in many cases to discharge the associated NOSI on title). It is often the case that consumers are unaware that a NOSI has been placed on their property until they are in the midst of selling or refinancing, and therefore under external pressure to quickly resolve the issue. The details of the buyout regime are not included in the *Act* and will instead come through future regulations, so we are not able to comment on the particulars of the buyout schedule at this time.

We do want to note that these future regulations should factor in the common situation where the cost of goods and services are blended together, making it impossible for the consumer to know what the actual price of the goods is aside from the services. The cost attributed to services can often far exceed the value or payments of the goods itself, yet the consumer is unaware of this situation. When considering a buyout, it is not fair for a consumer to pay for the price of services that they will never receive in the event of a buyout. To this end, we recommend mandating that suppliers must separate the cost of goods and services, and that the buyout figure for the goods factor in depreciation and the amounts already paid and exclude costs of services that would never be provided after termination. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 23-25 (Personal Development Services)

The *Act* does not include two key provisions related to personal development services from the Old *Act* that are beneficial to consumers and strengthen consumer protections. Specifically, we recommend including section 33 (limits on initiation fees) and section 34



(instalment plan availability and limits) from the *Old Act* in the proposed *Act*. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 29

While this section appears to mirror the *Old Act* and its associated regulations, it should be harmonized with section 627.33(1) of the *Bank Act*, which provides the same maximum liability for unauthorized charges for a credit card under a credit agreement, with the exception of situations where a borrower has demonstrated “gross negligence” in safeguarding the credit card, the account information or the personal authentication information.

Section 46(2)

Subsection 46(2) limits the liability of a person assigned a consumer contract to the amount paid to that person by the consumer.

A subsequent section, section 49(6) states that each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the consumer contract with the consumer for any amount to which the consumer is entitled.

We understand this to mean that section 46(2) will limit the liability of an assignee unless they engaged in an unfair practice, in which case they are jointly and severally liable. We recommend clarifying this application directly in section 46(2) to help avoid potential disputes in this regard as to the interaction of these sections. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 54

The OBA is not supportive of section 54 and recommends it be removed. Section 54 provides a consumer the ability to cancel a contract if it included a prohibited term or acknowledgment listed in section 14(1). The *Old Act*, which is replicated in section 14(2) of



the *Act*, provided that prohibited terms or acknowledgments are void, but maintained the validity of the remainder of the contract. In other words, it severed the prohibited term or acknowledgment from the contract.

In our view, section 14(2) of the *Act* is sufficient to protect consumers without the addition of section 54. Section 54 adds an unnecessary level of contractual uncertainty and would likely result in international players avoiding the Ontario market. It is unlikely that international businesses would make specific contracts for the Ontario market; it is more likely they would mimic the approach often taken when dealing with Quebec and its unique statutory regimes by excluding the market as a whole. We recommend removing section 54 and maintaining the sufficient protections in subsection 14(2). *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 60

The OBA strongly supports the addition of the statutory requirement for suppliers to discharge NOSIs on cancelled contracts. Lingering NOSIs was a problem in the Old *Act* that could only be dealt with through the Superior Court of Justice. This section could potentially be expanded to include all cancelled, terminated, or otherwise concluded contracts. This is a problem for many contracts (including, for example, high-interest loans) and should have broad application. Alternatively, if it does not apply to all contracts, having the ability to add additional subject contracts by regulation would be important to provide the necessary flexibility to respond to bad actors adapting and finding ways around this provision.

We recommend further strengthening this section by also requiring the discharge of any *PPSA* financing statement that is registered for the subject contract. We also recommend the addition of the requirement for a supplier to notify relevant credit reporting agencies about the subject consumer debt and security being terminated or satisfied, so that the consumer's credit reports are cleaned. These additions should be mirrored in sections 88(3), 93, and 104 as they relate to the discharge of NOSIs and related documents.



It should be noted that section 60 requires a supplier to discharge NOSIs in 15 days, while these suppliers are also subject to section 57(1) in the *PPSA* that requires discharge within 30 days. These two statutes should align. *Suggested amendment(s) are contained in the Appendix to this submission.*

Sections 89(2) and 90(2)

The addition of a reference to “facilitators” in these sections is a useful tool to tackle bad actors that obfuscate non-compliance by involving a complicated web of third parties. We recommend that the term “facilitator” be defined in section 1(1) of the *Act*. *Suggested amendment(s) are contained in the Appendix to this submission.*

Section 93

The OBA strongly supports this provision as it provides an out-of-court mechanism to have NOSI discharges enforced if the supplier does not comply with section 60. This empowers the consumer to be able to file an order with the land registrar directly. Our proposed additions to section 60, namely that there should be an accompanying requirement to discharge any *PPSA* financing statements, and to notify credit reporting agencies to clear the records of a consumer, should be mirrored in section 93. We also support the addition of a general power for the Director to order the discharge of NOSIs that are on their face non-compliant without limiting the Director’s powers to instances where all appeals have been exhausted. Examples of non-compliant NOSIs include where the registered NOSI does not adequately describe and identify the subject equipment, if it is registered without colour of right, or if a NOSI is registered for equipment for which a NOSI is not permitted. *Suggested amendment(s) are contained in the Appendix to this submission.*



Section 107

The OBA recommends the removal of subsections 107(2)-(4). While we strongly support the purpose of the *Act* and the desire to provide relief to consumers, the broad scope of these provisions would have a potentially disruptive effect on consumers and suppliers alike.

Subsections 107(2)-(4) as drafted permit the retroactive application of regulations and sections of the Act that fall under all of the broad subject areas captured by subsection 107(1) to all existing consumer contracts, and in such a matter that may fundamentally modify or extinguish the rights and obligations under those contracts. This means that any type of consumer contract could be subject to retroactive changes in ways that impact essential elements such as contract performance, termination, invalidity, and more.

For example, any business in Ontario who offers a good or service by consumer contract would be at risk of seeing their revenue projections upended through changes that could retroactively alter the cost of providing a particular service or good or make existing customer contracts invalid. Consumers could find that they have paid for a service or bought something through a contract and find later that the delivery standards have changed, or that their ability to cancel within a certain time is eliminated.

Being able to rely on contractual rights is essential to a functioning economy and to retaining business to Ontario, and subsections 107(2)-(4) removes the confidence that a contract can be relied on to identify the rights and obligations of the parties involved.

The powers in subsection 107(1) provide sufficient authority to deal with emerging issues prospectively as they arise, without implicating the fundamental principle of contractual certainty. *Suggested amendment(s) are contained in the Appendix to this submission.*



Appendix A: Recommended Amendments

Section 8	<p>False, misleading or deceptive representation</p> <p>8 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.</p> <p>Examples of false, misleading or deceptive representations</p> <p>(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:</p> <p>[...]</p> <p>19. A representation, including a representation that a consumer has won or is eligible for a prize or rebate, that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.</p> <p>OR, ALTERNATIVELY</p> <p>22. A representation that a consumer is eligible for a rebate if the person making the representation knows or ought to know that the consumer may not be so eligible.</p> <p>23. A representation that a rebate will cover the consumer's costs of a consumer good or service if</p>
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	<p>the person making the representation knows or ought to know that the rebate may not cover those costs.</p>
Section 14	<p>(3) If there is a conflict between the rules made under this section and any other Act, the rules under this section prevail.</p>
Section 16(3)	<p>Application</p> <p>16 (1) Subject to subsections (3) to (5), this Part applies in respect of the following consumer contracts:</p> <ol style="list-style-type: none">1. A consumer contract in respect of which delivery, performance or payment in full is not made when the parties enter the contract.2. A consumer contract that is entered into when the consumer and supplier are not present together, including a contract entered into online when the consumer and supplier are not present together.3. A direct contract. <p>Exceptions</p> <p>(3) This Part does not apply in respect of the following consumer contracts:</p>



	<ol style="list-style-type: none">1. A consumer contract for work to be done on or repairs to be made to a motor vehicle as defined in subsection 1 (1) of the <i>Highway Traffic Act</i>.2. A prepaid purchase card contract.3. Any part of a consumer contract that relates to the provision of rewards points.4. A credit agreement.5. A lease, unless the lease is a purchase-cost-plus lease or the lease is a direct contract.6. The supply of goods or services pursuant to an agreement that is subject to the <i>Motor Vehicle Dealers Act</i> or the <i>Motor Vehicle Dealers Act, 2002</i>.7. Such other consumer contracts as may be prescribed.
Section 19	Same (3) An amendment to or continuation of a consumer contract is void voidable if it is not made in accordance with the regulations.
Section 21 (and section 1(1))	<i>Note: This section and PCPLs require significant changes. Some non-exhaustive recommendations are:</i>



	<p>“purchase-cost-plus lease” means a lease for high-risk consumer contracts under which the total amount payable exceeds 90 per cent of the estimated retail value of the leased goods</p> <p>High-Risk Consumer Contracts Schedule:</p> <ol style="list-style-type: none">1. Furnaces.2. Air conditioners.3. Air cleaners.4. Air purifiers.5. Water heaters.6. Water treatment devices.7. Water purifiers.8. Water filters.9. Water softeners.10. Duct cleaning services.11. Thermostats12. Security cameras13. Any goods or services that are a combination of or that perform the functions of the goods or services listed in any of paragraphs 1 to 10, as may be prescribed by regulation. <p>21 (4) The cost of individual goods and services must be clearly separated in the contract.</p>
<p>Section 23-25 (add new sections under personal development services)</p>	<p>26 No supplier of personal development services shall,</p> <p>(a) charge a consumer more than one initiation fee; or</p>



	<p>(b) charge an initiation fee that is greater than twice the annual membership fee.</p> <p>Instalment plans</p> <p>27 (1) Every supplier of personal development services shall make available to consumers at least one plan for instalment payments of membership fees and initiation fees, if applicable, that allow consumers to make equal monthly payments over the term of the personal development services agreement.</p> <p>Same</p> <p>(2) No supplier shall provide an instalment payment plan through which the total amount paid by instalments exceeds the membership or initiation fee, if applicable, by more than 25 per cent.</p>
<p>Section 46(2)</p>	<p>Assignment of consumer contracts</p> <p>46 (1) If a supplier assigns a consumer contract or any right to payment under a consumer contract to another person, the assignee has no greater rights than, and is subject to the same obligations, liabilities and duties as, the supplier in connection with the contract, and the provisions of this Act and the regulations apply equally to the assignee.</p> <p>Same</p>



	<p>(2) Despite subsection (1), if a consumer contract to which subsection 49 (1) or (2) applies has been assigned or if any right to payment under such a consumer contract has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer, unless an unfair practice has occurred in which case subsection 49(6) applies.</p>
<p>Section 54</p>	<p>Cancellation: prohibited term or acknowledgement</p> <p>54 (1) A consumer may cancel a consumer contract within one year after the date of entering into the contract if the contract or a related agreement contains a term or acknowledgement that is deemed to be void under subsection 14 (2).</p>
<p>Section 60 (mirror suggested amendments in sections 88(3), 93 and 104)</p>	<p>Supplier’s duty to discharge registered notices, etc.</p> <p>60 If a consumer rescinds a consumer contract under subsection 49 (1), cancels a consumer contract under section 50, 51, 52, 53, 54 or 55, or terminates a purchase-cost-plus lease, or if the contract has been performed or forgiven, the supplier must do the following within 15 days after the rescission, cancellation or termination, as applicable:</p>



	<ol style="list-style-type: none">1. Register a certificate of discharge to discharge any notice of security interest that has been registered on title to land under section 54 of the <i>Personal Property Security Act</i> in respect of goods provided under the contract or any related agreement.2. In accordance with such requirements as may be prescribed, register any document or instrument as may be required to discharge or remove a prescribed registration, notice or instrument, including a PPSA financing statement that has been registered to protect an interest in goods provided under the contract or any related agreement.3. Notify credit reporting agencies about the satisfaction, cancellation, or termination of the subject consumer debt to clean the consumer's credit report.
Section 88(3)	Mirror changes in section 60.
Sections 89(2) and 90(2) (add definition to section 1)	"facilitator" means an individual who participates, assists, or is otherwise aiding and abetting an individual that is contravening a requirement under the Act.
Section 93	Mirror changes in section 60.
Section 104	Mirror changes in section 60.



<p>Section 107(2)-(4)</p>	<p>Application to existing consumer contracts</p> <p>(2) A regulation made under subsection (1) may, if it so provides, specify that it applies to a consumer contract or a related agreement that was entered into before the day the regulation is filed, including a consumer contract or a related agreement that was entered into before the day the <i>Better for Consumers, Better for Businesses Act, 2023</i> received Royal Assent.</p> <p>Same</p> <p>(3) For clarity, a regulation made under subsection (1) may, if it so provides, specify that one or more provisions of this Act apply to a consumer contract or a related agreement that was entered into before the day the regulation is filed, including a consumer contract or a related agreement that was entered into before the day the <i>Better for Consumers, Better for Businesses Act, 2023</i> received Royal Assent.</p> <p>Modification, extinguishment of rights</p> <p>(4) For clarity, a regulation that provides that it or a provision of the Act applies to a consumer contract or related agreement that was entered into before the day the regulation is filed, including a consumer contract or related</p>
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	<p>agreement that was entered into before the day the <i>Better for Consumers, Better for Businesses Act, 2023</i> received Royal Assent, may, if the regulation so provides, have the effect of modifying or extinguishing any right, obligation or interest acquired or accrued under the contract or related agreement.</p>
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