Bill 46, Protect Ontario by Cutting Red Tape Act, 2025

Submitted to: Ministry of Red Tape Reduction

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 feedback on Bill 46, *Protect Ontario by Cutting Red Tape Act, 2025* ("*Bill 46*"). We provide comments and recommendations on proposed amendments to the *Consumer Protection Act, 2002* ("*CPA, 2002*"), the *Courts of Justice Act*, the *Funeral, Burial and Cremation Services Act*, and the *Succession Law Reform Act*.

Ontario Bar Association

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

This submission was prepared and reviewed by members of the OBA's Business Law, Civil Litigation, Franchise Law, and Trusts & Estates sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience dealing with the relevant Acts commented on in this submission.

Comments & Recommendations

Schedule 5 – *Consumer Protection Act, 2002*

Retroactive Application and the Rule of Law

The subject proposal, once in effect, would authorize the Lieutenant Governor in Council to make regulations governing consumer agreements under which rewards points are provided, including applying the new rules *retroactively* to agreements made before the legislation comes into effect. As raised in the OBA's previous submission[1] on the *Consumer Protection Act, 2023*[2] *("CPA, 2023")* – Phase 1 Regulatory Proposals, the OBA takes a principled position against the retroactive and retrospective application of legislation and regulations.

Such provisions raise significant rule of law issues, as they can fundamentally modify or extinguish the rights and obligations of contracts, contrary to the understanding of the parties when they entered into the contract. Moreover, being able to rely on contractual rights is essential to a functioning economy and retaining business in Ontario. Accordingly, we recommend that proposed amendments avoid retroactive and retrospective application as much as possible.

Nonetheless, should the Ministry proceed with the proposed retroactive provision, further clarification will be required to determine its scope and effect. For instance, it remains unclear whether a consumer who entered into a rewards agreement in 2020 and lost points between 2020 and 2025 due to terms that would now be deemed invalid, would be entitled to have those points reinstated. If consumers were entitled to have certain rewards credited back to them, it would raise significant implications that should be considered,

[1] https://oba.org/ON/media/web/PDFs/PublicPolicy/Submissions/2025/OBA-Consumer-Protection-Act-Regulations.pdf
[2] Not yet in force – anticipated to repeal and replace *CPA, 2002*.

particularly in light of the new right of action set out at subsection 47.1(7). To that end, it is recommended that the Ministry take a cautious and precise approach in addressing the proposed scope of retroactivity, and its application should therefore be limited to a specific date in the past. Without such limitation, implementation will be largely unworkable, as suppliers will be unable to manage the risk posed by retroactive application of these provisions, which is amplified when considering the proposed right of action.

Uniformity As a Paramount Consideration

Uniformity is paramount for this kind of legislation. Many international businesses utilize standard form contracts that apply across multiple jurisdictions. Amendments should avoid making it burdensome for these businesses to offer services in Ontario – and consideration should be given to approaching this issue in a setting like the Uniform Law Conference of Canada ("**ULCC**") where uniformity is the key objective of reforms. We note that it appears the new provisions are similar to the points regime in Quebec, and that New Brunswick's new consumer protection legislation was modelled off Ontario and Quebec. This a positive sign towards uniformity, which would benefit from additional collective action and buy-in through a forum like the ULCC. Previous harmonization initiatives have historically evolved through the common law provinces, as Quebec has typically imposed more burdensome obligations on merchants than other provinces. Ontario should be careful to avoid adding burdensome and complex rules if it would detract from harmonization efforts with other common law provinces or stifle more innovative reward programs from being offered in the province.

Essential Points of Clarification

Under Schedule 5 of Bill 46, section 47.1(1) of the *CPA, 2002* is proposed to be repealed and substituted with: "47.1 (1) [e]very consumer agreement under which rewards points are provided shall be made, *renewed*, amended or *extended* in accordance with the prescribed

requirements…" Similarly, section 47.1(10)(c) provides that: "…In addition to the power of the Lieutenant Governor in Council to make regulations under section 123, the Lieutenant Governor in Council may make regulations governing matters relating to consumer agreements under which rewards points are provided, including, governing the making, *renewing*, amending or *extending* of such agreements."

Notably, both provisions reference the "*renewal*" and "*extension*" of these agreements. However, in practice, loyalty program terms are not generally term based. Consequently, they aren't typically renewed or extended. Instead, loyalty program terms are set up to govern participation in an ongoing, indeterminate-length term. To ensure effective implementation, it is important that the drafting of this provision accounts for this misalignment.

Furthermore, the Ministry should consider and likewise clarify how these types of consumer agreements interact with other regulated agreement types. Under the new *CPA, 2023*, loyalty program terms could also fall within the definition of an "internet agreement", as many consumers join loyalty programs online. Internet agreements (and the new version of internet agreements in *CPA, 2023*) carry additional disclosure requirements, which are not appropriate or workable when applied to loyalty program terms. In the current *CPA, 2002*, rewards points are excluded due to the prescribed amount being insignificant. If the rewards point regime is incorporated into the new *CPA, 2023*, it should similarly exclude the application of rules regarding internet agreements.

Aligning Disclosure Obligations with the Forthcoming CPA

Under Schedule 5 of Bill 46, section 47.1(1) of the *CPA, 2002* is proposed to be repealed and substituted with: "…47.1 (10) In addition to the power of the Lieutenant Governor in Council to make regulations under section 123, the Lieutenant Governor in Council may make regulations governing matters relating to consumer agreements under which rewards points are provided, including, (a) governing the *disclosure* of information."

From a red tape and business compliance burden perspective, any new disclosure obligations introduced through these regulations should be aligned with the anticipated disclosure framework under the pending *CPA, 2023*, of which the OBA has provided past advice on. Doing so will help prevent businesses from having to relearn obligations multiple times in a short 2-year window.

Schedule 7 – *Courts of Justice Act*

The proposed amendment to the *Courts of Justice Act* would repeal the recent addition of section 68.1(4). Section 68.1 was added as part of *Bill 227, Cutting Red Tape, Building Ontario Act, 2024* ("*Bill 227*"), which provided the Attorney General with a new authority to make, amend or revoke civil and family law rules, subject to limited consultation without proceeding through the relevant Committees. Previously, civil and family rule changes were recommended to the Attorney General through their respective committees, the Civil Rules Committee ("**CRC**"), and the Family Rules Committee ("**FRC**"). Section 68.1(4) specifically stated that, in the event of a conflict between a rule made by the Attorney General under section 68.1 and a rule made by the CRC or FRC, that the Attorney General's rule prevailed to the extent of the conflict.

Bill 46 proposes to remove section 68.1(4), while leaving the new powers of the Attorney General to make, amend, or revoke rules untouched. This raises the question as to what would happen in the case of a conflict between a rule made by the Attorney General and a rule made by the CRC or FRC. The previous rule was explicit as to how a conflict would be addressed – by removing this provision, the Act is silent on this. We recommend repealing and replacing this provision by stating the opposite – in the event of a conflict between an Attorney General rule under 68.1 and a rule made by the CRC or FRC, the CRC or FRC rule would prevail.

As we outlined at the time *Bill 227* was introduced to the legislature, we think that the CRC and FRC serve a crucial role, providing expertise and practical knowledge of how potential

rule changes will impact the justice system. We noted that the new power could be beneficial in some instances but needed to be specifically scoped as to the rules that could be changed through that procedure and recommended additional safeguards that would continue to benefit from the expertise of the Committees. We recommend revisiting and revising this section in consultation with the bar.

Schedule 11 – *Funeral, Burial and Cremation Services Act*

We welcome the amendments to the *Funeral, Burial and Cremation Services Act* ("*FBCSA*") that provide greater clarity to operators in terms of from whom they must obtain instructions in order to provide supplies or services regarding human remains. This can be important in time-sensitive situations, especially in accordance with the beliefs of certain cultures or religious faiths. For example, the Jewish faith requires deceased individuals to be buried within 24 hours of death; these amendments can provide clarity to and protect operators who are acting reasonably and in good faith in such situations.

Prescribed List of Persons or Entities

While section 3.1.1 of the *FBCSA* requires operators to provide supplies or services only when they have "received authorization to do so from the person or entity who has such authority in respect of the human remains as determined in accordance with the regulations", we note that we have not yet seen regulations. We recommend that these regulations be enacted contemporaneously with the amendments given that the amendments rely on the premise that there are indeed persons or entities with such authority.

In this regard, we recommend that the list essentially mirrors the list (from an Ontario perspective) as set out in subsection 5(1) of British Columbia's *Cremation, Interment and Funeral Services Act*, being the following in order of priority:

a) the personal representative named in the will of the deceased;

b) the spouse of the deceased[3];
c) an adult child of the deceased;
d) an adult grandchild of the deceased;
e) if the deceased was a minor, the person who had decision-making responsibility for the deceased on the date of death;
f) a parent of the deceased;
g) an adult sibling of the deceased;
h) an adult nephew or niece of the deceased;
i) an adult next of kin of the deceased;
j) the Minister of Children, Community and Social Services, or if the Public Guardian and Trustee is administering the estate of the deceased, the Public Guardian and Trustee; and
k) an adult person having a personal or kinship relationship with the deceased, other than those referred to in (b) to (d) and (f) to (i).

Schedule 22 – *Succession Law Reform Act*

Section 51 of the *Succession Law Reform Act* ("*SLRA*") is proposed to be amended to provide that, in the event that a participant has designated a person by instrument to receive a benefit payable under a plan on the participant's death, and that plan is being converted, renewed, replaced or transferred, that participant's attorney under a continuing power of attorney for property or the guardian of property may make a designation by instrument signed by the attorney or guardian in order to permit the same person to be designated under the plan that results from the conversion, renewal, replacement, or transfer.

[3] For simplicity purposes, and given the nature of decisions contemplated pursuant to the FBCSA, we propose that its definition of "spouse" is substantially similar to the definition in subsection 20(7)-(8) of the Health Care Consent Act, 1996. Accordingly, we propose that for the purposes of the FBCSA two persons are spouses if they are:

- Married to each other; or
- Living in a conjugal relationship outside marriage and;
    - Have cohabited for at least one year;
    - Are together the parents of a child; or
    - Have entered into a cohabitation agreement under section 53 of the Family Law Act.

Two persons would not be spouses for the purpose of the FBCSA if on the date of death of the deceased they were living separate and apart as a result of a breakdown of their relationship.

We welcome this amendment, which we supported in a submission[4] from November 2024. This amendment will provide much needed clarity regarding the ability of attorneys and guardians to manage plans with respect to incapable persons, while maintaining their testamentary intent. This will be helpful in situations including where an incapable person's RRSP automatically converts to an RRIF, or where an attorney or guardian is not satisfied with a financial institution's management of a plan.

We think that this amendment can be enhanced through additional minor and complementary amendments.

Court Application Option

To cover other prevalent situations, we recommend including an option in an application to court to permit the making, alteration or revocation of a designation, if it can be shown to be in the best interest or in accordance with the testamentary intent of an incapable person. This will provide flexibility in specific instances such as where separation, divorce or marriage has occurred, changing the obligations of or tax planning available to an incapable person, or where an incapable person otherwise made a beneficiary designation prior to becoming incapable, and there is evidence demonstrating that the incapable person would make a different beneficiary designation, if capable.

Substitute Decisions Act

The *Substitute Decisions Act* ("**SDA**") includes references to an attorney not being able to make a will (subsection 7(2)), and a guardian for property not being able to make a will (subsection 31(1)). In addition, one of its requirements for a person being able to give a power of attorney is that the person must know "that the attorney will be able to do on the

[4] OBA Submission on Amendments to Estate Law Beneficiary Designations

person's behalf anything in respect of property that the person could do if capable, except make a will" (subsection 8(1)(c)).

The *SDA* defines "will" with reference to the *SLRA*. The issue is that the *SLRA*'s definition of "will" includes "testamentary dispositions", which jurisprudence suggests includes beneficiary designations. Based on this language, one could take the position that the *SDA* disallows attorneys and guardians from making beneficiary designations, and that the person giving the continuing power of attorney must know that the attorneys cannot make beneficiary designations.

For maximum clarity, we believe that there should be a carveout in the *SLRA* and/or the *SDA* that indicates that notwithstanding this definition of "will":

- that attorneys and guardians for property may make beneficiary designations, albeit only to the extent specified in Part III of the *SLRA*; and
- that for the purposes of Paragraph 8(1)(c), the term "will" does not include beneficiary designations made by attorneys and guardians for property to the extent specified in Part III of the *SLRA*.

Insurance Act

We recommend similar amendments to section 192 of the *Insurance Act* to allow an attorney or guardian to make, alter or revoke a beneficiary designation for life insurance policies, similarly to the contemplated amendments to the *SLRA* (i.e. where the beneficiary is not actually changing). Such a beneficiary designation may be needed for scenarios such as:

- a term policy that needs to be renewed due to an ongoing financial obligation of the grantor (terms of a separation agreement or a contract dispute);

- a term policy may need to be converted to permanent for financial or tax planning reasons that will benefit the grantor; and/or
- a financial management decision where the attorney or guardian finds a less expensive policy is available for equal or greater benefit to replace an existing policy

Similarly to what we have recommended with respect to the *SLRA*, we would support including an option in an application to a court to permit the making, alteration or revocation of a designation if it can be shown to be in the best interests or in accordance with the testamentary intent of an incapable person, for the same reasons as described above.

First Home Savings Account

One final recommendation regarding beneficiary designations is to:

- amend the definition of "plan" in section 50 of the *SLRA* to include the "first home savings account", as such term is defined in the *Income Tax Act* ("***ITA***"); or
- alternatively, revise the definition of "plan" to be broader so as to include any account or arrangement that permits the designation of a beneficiary pursuant to the *ITA*.

A similar issue occurred in 2009, where Regulations to the *SLRA* provided as follows to deal with Tax-Free Savings Accounts:

Prescribed plans

2. Tax-free savings accounts within the meaning of the *Income Tax Act* (Canada) are prescribed as plans for the purposes of Part III of the Act, regardless of when the

designation of a beneficiary was made.

While this approach could also be used to accommodate FHSAs, it would involve a new regulation whereas we submit that an amendment to the *SLRA* would be more efficient. In this regard, if the definition of "plan" was expanded to include any account or arrangement of a beneficiary pursuant to the *ITA*, this would capture any future plans that may be created under the *ITA* which would mitigate the need to amend the *SLRA* if this were to occur.

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The OBA would be pleased to discuss this further and answer any questions that you may have.