2019 Business Law Modernization and Burden Reduction Council's Recommendations to Modernize Ontario's Business Law Statutes

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Submitted by: The Ontario Bar Association

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 Ministry of Government and Consumer Services (the "**Ministry**") has established a short-term advisory body called the Business Law Modernization and Burden Reduction Council (the "**Council**"). The Council has proposed seven regulatory and legislative changes to the *Ontario Business Corporations Act* (the "**OBCA**"), the *Arthur Wishart Act* (the "**AWA**") and the *Personal Property Security Act* (the "**PPSA**"). The OBA has had the opportunity to review the Council's proposals and provides these comments for consideration.

The OBA

Established in 1907, the OBA is Ontario's largest legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission has been prepared by the OBA's Business Law Section (Proposals 1, 5, 6 and 7), Franchise Law Section (Proposal 4) and the Personal Property Security Law Committee (Proposals 5, 6 and 7) with review by the OBA Pensions and Benefits Section (Proposal 6). The OBA Franchise Law Section includes the leading experts in franchise law issues, including many whose legal practices are devoted to representing franchisors, franchisees, or both. Members of the Franchise Law Section include both solicitors – who advise franchise companies on starting or expanding franchise systems, deal with the franchise contracts and compliance with the Act, and barristers – who deal with disputes that arise under the Act, including litigation. The Franchise Law Section also has a number of lawyers who practice in-house with franchisor companies.

The OBA Business Law Section has nearly 1500 members, and includes leading experts in business law issues who advise a broad range of individuals, businesses, and partnerships in respect of business law issues. Those issues pertaining to the PPSA are prepared by the Personal Property Security Law Committee ("**PPSLC**") which includes the leading experts in the field. The PPSLC members would count among their clients virtually every stakeholder in the personal property security regime and the cash collateral issue, including lenders, borrowers, financial institutions, derivatives counterparties and regulators.

Overview

The OBA commends the Ministry on establishing the Council as well as the composition of the Council. The OBA has previously recommended that the Government of Ontario establish a regular formal process that uses the insights and opinions of experts to promote the continuous review and updating of Ontario's corporate and commercial statutes to produce evidence-based recommendations on an ongoing basis for a responsive and efficient business law framework.

Proposal 1

Proposal: Remove the current requirement under the OBCA that, generally, at least 25% of a business corporation's directors be Canadian residents.

The OBA supports the Council's proposal to eliminate the current requirement under the OBCA that 25% of directors be resident Canadian (the "**Residency Requirement**"). We do not think that the Residency Requirement is serving any useful purpose. Retention of the Residency Requirement makes the OBCA uncompetitive against the corporate laws of its sister jurisdictions. Repeal would make the OBCA competitive with legislation in BC, MB, NB, NS, PE, QC, NU, NW and YK.

In particular, we are aware of no evidence to suggest that the Residency Requirement is needed or useful to collect or enforce tax liabilities imposed on corporations by the Province of Ontario. First, incorporation under the OBCA is only optional. Corporations that wish to avoid having any resident Canadian directors will simply choose to incorporate under another provincial/territorial law. Second, even under the OBCA, the liabilities of the directors can be removed by unanimous shareholder agreement or, in the case of single-shareholder corporations, unanimous shareholder declaration. Most Ontario-based businesses will have resident Canadian directors because they are Canadian-owned or managed businesses. There is no empirical evidence of which we are aware that would suggest that the Residency Requirement aids tax compliance or enforcement. Jurisdictions such as BC have abolished the rule, and there does not seem to be a report of any resultant revenue loss.

The Canadian Bar Association has made similar submissions regarding the director residency requirement contained in federal business corporation legislation

> We recommend removing the residency requirement on directors in Subsection 105(3) of the CBCA, except for distributing corporations. This may require adding a provision to ensure companies present an officer or director for examination in the event of litigation or enforcement of judgments.[1]

The proposals of the Council on this item are entirely consistent with the stated position of the OBA and CBA. It should be noted that other jurisdictions have repealed and have not replaced this requirement.

Proposal 4

Proposal: Clarify existing ambiguities and codify existing business practices under the AWA by bringing into force amendments to the AWA and making related amendments to the regulations under the AWA.

1. Is your organization supportive of the proposal?

The OBA is supportive of this proposal. The OBA has provided extensive submissions on proposed amendments to the AWA, including submissions in 2015 (attached at **Appendix A**) and 2017 (attached at **Appendix B**) that helped to inform the most recent amendments to the AWA contained in the Cutting Unnecessary Red Tape (CURT) Act. The proposed changes to the regulations are necessary for the enactment of the legislative changes in the CURT Act.

2, What types of costs should be prescribed for the purposes of determining the "Total Initial Investment"? (e.g. deposits, inventory, leasehold improvements, equipment, leases, rentals etc.).

It is the OBA's view that the types of costs prescribed for the purposes of determining the "Total Initial Investment" should be an open, rather than closed, list, in order to prevent valid costs from not being permitted in the calculation.

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[1] Canadian Bar Association, Canada Business Corporations Act, May 2014 at p. 17 (available online).

The items described above in the question are all valid types of costs.[2] The OBA recommends also including the cost of real estate (real property), buildings, and construction as types of costs. Hotel franchises and automotive dealerships often trigger the exemption under the current legislation, and such costs associated with these industries should be reflected. Further, it should be clear that the substantial investment exemption is available during the single sale of multiple franchises or large multi-unit territorial agreements.

3. Should these costs be the actual costs or just estimates?

Estimated costs must be permitted as at the time the parties are making the determination as to whether or not to provide a disclosure document, there have been no actual costs incurred for that prospective franchise. The parties could confirm the estimated costs in the franchise agreement or an alternate document that demonstrates an agreement on the estimates by the franchisee and the franchisor. The parties should also be able to rely on the actual costs where either an estimate was not agreed to in advance or the actual costs have ended up meeting the threshold.

The OBA also notes that the regulation will also have to specify the time period over which the "Total Initial Investment" ought to be calculated. In many cases, there can be a significant amount of time between the parties entering into a franchise agreement and the opening of the franchise (particularly where the franchise agreement is entered into without a retail location having been acquired yet), and the cost of the initial investment is only accurately calculated if it represents all expenses incurred over this broad period. Care will have to be taken to ensure that the Total Initial Investment is reflective of <u>all</u> the costs that go into opening the franchise. As was noted in the OBA's June 21, 2017 submissions, "the Section recommends that the [provincial government] carefully consider that determining the "initial investment" can be difficult and may have to take into account funds spent over an express period of time surrounding the opening."

4. Should the large investment thresholds be lowered from the current \$5M to \$3M to reflect the revised manner from determining the "Total Initial Investment"?

As per the OBA's January 9, 2015 submission, "the OBA…advises that the \$5 million threshold required to fall within the exemption stated in the Regulations be lowered to \$3 million since

[2] Supplies should be an enumerated cost, as it is listed as one of the heads of rescission damages under section 6(6) of the AWA.

the recommendation for the paragraph only deals with acquisition and set up costs, and not ongoing operational costs." Given that the CURT amendment also removes the requirement to consider ongoing operational costs, this recommendation by the OBA remains relevant.

5. Should the refundable deposit amount be a percentage (i.e. 20%) of the initial investment or a set amount (i.e. $100K)?

The OBA proposes that the refundable deposit should be based on the "initial franchisee fee," not the "initial investment".

The OBA supports prescribing the percentage at 20%, which is the amount prescribed in the British Columbia, Alberta, and Manitoba regulations. We note that Manitoba's regulations dictate that "the prescribed amount is 20% of the initial franchise fee, to a maximum of $100,000," which covers both options raised in this question.

6. What type(s) of information should be contained in a Statement of Material Change? For example, should it mirror what is currently required for a Franchisor's certificate under the AWA?

The Statement of Material Change should include certificates like those that are required under the Manitoba, New Brunswick, and PEI regulations.

The OBA's January 9, 2015 submission in this regard was: "The OBA recommends that such a certificate [of material change] should be required, as is the case in Manitoba. The OBA also recommends that the specific requirements of this certificate can be dealt with in the regulations, also using Manitoba as an example."

With respect to the form of the certificate, the OBA notes that the BC *Franchises Act* only prescribes that there be a certificate and that it contain certain items, but not that it appear in a certain form. This approach may preserve flexibility for franchisors and potentially avoid the need for a separate Ontario certificate for national disclosure documents.

7. The AWA currently requires that all accounted financial statements be prepared in accordance with the Canadian Institute of Chartered Accountants Handbook. Which other accounting standards (e.g. American or international accounting standards) should be allowable for financial statements that are included in franchise disclosures?

The OBA's June 21, 2017 submission stated that "U.S. GAAP and GAAS, as well as IFRS and IAASB auditing and review engagement standards as adopted by other countries, should be deemed to be acceptable bases for the preparation and auditing or review of financial statements required to be attached to a disclosure document."

8. Are there any Canadian or U.S. jurisdictions that Ontario should be mirroring with respect to any/all of these matters?

The OBA supports continued efforts to harmonize the AWA with other Canadian franchise legislation. Without identifying particular pieces of legislation as a national standard, it is noted that the legislation in BC and Manitoba are the most recent in terms of significant modernization efforts.

Proposal 5

Proposal: Allow the Registrar of the PPSA to discharge vexatious registrations on the Personal Property Security Registry.

The OBA supports the proposal to provide an efficient and effective mechanism to allow vexatious registrations to be discharged and removed from the personal property security registry. It is important in this discussion to distinguish "vexatious" registrations, those completed for the purpose of annoying or harassing a named debtor, from those which are simply erroneous or unnecessary. We are aware that regimes for this purpose presently exist in the regulations under the Alberta PPSA (part 7.1 of those regulations) and in the Manitoba PPSA (part 6.1 of that Act). These should be considered for the purpose of implementing any similar regime in Ontario.

The motivation to implement this proposal is that, under the present law, a demand may be made to the named secured party to discharge a registration which appears to be vexatious, but if the demand is not honoured the only recourse a party has is to apply to the court. (See generally s. 56 of the PPSA, particularly ss.56(2), (4) and (5).) That recourse can be expensive and time-consuming, particularly when the registration was completed precisely for the purpose of annoyance or harassment. In a clear case, allowing such a registration to be dealt with administratively would promote efficiency and avoid or minimize the waste of resources.

Our view is that the registrar under the PPSA (the "**Registrar**") should be authorized, but not required, to act to discharge vexatious registrations, and should be given the authority to request evidence such as a copy of a relevant security agreement for the purpose of exercising this power.

It is important to ensure that the increased efficiency of an administrative process not result, or appear to result, in unfairness. Our expectation would be that the Registrar would exercise her authority in clear cases only, but it will also be important to ensure that there are notice provisions and appropriate opportunities to review or appeal the decisions of the Registrar in the courts included in any vexatious registration regime that is developed (and we note that these are included in the Manitoba and Alberta systems referred to above). To the questions posed in connection with this proposal, the requirement that appropriate notice be given and the availability of review or appeal would mitigate any concerns with allowing third parties (neither the named secured party nor the debtor) to request action by the Registrar in connection with a vexatious registration.

In terms of additional considerations, it will be necessary to consider the scope of any vexatious registration regime. That is, whether the regime would apply only to financing statements registered under the PPSA or also to financing change statements or notices filed in land registry offices under s. 54 as well, or whether it should also extend to claims for lien registered under Part II of the Repair and Storage Liens Act. However, these are details which can be addressed in the drafting process, and the OBA strongly supports the proposal to add this feature to the Ontario PPSA.

Proposal 6

Proposal: Amend the PPSA to enable a security interest in cash collateral in financial accounts (e.g. bank account funds) to be perfected by control to provide for a first priority security interest.

Does your organization support the proposal?

The OBA supports an amendment to the PPSA that would permit security interests in cash collateral in financial accounts to be perfected by control. However, it does not support any change to subsection 30(7) of the PPSA which would subordinate the interests of workers and pensioners under the *Pension Benefits Act*, RSO 1990, c P.8 (the PBA), the *Pooled Registered Pension Plans Act, 2015*, SO 2015, c 9 (the PRPPA) or the *Employment Standards Act, 2000*, SO 2000, C 41 (the ESA) to those of creditors with a perfected security interest in an account, inventory or a financial account.

Should the priority rule in subsection 30(7) of the PPSA be maintained so that a security interest in an account perfected by control is subordinate to the interests of a trust holder (i.e., a pensioner)?

The OBA supports the maintenance of the priority rule in subsection 30(7).

Could parties have the flexibility to choose the laws of another jurisdiction to govern some of the rules that create a security interest in a financial account (i.e. a bank account), including the priority rules (and therefore be able to contract out of some of the rules of the PPSA, such as the conflict of laws provisions)?

If so, how could this flexibility impact the priority rule in s. 30(7)

As is now the case with perfecting security interests in investment property by control and under Article 9 of the UCC, the debtor and a secured party that is a financial institution would have some latitude in determining by contract the jurisdiction whose laws will govern the perfection, effect of perfection and priority of security interests in financial accounts. However, the freedom to choose this jurisdiction may be more apparent than real. Under the proposed amendment to subsection 7.1(5), the law of the jurisdiction in which the debtor is located would govern the perfection of a security interest in a financial account by registration. Except for perfection by registration, perfection, the effect of perfection or non-perfection and the priority of a security interest in a financial account would be governed by the law of the "financial institution's jurisdiction" ("**FIJ**").[3] The validity of a security interest in a financial account would be governed by the law of the FIJ at the time the security interest attaches. Similar to the definition of "jurisdiction of the securities intermediary" in subsection 45(2) of the *Securities Transfer Act, 2006,* the FIJ is determined by a hierarchy of rules set out in new subsection 7.1(10). One proceeds down the list until the rule that fits the fact situation is found, and then that rule determines the FIJ. The first three rules look to the contents of "an agreement between the financial institution and its customer governing the financial account" (the "**Governing Agreement**"). Rule 1 requires an express statement in the Governing Agreement that a particular jurisdiction is the FIJ for the purposes of the law of that jurisdiction or the PPSA. Rule 2 looks to the parties' express choice of governing law in the Governing Agreement. Rule 3 depends on an express provision in the Governing Agreement that the financial account is maintained at an office in a particular jurisdiction.

Practically speaking, only the factors in rules 1 and 2 could be altered contractually; it seems highly unlikely that a financial institution in Ontario would relocate a customer's branch of

[3] This parallels a similar rule in §9-304(a) of the UCC.

account to another jurisdiction in order to gain the benefit of more favorable perfection or priority rules. Under rule 2 it also seems quite unlikely that a Canadian financial institution would alter the governing law of its standard form operation of account agreement to gain such an advantage. Article 9 of the UCC[4] and the Civil Code of Quebec[5] ("**CCQ**") also provide for such contractual opting in. It would now therefore be possible in principle for a Canadian bank holding a security interest in a deposit account held by an Ontario debtor to include an express statement in its operation of account agreement that would choose, say, the State of New York or the Province of Quebec as the applicable law in order or change its governing law to get the benefit of the control provisions of the UCC or the Civil Code. Yet in the experience of members of the PPSLC who have suggested such changes as a way of assuring priority, such proposals are rarely if ever accepted. There is little reason to believe that the situation will change with the proposed amendments. Also, the contractual freedom to change the FIJ's jurisdiction would not extend to a third party that takes a security interest in a deposit account maintained by the financial institution itself since that option applies only to agreements between the financial institution and the debtor.

Since priority is one of the factors affected by the choice of law rules in the PPSA, changing the FIJ could also change those priority rules, including that set out in subsection 30(7). However, it is possible that by analogy to the principles governing contractual choice of law, [6] a court could decline to give effect to a choice of a system of law otherwise unconnected to a transaction made with a view to evading the consequences of the laws of Ontario, with which the parties and the transaction have their closest and most real connection, as not being *bona fide.*

What are the key considerations for the rules regarding the priority of conflicting security interests from the proceeds of a financial account (i.e., a bank account)

In general the priority of conflicting security interests in the proceeds of a financial account would be governed by the priority rules set out in the proposed amendment to section 30.1(2) – namely, that a security interest of a secured party having control of a financial account has priority over a security interest of a secured party that does not have control of the financial account. The main policy consideration raised by this rule is the possible priority contest between secured party A, the holder of a properly perfected purchase money

[4] Compare §9-304(b) of the UCC
[5] Compare CCQ Article 3106.1
[6] See J. Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., loose-leaf (Markham, ON: LexisNexis Canada, 2005+), §8.7 at 8-14.

security interest ("**PMSI**") that gives rise to cash proceeds that are then deposited to a deposit account and that deposit account is subject to a security interest perfected by control in favour of a competing secured party. In these circumstances secured party B would prevail, as is now the case under the UCC.[7]

Of course a policy decision could be made to favour PMSI financers, as is now the case with respect to subsection 30(7)[8], but we question whether this is necessary or desirable. It seems likely that PMSI financers of inventory and other goods will either continue to protect their own interests in PMSI proceeds by making appropriate cash managements arrangements with their debtors, such as contractually requiring their debtors to deposit all proceeds to a blocked account or lockbox account under the dominion and control of the financer and not subject to any other security interest, or rest content with their PMSI priority in the financed goods or inventory, knowing that this may be lost if the proceeds are deposited to an account subject to a competing security interest.

Maintaining PMSI priority with respect to proceeds deposited to a deposit account would also introduce an undesirable element of uncertainty with respect to the extent of the priority that a secured party having control of a deposit account actually has. For example if a derivatives counterparty has a security interest in a deposit account perfected by control to secure swap obligations, its value would be greatly diminished of if it could be defeated at ay time by identifiable and traceable PMSI proceeds deposited to that account.

Before obtaining a security interest in the financial account (i.e. bank account) by control, should a financial institution (i.e. a bank) be required to disclose/provide notice of their security interest to:

- **The account holder/debtor**
- **Other creditors**
- **If so, what additional information should be provided?**

We do not believe that it is necessary or desirable for such notice to be provided. Concerns have sometimes been expressed regarding the proliferation of "secret liens" under the PPSA

[7] §9-327; UCC §324, Comment 8: "When the proceeds of original collateral … consists of a deposit account, Section 9-327 governs priority to the extent it conflicts with the priority of this section [§9-324, PMSIs]. See also *Douglas Dynamics, Inc. v. Carnegie Body, Ltd.*, 2011 Ohio Misc. LEXIS 562 (OH Court of Common Pleas 2011) (purchase money inventory lender lost priority once proceeds of inventory were deposited into blocked deposit account established in favor of another creditor).
[8] Subsection 30(8) provides that s. 30(7) does not apply a perfected PMSI in inventory or its proceeds.

or Article 9 of the UCC[9], which is contrary to the principle of publicity. However, perfection of security interests without the publicity provided by registration or other public notice is nothing new under the PPSA: perfection by possession or repossession perfects a security interest in goods, chattel paper, negotiable instruments and money[10]; perfection of a security interest in a certificated security is perfected by delivery;[11] and of course perfection of a security interest in investment property is perfected by control[12]. When proclaimed, recent amendments will extend perfection by control to electronic chattel paper.[13] Of course if secret liens are perceived as inherently evil, extending them to still new forms of collateral will just make a bad situation worse. However, policy decisions have already been made in favour of a non-notice regime with respect to certain types of collateral where doing so presumably would be consistent with the integrity of the personal property security regime as a whole.

Imposing such a notice requirement with respect to cash collateral would also partly defeat one of the purposes of permitting perfection by control, which is to reduce the time needed to perfect such security interests by obviating the need to conduct searches and seek estoppel certificates or subordinations from prior secured parties. Nor would notices to third parties with respect to financial accounts identifying the secured party and the collateral serve any particular public purpose. Any creditor relying on the balance of a financial account a security will already know the identity of the financial institution with which the account is maintained. The only missing information is whether the financial institution in fact has a security interest.

To some extent the OBA Proposal deals with the legitimate interest of other parties in knowing whether a security interest perfected by control exists with respect to a financial account by requiring the financial institution to confirm the existence of a control agreement with another person on inquiry from a person with an interest in the account with the consent of the debtor or on request of the debtor.[14] It also requires the financial institution to seek the consent of the debtor if it does not already have it. While that proposed amendment now speaks only to the existence of control agreements, it could easily be

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[9] See. e.g. J. Lipson. "Secrets and Liens: The End of Notice in Commercial Finance Law". (2004). Emory Bankr. Dev. J.. 21; Catherine Walsh, "The Role of Party Autonomy in Determining the Third-Party Effects of Assignments: Of 'Secret Laws' and 'Secret Liens' (2018) 81 *Law and Contemporary Problems* 18.
[10] PPSA s. 22(1)
[11] PPSA s. 22(2);
[12] PPSA s. 22.1(1)
[13] Bill 100, *Protecting What Matters Most Act (Budget Measures),* 2019, Sch. 49 (R.A. May 29, 2019)
[14] Proposed amendment, s. 17.2(3).

amended to extend to security interests held by the financial institution itself. In addition the Proposal requires that the security interest be conferred in a written agreement. The customer will already know of the existence of the security interest by reason of such written agreement, and the customer must also be a party to a control agreement. In cases where control is obtained by the secured party becoming the customer of the financial institution[15], the financial account will not even appear on the books of the debtor as asset, making it very unlikely that a third party creditor will rely on the financial account as a source of payment.

Following consultations with the Ministry of Government and Consumer Services in the summer of 2012, the PPSLC circulated revisions to the OBA Proposal that would have required financial institutions to deliver disclosure statements to debtors advising them of their security interests and urging the debtors to notify other competing secured parties, such as PMSI financers, of the existence of the security interest. However, after further consideration we concluded that such a requirement would add considerable burdensome complexity without much if any corresponding benefit.

Are there any additional considerations/risks/impacts that should be considered?

Consumer Protection: As noted in the OBA Proposal, "consumer accounts"[16] are excluded from the control regime[17] partly because the control regime in Article 9 of the UCC does not apply to consumer accounts[18] and partly to allay some commentators' fears that financial institutions would exploit their dominant position at the expense of consumers. While we believed that consumers and financial institutions would actually both benefit if consumer accounts were included within the definition of financial account, and subject to the control regime; but we are concerned that critics of the Proposal may view consumers differently. Therefore, with a view to minimizing controversy, consumer accounts were excluded.

Should Operating Accounts be Excluded? One issue that we considered was whether operating accounts should be excluded from the regime to prevent intractable priority disputes. However, as discussed in the OBA Proposal, in light of the drafting difficulties of defining operating accounts with sufficient precision, we concluded that the additional

[15] S. 1(2)(f)(iii)
[16] Defined as "a deposit account that is maintained for a natural person and is used by the natural person primarily for person, family or household purposes".
[17] By excluding them from the definition of "financial account"
[18] UCC §9-109(d)(13)

complexity required for such an exclusion would not justify its marginal benefits. In our view, this decision will not generally be significant in practice because: (a) there are usually no significant funds remaining in an operating account at the time of insolvency proceedings, (b) the financial institution which maintains the operating account typically has rights of set-off against that account, and (c) secured parties generally do not extend credit on the strength of the fluctuating balance held in an operating account, whether by way of proceeds or as cash collateral. The inclusion of operating accounts in the control regime is also consistent with the approach taken in the United States in Article 9 of the UCC.

Possible Abuse by Financial Institutions of their Dominant Position. The OBA Proposal grants the financial institution automatic control and super priority, even over other secured creditors with control other than a secured creditor that is the customer. The deposit bank need not cede this priority to a third party and need not enter into a control agreement. It has been argued that this could result in banks extending their oligopoly over credit and exercising undue market power. We believe that while these concerns should not be dismissed, they should not outweigh the befits of a control regime and that there are sufficient statutory and practical constraints that will prevent significant abuse.

First, as noted above, the enhanced priority given to financial institutions will not apply to consumer accounts.

Second, like section 9-327(4) of the UCC, the OBA Proposal provides that a secured party that perfects its security interest in a financial account by becoming the account customer has priority over the financial institution with which the financial account is maintained.

The concern that Canadian financial institutions will abuse their power by refusing to enter into control agreements or subordinate their security interest with respect to financial accounts maintained with them seems misplaced where clients wish to set up special security arrangements with their other creditors. We believe that competitive pressures of the market should prevent this result. Securities intermediaries now enjoy a similar privileged status under the STA and PPSA and yet routinely enter into control agreements and subordinate their security interests in securities accounts maintained with them except with respect to a small class of obligations such as fees and overdrafts. Banks also regularly enter into blocked account agreements in favour of lending syndicates or PMSI financers in which they typically subordinate or waive their rights of set-off with the same limited exceptions. Banks have an interest in the financial well-being of their business customers, and preventing those customers from accessing additional credit from third parties where they are not prepared to extend it on comparable terms could be self-defeating.

Proposal 7

Proposal: Examine opportunities to modernize the Personal Property Security Registry, including amending the definition of "motor vehicle" to include more types of vehicles such as tractor trailers and ATVs.

The OBA is strongly supportive of modernizing the Personal Property Security Registry (the "**Registry**"), and has made many specific and general submissions along these lines in past years.

In our view, it is time to acknowledge that Ontario, which was the first jurisdiction in North America to have an electronic registry for personal property security registrations in 1976, now trails all other North American jurisdictions in this regard. The Registry is based on old technology and concepts which are derived from paper-based systems, applied in a context where those concepts no longer apply.

This impacts the ability to proceed with various changes to the Registry that the Council and/or the OBA has proposed, including:

- Expanding the definition of "motor vehicle" to include additional types of vehicles, or replacing the concept of registration of motor vehicles by vehicle identification number ("VIN") with a broader concept of registration against "serial number goods" as in other provinces, to include property such as aircraft or mobile homes;
- Eliminating the "check-box" collateral system in favour of a free-form collateral description field, as all other provinces now use;
- Eliminating the "caution filing" indicator in respect of collateral entering Ontario which is subject to security interests in another jurisdiction, which is confusing and misleading to registering parties; and
- Eliminating the need to produce paper copies of certified searches, which is presently the only paper part of a generally digital system (and results in additional work and expense for search recipients who often prepare scans of the results when they receive them).

Replacing the Registry would not be a minor undertaking, but we believe that failing to proceed with it both prevents the implementation of changes that would add to the efficiency of the system for all users and poses an increasing risk that the system will become impossible to patch together. Ultimately, this could lead for the system to fail in a way that is unexpected and/or difficult to recover from quickly.

In past years concerns have been raised about the cost of this project in light of the budgetary constraints and competing priorities we know the government must consider. In this regard we have concrete suggestion for consideration and further investigation if deemed appropriate.

The Personal Property Security Assurance Fund (the "**Assurance Fund**") is a fund mandated by s. 44 of the PPSA. Pursuant to regulation (R.R.O. 1990, Reg. 913), 1% of fees received in respect of registrations are required to be paid into the Assurance Fund, and this has been the case since 1971. The Assurance Fund exists solely for the purpose of compensating losses or damages suffered by persons relying on certified searches (not uncertified or "verbal" searches) that are incorrect "because of an error or omission in the operation of the system of registration recording or production of information" under the PPSA or the RSLA (s.44(4)); any payout from the Assurance Fund is limited to a maximum of $1 million "with respect to claims related to any one security agreement" (s. 44(20)).

While we would welcome additional information or data from the Ministry in this regard, it seems unlikely to us that there are or practically could be many claims on the Assurance Fund under the current implementation of the Registry. It has long been established that the Assurance Fund relates only to internal errors within the Registry, not to errors in the information supplied by registering parties (see *Federal Business Development Bank v. Ontario (Registrar of Personal Property Security)* (1984), 4 PPSAC 1, 50 CBR(NS) 121 (Ont.Div.Ct.)). The likelihood of those internal errors was significant at the beginning of the life of the Registry, when information from paper forms was manually retyped into the Registry by Ministry staff or later when those same forms were electronically scanned. In a purely electronic registration system where information is transmitted to the Registry directly by registering parties or by commercial intermediaries, the source of errors which inspired the Assurance Fund has largely ceased to exist. In addition, in the modern context, the maximum amount payable precludes registering parties from relying on any protection the Assurance Fund did provide in the context of many commercial and corporate secured transactions.

If it could be established that the Assurance Fund is not in fact called on with any frequency (or at all), consideration could be given to repurposing the existing and future contributions to the Assurance Fund for the more general – and in our view more important – purpose of modernizing and maintaining the Registry.

Conclusion

The OBA commends the Ontario Government on the establishment of the Council. We thank you for considering these comments and suggestions, and would welcome the opportunity to discuss this submission with you or your staff at any time.