Consultation on Issues Related to Notices of Security Interest (NOSIs)

Submitted to: Ministry of Public and Business Service Delivery

Submitted by: 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

Table of Contents

Introduction

The Ontario Bar Association (**"OBA"**) appreciates the opportunity to provide input on issues related to Notices of Security Interests ("**NOSIs**") in Ontario.

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 the Personal Property Security Law Committee ("**PPSL Committee**") of the OBA's Business Law Section. The PPSL Committee's members are practitioners from large Toronto law firms, small boutique law firms, in-house lawyers working with equipment financiers, and academics, many of whom are recognized as leaders on secured transactions involving businesses and consumers and experts on the Ontario *Personal Property Security Act*. By virtue of this varied membership, the PPSL Committee represents a broad spectrum of perspectives, including vulnerable consumers (as part of *pro bono* work). The submission also has the benefit of review from the OBA's Business Law, Civil Litigation, Class Actions, and Real Property Law sections.

Executive Summary of Recommendations

The following is a summary of our comments, which are more fully set out below:

- **Topic 1: Clarifying "Fixtures":** We do not think Ontario should add a definition of "fixtures" to the *PPSA*. We do think that a definition of "building materials" should be added, along the lines of the provision in the other provincial and territorial *PPSAs*.

- **Topic 2: Limiting the Duration of NOSI Registrations:** We do not support the imposition of a cap on the length of NOSI registrations.

- **Topic 3: Notice Requirements:** If the fixture is consumer goods, the secured party should be required to give the consumer advance written notice of its intention to register a NOSI and proof that the notice has been given should be a requirement for registration.

- **Topic 4: NOSI Assignments:** There should be no requirement to notify a consumer if a security interest to which a NOSI relates is assigned or to amend the NOSI registration by substituting the assignee for the assignor as the party named in the registration as the secured party.

- **Topic 5: Limit or Eliminate the Amount/Value on a NOSI Registration:** The consideration field on the NOSI registration form should be removed.

- **Topic 6: Limit the Amount to be Paid to a Secured Party to Retain a Fixture in Certain Circumstances:** We believe this question is better addressed in the *CPA*, and so we defer to the OBA's Bill 142 response to it.

- **Topic 7:** In our view: (i) the notice requirements discussed in Section A of the Consultation Paper should be limited to NOSIs in consumer goods; and (ii) there is no need for a residential property limitation as well.

- **Topic 8: Alternative Means of Discharging a NOSI:** We support the alternative discharge procedure described in the Consultation Paper, subject to the qualifications discussed below.

- **Topic 9: Place Restrictions on Who can Register NOSIs:** No new restrictions are needed. The process used by the Director of Titles is sufficient to authorize users and record who has made a filing that may later end up in dispute.

- **Topic 10: Adding or Enhancing Available Offences:** This is another *CPA* matter on which we defer to others who are advising the Government on Bill 142.

- **Topic 11: Enhanced Education and Awareness of NOSI Issues:** We suggest the following: (i) a mandatory notice requirement for NOSIs relating to consumer goods, including a short and prominent warning about the risks; (ii) the establishment of a Ministry website containing information about NOSIs and the consumer's rights and

obligations under both the *CPA* and the *PPSA*; and (iii) publication of a hard copy version of the website information for distribution as widely as possible throughout the community.

- **Topic 12: Additional Operational Changes:** We do not agree with the suggestion that additional information might be included on the NOSI registration form because it misconceives the function of the NOSI.

- **Topic 13: Any Additional Suggestions:** We suggest a prohibition on NOSIs for low value transactions and provision for regulations which would allow NOSIs in prescribed consumer goods to be prohibited.

Comments & Recommendations

Topic 1: Clarifying "Fixtures"

Summary: We do not think Ontario should add a definition of "fixtures" to the PPSA. We do think that a definition of "building materials" should be added, along the lines of the provision in the other provincial and territorial PPSAs.

The common law test for determining whether an article attached to land is a fixture turns on the degree of "annexation" (how firmly the article is attached to the land) and the object of annexation (the purpose of attaching the article to the land). The test is notoriously difficult to apply and there is a large body of seemingly inconsistent case law.[1] Attempts to formulate a statutory test have been largely unsuccessful. For example, the definition of "fixtures" in sub-section 1(1) of the Yukon *Personal Property Security Act*,[2] which is referred to in Appendix A of the Consultation Paper, does no more than incorporate by reference the common law of real property.

The same is true of the "fixtures" definition in section 9-102(41) of Article 9 of the United States *Uniform Commercial Code*, from an earlier version of which the Yukon provision was derived. These provisions are unhelpful, because they simply refer the courts back to the common law fixture test, which they would have resorted to anyway, even in the absence of

[1] For a brief, relatively recent summary, see Ronald C.C. Cuming, "The Law of Fixtures: The Need for a Different Approach" (2018) 61 *Canadian Business Law Journal* 1 at 5-12 (the "Cuming Article").
[2] RSY 2002, c.169.

the statutory definition. This is presumably why none of the Canadian PPSAs, except for the Yukon, currently includes a definition of "fixtures".[3]

The Cuming Article proposes a modern and functional approach to the definition of "fixtures", but his proposals relate to the law of fixtures at large, not just fixtures in the PPSA context. It would be inappropriate to consider adoption of the Cuming proposals in the NOSI context, without also considering their adoption in the law of real property at large. But the current project, with its specific focus on NOSIs, is not the appropriate vehicle for this larger inquiry. Therefore, we do not recommend adding a definition of "fixtures" to the Ontario PPSA as part of the NOSI project.

However, we do recommend adding a definition of "building materials" along the lines of the provision in the other provinces and territories. An extract from the British Columbia version of the provision appears in Appendix A of the Consultation Paper. The definition is set out in full below, along with the definition of "building" and "fixture" (the definition of "fixture" serves simply to make it clear that if an article is building materials, it is not a fixture):

> "building" means a structure, erection, mine or works built, constructed or opened on or in land;
>
> "building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal
>
> (a) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building apart from the loss of value of the building resulting from the removal, or
> (b) would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration,
>
> but does not include
>
> (c) heating, air conditioning or conveyancing devices, or
> (d) machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;
>
> "fixture" does not include building materials.

[3] A definition of "fixtures" similar to that in the Yukon legislation was contained in the prior version of the Saskatchewan *Personal Property Security Act* (see *Personal Property Security Act*, S.S. 1979-80, c. P-6.1), but was not included when the current version (*The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2) was enacted.

The definition of "building materials" is, in a sense, a negative definition of "fixtures" because it enacts a partial test for determining when an article is not a fixture. To be clear, the main implication if an article falls within the definition is that the PPSA and, in particular, the NOSI provisions, do not apply. In other words, it is not possible to take or register a personal property security interest in building materials. The non-Ontario version of the "building materials" definition excludes heating, air conditioning and other specified devices. The consequence is that these items are fixtures when attached to a building and, therefore, the PPSA and, in particular, the NOSI provisions apply.

If the Ontario government elects to adopt the "building materials" definition, it will presumably want to consider whether paragraphs (c) and (d) are appropriate in Ontario and also whether there should be other exceptions. To repeat, if paragraphs (c) and (d) are not adopted in Ontario, the consequence will be to preclude security interests in the specified articles altogether if they meet the conditions in paragraphs (a) or (b). On the other hand, if paragraphs (c) and (d) are adopted in Ontario, the consequence will be to permit security interests in the specified articles, subject to the provisions elsewhere in the PPSA governing NOSI registrations and other matters and subject also to the proposed reforms.

The Ontario government might also want to consider providing for regulations which would expand the definition of "building materials". For example, in our April 2023 submission, "*Consumer Protection Modernization: Notices of Security Interest*", we noted that the Director of Titles no longer accepts registration applications for NOSIs in windows, doors and roofs that are consumer goods. We recommended in our submission that the government codify this ruling by regulation. This could be done by specifying that the articles are building materials. There may be other types of goods that the government thinks should be prescribed: see further our response to the Topic 13 questions below.

Topic 2: Limiting the Duration of NOSI Registrations

Summary: We do not support the imposition of a cap on the length of NOSI registrations.

We do not support the imposition of a cap on NOSI registrations. As noted in the Consultation Paper, there used to be a 5 year cap on consumer registrations (PPSA, sub-sections 51(5) and (6)), but these provisions were repealed in 2015, following a recommendation made by

the Ontario Bar Association.[4] The main reason for the repeal was that consumer security agreements are often for a term of more than 5 years and the 5 year cap meant that the secured party would have to track registration expiry dates and file a renewal in time to avoid loss of perfection. The implementation and carrying out of these procedures were costly and these costs were passed on to consumers.

The policy considerations are still the same. There was, and is, no cap on consumer registrations in the other provinces. The absence of a cap does not prejudice consumers because section 57 of the PPSA requires a secured party to discharge a registration within 30 days of the consumer satisfying their obligations under the security agreement. Section 57 applies to PPS registrations and NOSIs alike. See further our response below to the Consultation Paper's Topic 8 questions on the discharge of NOSIs.

There is a further reason for not introducing a time limit on NOSI registrations. Our understanding of the way NOSIs work in the land registry system is that whether or not they have an expiry date, they will not in fact be removed from title unless the secured party (or the Director of Titles) removes them. This is in contrast to the PPSR system, where the expiry of a financing statement will be followed relatively quickly by its automatic removal from the registry. If this understanding is right, then the imposition of a time limit on NOSIs would create the same issue that arose after the Ontario *Corporation Securities Registration Act* was repealed and its registrations moved into the PPSR; there may be a statement on the record indicating that the registration has expired, but system participants may be reluctant to ignore the registration on that basis alone.

To be clear, imposing a cap on NOSI registrations for consumer goods would not affect the duration of the underlying security interest, which is governed by the terms of the security agreement, not the NOSI. We would not support imposing any limit on the duration of the security interest itself. The main concern the Consultation Paper identifies is the misuse of NOSI registrations to extort "exorbitant payouts" from consumers wanting to obtain clear title to their home (usually to facilitate a sale or refinancing). In other words, the concerns relate to the registration of the NOSI, not the content of the security agreement and the proposed reforms should be targeted accordingly.

The PPSA currently requires NOSIs relating to fixtures which are consumer goods to contain an expiration date, but it does not limit the date and allows it to be extended without

[4] OBA Submission on Recommendations to Modernize and Harmonize Ontario's Personal Property Security Act and Repair and Storage Liens Act (August 2010) at 3.

apparent constraint: see sub-sections 54(2), (3) and (6). To ensure consistency with the 2015 amendments referred to above (relating to PPSR registrations), sub-sections 54(2), (3) and (6) should be repealed.

Topic 3: Notice Requirements

Summary: If the fixture is consumer goods, the secured party should be required to give the consumer advance written notice of its intention to register a NOSI and proof that the notice has been given should be a requirement for registration.

As recommended in our April 2023 Submission (at page 8), the secured party should be required to give the consumer a notice in the prescribed form stating that it holds or plans to acquire a security interest in the fixture-collateral and that it plans to register a NOSI. The notice would have to be given a specified number of days before the NOSI is registered and it would have to be in a document separate from the security agreement. To complete the registration, the secured party would have to furnish proof that the notice had been given. It should not be possible for consumers to waive their right to receive the notice because this would contradict the premise on which the proposed notice requirement is based, namely that many consumers lack information about their NOSI-related rights.

We agree with the statement in the Consultation Paper that the information in the notice should be "accurate, clear and accessible". This means, among other things, that the notice should be brief and uncluttered so as to avoid the risk of information overload. In this connection, we do not think that the notice should go into too much detail about what a NOSI is and means. Instead, the notice should include a prominent statement along the following lines:

> **WARNING**: Registration of a NOSI on the title to your property may affect your ability to sell the property or obtain mortgage finance in the future. For more information, go to [link] or pick up the NOSI brochure from a Service Ontario office, any public library, or any bank or other financial institution.

The link would provide access to a site containing a plain English explanation of what a NOSI is and what its legal implications are. There should also be an explanation of the consumer's right to have the registration discharged in certain circumstances and how they can exercise the right. The information on the website should also be made available in hard copy form, with the warning notice indicating where a copy of the brochure can be obtained: see our responses to the Topic 11 questions below.

Topic 4: NOSI Assignments

Summary: There should be no requirement to notify a consumer if a security interest to which a NOSI relates is assigned or to amend the NOSI registration by substituting the assignee for the assignor as the party named in the registration as the secured party.

Section 40(2) of the PPSA already gives debtors some protection against the concern addressed in Topic 4 of the Consultation Paper. It provides that if an account is assigned, the account debtor may pay the assignor until the account debtor receives notice of the assignment and, if requested by the account debtor, the assignee must furnish proof within a reasonable time that the assignment has been made. In most cases, if a fixture security interest is assigned, the money obligation (or "account") it secures will be assigned as well, in which case, sub-section 40(2) applies and the assignee runs the risk of non-payment if it fails to notify the debtor of the assignment.

Section 56(1)(a) and (6) are also relevant. Section 56(1)(a) provides, in part, that if all the obligations under a security agreement have been performed, any interested party (including the debtor) may serve a written notice on the secured party demanding a certificate of discharge of the NOSI registration. Section 56(6) supplements this provision by providing, in effect, that if, following the assignment of a security interest, the assignor receives a paragraph 56(1)(a) notice, it must within 15 days disclose the assignee's details to the notice sender.

Rule H-1, section 28 of the *Canadian Payments Act*[5] and section 53 of the Ontario *Conveyancing and Law of Property Act*[6] also require notification of the account debtor in the case of an assignment.

In the PPSR context, following the assignment of a security interest, the registration may be amended to record the assignee's name as the new secured party, but the amendment is optional, not mandatory: see PPSA, sub-section 47(1). The idea is to leave the issue to the risk assessment of the assignee secured party; it may choose not to register a financing change statement to reflect the assignment, but in that case (unless it has some kind of servicing arrangement in place with the assignor), it runs the risk that notices (*e.g.* of enforcement by other secured parties, of the debtor's bankruptcy, or debtor enquiries) may not reach it in a timely way or at all. There is no reason to depart from that model in the

[5] RSC 1985, c. C-2, Rule H-1, s.28.
[6] RSO 1990, c. C.34.

NOSI context so long as there is an efficient system in place for the discharge of NOSI registrations.

We discuss the introduction of a new administrative system for NOSI discharges in our response to the Topic 8 questions below. To anticipate, one of the requirements would be that the consumer give written notice to the secured party requiring discharge of the registration and if the secured party fails to comply within the required period, the consumer may require the registrar to discharge the registration. If a security interest to which a NOSI relates is assigned and the assignee elects not to amend the registration, it runs the risk that it will not receive a discharge request and that, consequently, it will lose the opportunity of arguing that the registration should not be discharged. This is a further incentive for the assignee to amend the registration, even though the law gives it the option of not doing so.

Topic 5: Limit or Eliminate the Amount/Value on a NOSI Registration

Summary: The consideration field on the NOSI registration form should be removed.

If the consideration field on the NOSI registration form is being abused, the simplest response would be to remove it. There is no requirement to state the consideration in a PPS registration, except if the collateral is consumer goods, and even there, the requirement is simply to state the "principal amount". There is no definition of "principal amount" in the PPSA and little guidance as to how it is to be calculated. In these circumstances, it is unclear what purpose the requirement serves. The same can be said of the consideration requirement on the NOSI registration form.

Again, the distinction between the NOSI and the security agreement needs to be kept in mind. The NOSI is not a contractual document and the consideration payable by the consumer is determined by the terms of the security agreement, not the NOSI. This means that removal of the consideration field on the NOSI registration form would not affect the consumer's obligation to pay the amount agreed on in the security agreement and any accompanying documentation.

The same point applies to the proposal floated in the Consultation Paper for capping the amount that may appear in the consideration field. This measure would not affect the amount actually payable by the consumer under the terms of the security agreement. If the capped amount specified in the NOSI is different from (presumably less than) the amount payable under the security agreement, this will simply lead to confusion on the consumer's part and, perhaps, needless litigation. If the Government thinks it is necessary to impose

limits on the amount actually payable by the consumer under the security agreement, the appropriate place to do this is in the Ontario *Consumer Protection Act* ("CPA"), not the PPSA: see our response to the Topic 6 questions below.

Topic 6: Limit the Amount to be Paid to a Secured Party to Retain a Fixture in Certain Circumstances

Summary: We believe this question is better addressed in the CPA, and so we defer to the OBA's Bill 142 response to it.

Our understanding is that the thrust of the Ministry's NOSI consultation is to address demonstrated concerns about the impact of NOSIs on consumers. Limits on the substantive payout for consumer obligations belong in the CPA, not the PPSA, and so we defer to the OBA's Bill 142 response[7] on this issue. To the extent that the CPA places legal restrictions on the content of consumer contracts, including buyout obligations, those restrictions will carry through to transactions that are secured transactions within the scope of the PPSA. We note in this regard that if there were a conflict between provisions of the PPSA and the CPA, the CPA would prevail (see s.73(2)(a) of the PPSA).

Topic 7

Summary: In our view: (i) the notice requirements discussed in Section A of the Consultation Paper should be limited to NOSIs in consumer goods; and (ii) there is no need for a residential property limitation as well.

In our response to the Section A, Topic 1 questions above, we do not support adding a definition of "fixtures", but we do support adding a definition of "building materials". This proposal is not limited to consumer transactions.

In our response to the Topic 5 questions, we recommend elimination of the consideration field from the NOSI registration form. This proposal is not limited to consumer transactions.

In our response to the Topic 3 questions, we support the introduction of notice requirements for NOSIs which would be limited to cases where the collateral is consumer goods.

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[7] GetFile.aspx (oba.org)

We do not support the proposals in Topics 2 and 4 and so the first Topic 7 question does not arise. We have not provided an answer to the Topic 6 questions, because these are CPA matters and so, again, the first Topic 7 question does not arise.

We discuss the discharge of NOSIs in response to the Topic 8 questions in Section B. Some of the proposals we make there should apply only if the collateral is consumer goods, but most of them should apply across the board, *i.e.*, to consumer and non-consumer transactions alike: see the discussion under the Topic 8 heading below.

Our proposals in response to the Topics 11 and 12 questions (also in Section B of the Consultation Paper) relate specifically to consumer transactions.

"Consumer goods" should have the same meaning in the NOSI context as it does elsewhere in the PPSA. In our view, there is no need for an additional "residential property" limitation. There are three main reasons. First, it may be difficult in quite a number of cases to distinguish between residential property and commercial property (*e.g.* where the customer works from home, or where the customer's residence is attached to business premises). Secondly, if the disputed article is affixed to commercial premises, it is more likely to be "equipment" than "consumer goods" (in this connection, it is worth noting that the definition of "consumer goods" refers to the actual purpose the customer uses or acquires the goods for, not the purpose the goods are typically used or acquired for). Conversely, if the disputed article is affixed to residential premises, it is likely to be "consumer goods" (having regard to the wording of the definition).

Thirdly, creating rules based on the categorization of the property to which the fixture subject to the PPSA is attached, rather than on the nature and use of the goods subject to the PPSA, would be inconsistent with the structure of the PPSA. The PPSA is intended to govern consensual security interests in personal property and contains extensive provisions dependent on the categorization of personal property, for example categorizing "goods" as equipment, inventory or consumer goods. To introduce new rules which depend on categorizing the real property to which the personal property is attached, as well as the personal property, creates a risk of unclear and unpredictable results and possibly increased litigation.

In summary, if the NOSI measures in question are limited to consumer goods, an additional "residential property" limitation is neither necessary nor desirable.

Incidentally, the Topic 7 questions confuse the NOSI with the underlying security agreement. As we pointed out in our April 2023 submission, "NOSI" refers to a "notice of security

interest". The notice of security interest is a registration instrument, comparable to a financing statement. Like a financing statement, it is not a contractual document and it is separate and distinct from the underlying security agreement.

The Topic 7 questions focus on NOSIs, but some of the proposed measures in Section A of the Consultation Paper relate to the security agreement, not the NOSI. Under the PPSA, the purpose of a financing statement is to perfect the secured party's interest in collateral under a security agreement and to protect that interest against potentially competing interests in the same collateral. The purpose of a NOSI, where the collateral is a fixture, is to provide notice of the security interest to persons who may deal with real property and who otherwise may not be aware that the fixture is subject to a security agreement, and to protect the secured party's interest in the fixture.

In considering the proposed NOSI reforms, it is important for the government to keep in mind the functional difference between the security agreement and the NOSI.

Topic 8: Alternative Means of Discharging a NOSI

Summary: We support the alternative discharge procedure described in the Consultation Paper, subject to the qualifications discussed below.

The PPSA already provides for the discharge of security interests in certain cases, as does Bill 142. In what follows, we briefly summarize the existing PPSA provisions, before proceeding to recommend a new and additional automatic discharge procedure for NOSIs.

The PPSA currently provides for discharge procedures in cases where: (1) the security interest has been performed or forgiven; (2) the secured party never acquired a security interest; and (3) the security agreement is cancelled, rescinded, or terminated. The relevant provisions are discussed in our April, 2023 submission at pages 3-5. The provisions apply to both PPS registrations and NOSIs. In Case (1), there are different procedures, depending on whether or not the collateral is consumer goods, but in Cases (2) and (3), the procedure is the same for both consumer goods and other collateral types. The new discharge provisions we propose should be drafted so as to be compatible with these existing provisions. In other words, overlap and conflict must be avoided.

In all three cases, the procedure entitles the debtor to require registration by the secured party of a certificate of discharge. The concern identified in the Consultation Paper is that,

short of litigation, there is little the consumer can do if the secured party refuses or fails to register the certificate.

We support a solution along the lines of the British Columbia model, as described in the Consultation Paper, coupled with any consequential amendments that may be required to the existing discharge provisions referred to above. We would add the following items to the British Columbia list:

- Where the secured party never acquired a security interest in the collateral;
- Where the debtor is unable to locate the secured party; and
- Where the collateral is "building materials" (see our answer to the Topic 1 questions above).

We do not support extending the alternative discharge procedure to cover the broader grounds identified in the Consultation Paper. The suggested grounds are not limited to cases where the consumer is directly affected by the secured party's failure to discharge the NOSI and they might encourage opportunistic behaviour on the part of some consumers. This risk might, in turn, increase the cost and availability of credit. Besides, proposed amendments to the CPA provide for the discharge of a NOSI in at least some of the broader cases envisaged in the Consultation Paper.

Section 57(1)(b) of the Ontario PPSA applies where all the obligations under a security agreement relating to consumer goods have been performed, and it requires the secured party to register a certificate of discharge within 30 days, without the need for any action on the consumer's part. The proposed reforms should not take away this automatic right of discharge for consumers. Subject to this qualification, the proposed new discharge provisions should apply to consumer and non-consumer transactions alike and, in each case, the debtor should be required first to make a written request to the secured party.

The British Columbia Act gives the secured party 40 days to respond. This seems excessive. The existing Ontario discharge provisions referred to above (leaving aside sub-section 57(1)) allow 10 days for the secured party's response. For consistency with these existing provisions, the period should be the same in the NOSI context. As in British Columbia, the onus should be on the secured party to challenge the debtor's discharge application. This would be consistent with the discharge procedure provided for in Part V.1 of the Ontario PPSA, dealing with vexatious registrations.

As currently drafted, the vexatious registration provisions apply only to PPS registrations. In addition to the alternative discharge provisions discussed above, the vexatious registration provisions should be expanded to cover NOSIs: see our April 2023 submission at page 8. The current vexatious registration provisions are not limited to consumer transactions and, likewise, they should not be limited to consumer transactions in their proposed application to NOSIs.

The $500 penalty for a secured party's failure to comply with the discharge requirements in sections 56 and 57 should be increased to at least $10,000. This change should be made not just in the NOSI context, but across the board.

Topic 9: Place Restrictions on Who can Register NOSIs

Summary: No new restrictions are needed. The process used by the Director of Titles is sufficient to authorize users and record who has made a filing that may later end up in dispute.

No new restrictions are needed. The process used by the Director of Titles is sufficient to authorize users and record who has made a filing that may later end up in dispute. Requiring lawyers or para-legals to register NOSIs would increase the time and costs of transactions, which would end up being passed on to consumers. Extension of the vexatious registration provisions to NOSIs, as proposed above, would at least partly address the concerns raised in the Consultation Paper.

Topic 10: Adding or Enhancing Available Offences

Summary: This is another CPA matter on which we defer to others who are advising the Government on Bill 142.

This is another CPA matter on which we defer to others who are advising the Government on Bill 142.

Topic 11: Enhanced Education and Awareness of NOSI Issues

Summary: We suggest the following: (i) a mandatory notice requirement for NOSIs relating to consumer goods, including a short and prominent warning about the risks; (ii) the establishment of a Ministry website containing information about NOSIs and the consumer's rights and obligations under both the CPA and the PPSA; and (iii) publication of a hard copy version of the website information for distribution as widely as possible throughout the community.

As discussed in our response to the Topic 3 questions, there should be a mandatory notice requirement for NOSIs and it should not be possible to register a NOSI without proof that the consumer has been given the NOSI. The notice should include a prominent warning as suggested in our Topic 3 discussion and it should contain a link to a website which explains the NOSI and sets out the consumer's rights and obligations (including the right to discharge a NOSI in the circumstances we identify in our response to the Topic 8 questions).

The information on the website should also be published in hard copy brochure form, for the benefit of consumers who do not have internet access. Copies of the brochure should be made available in public libraries, financial institutions and legal clinics, and through real estate agents and mortgage and loan brokers, as well as directly from the Ministry itself.

In addition to the information referred to above, the website and brochure should strongly advise consumers to keep a copy of their agreement in a safe place because it is their main source of information about their legal rights and obligations.

Topic 12: Additional Operational Changes

Summary: We do not agree with the suggestion that additional information might be included on the NOSI registration form because it misconceives the function of the NOSI.

The inclusion of additional information on the NOSI registration form would not help the consumer and it misconceives the function of the NOSI. The purpose of the NOSI is to assist third parties (prospective mortgage lenders, purchasers, etc.) to discover the existence of any fixture security interests before transacting with the debtor (property owner). The purpose is not to provide a source of information to debtors about details of their security agreement with the fixture secured party.

It follows that the content of the NOSI registration form should be governed by the needs of third party register searchers, not the needs of the debtor/consumer. The debtor's need for

information about their transaction with the secured party is addressed by section 18 of the PPSA, which entitles the debtor (among others) to obtain details of the security agreement, and to receive a copy of the agreement, from the secured party.

As discussed in our answer to the Topic 5 questions above, we believe that the consideration field should be removed from the NOSI registration form. This is in light of evidence that the field is being used to extort excessive payments from consumers, but it is also based on our understanding that third parties do not need, and should not rely on, the consideration details anyway. Again, if a searcher wants more information about the transaction than the registration provides, their recourse is to make a section 18 inquiry. In summary, our recommendation in response to the Topic 5 questions is not inconsistent with the proposition that the function of NOSI registration is to assist third parties, not the debtor/consumer.

Topic 13: Any Additional Suggestions

Summary: We suggest a prohibition on NOSIs for low value transactions and provision for regulations which would allow NOSIs in prescribed consumer goods to be prohibited.

The main reform proposals we favour are the notice requirements for NOSIs (Topic 3) and an improved and simplified NOSI discharge system (Topic 8). We are conscious that these measures are not a cure-all for the concerns identified in the Consultation Paper, but we believe that they represent a considerable advance on the law as it presently stands.

It might have been simpler and quicker to recommend prohibiting consumer NOSIs altogether but, as the Consultation Paper remarks, "used properly, a NOSI is a legitimate [business] tool" (page 3). To the extent that NOSIs are "used properly", prohibiting them altogether would have adverse market effects for suppliers and consumers alike. More specifically, some of the priority rules in section 34 of the PPSA depend on the holder of a fixture security interest having registered a NOSI before the competing real property interest is acquired. If NOSIs are prohibited for consumer goods, the holder of the fixture security interest would be deprived of the protection section 34 currently provides against competing real property interests, and the associated increased risk would inevitably be reflected in the cost and availability of credit to consumers.

On the other hand, if NOSI registrations remain permissible where the collateral is non-consumer goods (equipment or inventory), the holder of the fixture security interest would still have the means of protecting itself as provided for in section 34. In summary, the

outcome of priority disputes would be liable to vary as between the consumer and non-consumer contexts. This variation makes no sense as a matter of either policy or logic.

Nevertheless, we do support two targeted prohibitions which would be aimed at minimizing potential adverse market effects. The first would be a prohibition on taking a fixture security interest in low value collateral, for example where the market value of each item identified in the description field of the NOSI application is less than (say) $1,500. The rationale is that in most cases it will not be worthwhile for the prospective secured party to repossess low value collateral and so it has little to lose from the prohibition in this connection. On the other hand, if the secured party's real purpose is an extortionate one (as described in the Consultation Paper), the case for prohibiting the transaction speaks for itself.

The second and additional targeted prohibition we have in mind is a variation of a suggestion we made in our April 2023 submission (at pages 5 and 6). The Government should consider prohibiting either security interests or, alternatively, NOSIs relating to "prescribed goods". "Prescribed goods" would be consumer goods prescribed by regulation with the aim of targeting specific areas where NOSI abuses have been particularly rife.[8] There are two possible approaches in this connection. One would be to make a regulation providing that the goods in question are building materials. The effect of this approach would be to prevent the taking of a personal property security interest in the prescribed goods at all. The other approach would be to prohibit the registration of a NOSI in respect of prescribed goods. The effect of this approach would be to permit the security interest but to deprive the secured party of the protection given by section 34 of the PPSA against third party claims.

The OBA would welcome the opportunity to provide additional input into draft language of the regulations.

[8] The list might be based on the list of "prescribed goods" in r.35.1(1) of O.Reg.17/05: General under *Consumer Protection Act*, 2002, S.O. c.30. Sched.A. This provision relates to s.43.1 of the Act, which prohibits the door-to-door solicitation of a direct agreement with a consumer for the supply of prescribed goods or services unless the consumer initiated the contact. The list may need amendment from time to time to keep up with market place developments.