Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017*

Submitted to: Standing Committee on Social Policy

Submitted by: The Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "**OBA**") appreciates the opportunity to make this submission to the Standing Committee on Social Policy (the "**Committee**") in respect of Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017* ("**Bill 166**" or the "**Bill**"). The Bill will, if passed, ultimately amend, introduce, repeal and replace several acts, including repealing the *Ontario New Home Warranties Plan Act* (the "**ONHWP Act**")[1] and the *Ticket Speculation Act*.

Our submission is organized around three of Bill 166's proposed schedules: schedules 1, 2 and 3. Schedules 1 and 2 deal with new home regulation and consumer protection issues formerly dealt with under a single piece of legislation. Bill 166 essentially divides the regulatory scheme and consumer protection scheme formerly contained in the ONHWP Act into two parts: schedule 1 enacts the *New Home Construction Licensing Act, 2017* (the "New Home Licensing Act" or the "**Licensing Act**"), and schedule 2 enacts the *Protection for Owners and Purchasers of New Homes Act, 2017* (the "**Warranty Act**"). Schedule 3 deals with ticket sales for events, and enacts the *Ticket Sales Act, 2017*.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed with input from the OBA's Constitutional, Civil Liberties and Human Rights Law section, Entertainment, Media and Communications Law section, Construction and Infrastructure Law section and Real Property Law section. Together, these sections represent more than 1500 members. OBA members participating in this consultation include lawyers who represent the widest possible range of clients, including individuals and organizations, for-profit corporations, boards, management and membership groups, and who have worked closely with the provincial and federal governments on legislative reform affecting the various sectors affected by this proposed legislation.

[1] R.S.O. 1990, c. O.31

Schedule 1 – the *Licensing Act*

We have several technical comments with respect to the Licensing Act as set out in Bill 166, and aim to address them in as they arise within the Bill.

Definitions

The definition of Vendor in both Acts is overly broad and may inadvertently capture real estate agents and brokers, who should not have to be registered as Vendors under these Acts. The ONHWP Act includes the words "on their own behalf" which removes this issue and should be considered for inclusion.

False Statements

Section 38 of the Licensing Act states that applicants are eligible to be registered unless, among other things, the applicant, the employee or the agent of the applicant make a "false statement" relating to the conduct of their business. This section expands the offence in the current ONHWP Act of providing false information and is overly broad in our view. Context should matter in relation to false statements, and their impact can be either significant or insignificant. The Licensing Act should provide the Registrar with discretion to enforce this rule on false statements that are serious, rather than those that are innocent and/or insignificant.

Complaints

Subsection 56 (4) of the Licensing Act sets out how complaints can be referred to the Discipline Committee and what the Licensing Authority can do if it receives complaints. Significantly, the Act does not set out who makes these decisions. The legislation should set out who makes decisions (such as a Complaints Committee or a Registrar or Deputy Registrar). Also, the Licensing Act does not provide broad investigative powers of the Licensing Authority to rely on to conduct investigations with respect to complaints. This omission should be corrected.

Division of Authority between Discipline Committee and Tribunal

Under section 57 of the Licensing Act, the Discipline Committee is given the power to hear cases where registrants have breached the Code of Ethics. The Code of Ethics is a significant new regulatory tool that has been granted to the Licensing Authority, and yet the only tools the Discipline Committee has been given to deal with contraventions of the Code are educational courses and fines. The division of functions and powers to impose fines or other consequences as between the Discipline Committee and the Tribunal may also have unintended consequences that will limit the ability of either forum to properly address the issues before them.

Offences

One of the offences in the Licensing Act, (s. 68 (1) (b)), states that the violation of a term of a licence is an offence. The severity or importance of terms of licenses can vary greatly, and minor breaches should not be offences under the Licensing Act. Rather, the legislation should permit the regulator to address minor breaches with some flexibility, for instance, as a breach of the Code of Conduct, as a licensing issue through a Notice of Proposal (subject to appeal to the Tribunal), or, in the most severe cases, as offences. In our experience, the threat of licence revocation, is a much more powerful tool in this kind of situation and the threat alone has historically been more successful in obtaining compliance for licence issues.

Conditions of Licence

Section 39(a) of the Licensing Act permits the Registrar to restrict a licence by imposing conditions "to which the applicant or licensee consents". In our experience, the Registrar initiates the inclusion of restrictions and asks the licencee to consent, with the implication that a refusal will lead to the denial of a licence (or a licence renewal). Any subsequent appeal to the Licence Appeal Tribunal (the "**LAT**") is then be on the issue of whether should be any licence, not on the issue of whether the proposed restriction is or is not reasonable. In our view, the Licensing Act should include a provision permitting an appeal to LAT on the issue of whether a restriction proposed by the Registrar is reasonable (not whether the licence should be refused or revoked).

Schedule 2 – the *Warranty Act*

We have several technical comments with respect to the Warranty Act as set out in Bill 166, and aim to address them in as they arise within the Bill.

Public Information Mandate

Under the proposed Licensing Act, the Licensing Authority has been given the mandate to provide public information on, among other things, home maintenance. In our view, this function would be better suited under s. 36 of the Warranty Act because the Warranty Authority is going to be the organization with the most expertise on home construction and the day to day expectations of new home purchasers.

Latent Defects

The Warranty Act (or regulations) should be amended to specify which party is required to prove that a defect exists, in the event that the Warranty Authority disputes a homeowner's claim that a defect exists. While subsection 53 (3) of the Warranty Act

states that the claimant does not need to prove the cause of the defect, the section must clearly set out both who is responsible for the investigation into latent defects, who pays the cost to investigate them, how to manage damage caused by the investigation and in what circumstances, and then which party has the onus to prove what at the Tribunal.

Appeal by builders of decisions of Warranty Authority

Under the Warranty Act, builders still do not have a mechanism to appeal a decision of the Warranty Authority. Currently, Tarion has the Builder Arbitration Forum to address this lack of a statutory appeal right. However, the arbitration forum is expensive, proceedings and awards are private, and it is limited to builders. In our view, consumers and registrants would be better served by having a statutory right to appeal decisions of the Warranty Authority to the Tribunal.

Condominium Conversions

In our view, it is unclear whether the Warranty Act, or the Licensing Act apply to condominium conversion projects. If the Acts are intended to apply to condo conversions, the Acts should clearly articulate this application.

"Virtual" New Homes and "Disguised" Builders

In our view, the Acts should regulate new homes that are built in whole or part on an existing set of foundations. Existing definitions of "builder" and "vendor" within the Acts may not be sufficient to protect purchasers of these homes, and there appear to be no policy reasons why this part of the new home industry should remain unregulated. The Act permits conditions to be prescribed regarding the definition of "owner-builder" to appropriately regulate the construction and sale of these homes and, in our view, these requirements should be prescribed.

"Workmanlike", "skillful" and "properly built"

Section 13 (1) (a) of the ONHWP Act contains a statutory warranty that the home "is constructed in a workmanlike manner and is free from defects and material." The new Section 47 (1) (b) substitutes "skillful" for "workmanlike". In our view, the section should use the words "properly built" because Section 1 (b) of both Acts establish that one of the purposes of the Acts is "to promote the construction in Ontario of properly built new homes for residential purposes". Using the words "properly built" to describe the statutory warranty will make clear that the standards for what is required have not changed.

Payment from Builder

Section 48(2) aims to create a statutory remedy for owners who have paid a builder in excess of the value of the work and materials supplied to the owner under the contract. In our view, the section should not be limited to cases where the builder "has not substantially completed the home", as there can still be very significant defects in such homes.

Potential for Conflict with the Construction Act, Bill 142

As you may know, there is the potential for conflict between section 13.1 of the new *Construction Act*[2] and the warranty obligations and complaints investigations undertaken under the Warranties Act. In our view, the Warranties Act should be amended in order to clarify when disputes can and should be settled under these two pieces of legislation.

Schedule 3 – *Ticket Sales Act, 2017*

As recognized by the Minister of Government and Consumer Services in announcing the introduction of this legislation, buying a ticket to an event should not be difficult, unfair or risky. To that end, one of the stated goals of Bill 166 is to level the playing field with respect to Ontario's ticket market, ensuring that all individuals have a fair shot at attending music, sport, or theatrical events; indeed, the Attorney General has noted in debate on this Bill that further efforts are needed in the regulation of the ticket marketplace in order to ensure that unfairness is eliminated from the marketplace for the protection and benefit of consumers.

The right of individuals with disabilities to be free from discrimination when they receive goods or services has been enshrined in the Ontario *Human Rights Code* although, as noted by the Ontario Human Rights Commission and others, it is also clear that people with disabilities continue to experience difficulties accessing various goods and services throughout Ontario. In our view, the overarching imperative in examining the provisions of Bill 166 must be to ensure the elimination of any barriers to equal participation to the ticket marketplace. In supporting this principle it is critical that Bill 166 avoid any measures that would have any discriminatory effects with respect to the sale of tickets, whether they be direct, indirect, intentional, or unintentional. It is important to closely examine the effect of measures implemented on the disabled community and changes

[2] See Bill 142, Construction Lien Amendment Act, 2017.

should be made with that community's input and guidance. Sometimes measures adopted for good intentions can have an unexpected and detrimental impact upon an individual with a disability.

From the materials publicly available regarding the Ministry's consultation on ticket buying and resale, it does not appear that input was sought or received on the impact of the proposed legislation on the specific issue of the sale of tickets for accessible seating. To that end, we recommend that the Ministry reach out to the disability community and ticket sellers to canvass whether requiring equal distribution mechanisms for all tickets, or other legislative or regulatory requirements, would be an effective and desirable way to ensure that a) persons with disabilities do not face barriers that are discriminatory and b) no discriminatory burdens are placed on persons with disabilities in obtaining or exchanging tickets for accessible seating without penalty.

Conclusion

Once again, the OBA appreciates the opportunity to provide these comments. We commend the attention the Legislature has provided these matters.