# *Consumer Protection Act, 2023* – Phase 1 Regulatory Proposals

**Submitted to:** Ministry of Public and Business Service Delivery and Procurement

**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

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# 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 Sole, Small Firm and General Practice sections. Members of these section 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 consumer protection legislation.

# Comments & Recommendations

***General Contract Rules***

**Question**: For pre-disclosure and contract requirements related to the delivery of goods, what details about the delivery should consumers reasonably expect a business to provide? Are there any challenges a business could face in disclosing how goods are to be delivered, in particular, relating to disclosure of the identity of the carrier? Please be as specific as you can about the reasons for your response.

**Comments:**

The proposed pre-disclosure obligations related to the delivery of goods will be difficult or impossible for many suppliers to meet, particularly in the e-commerce environment. In particular, detailed information related to the carrier and precise delivery method is often unknown prior to entering into the contract. For many suppliers, the choice of carrier is often a last-minute decision that is subject to change depending on various factors including supplier demand, weather, consumer location and labour disruptions. In addition, the carrier choice often has no impact on the consumer so long as the identity of the carrier is disclosed to the consumer once the item is shipped. Finally, the proposed language also removes exceptions for transactions where the delivery is made to the consumer free of charge.

We recommend:

- This disclosure obligation should allow for situations where such information is unknown to the supplier at the time of disclosure, whether by: (a) qualifying it by "if known"; (b) allowing the supplier to provide such information at a later date; or (c) limiting it to the "mode" of delivery (e.g., Canada Post, courier, contracted ground delivery, etc.), without obligating the supplier to identify a specific carrier prior to when the item is shipped.

- This disclosure obligation should account for situations where there is a lower risk of harm to the consumers if they do not receive this information by: (a) re-inserting the carve-out for free delivery; and/or (b) creating a threshold value, only above which this information will be mandated disclosure (i.e., situations where the consumer has a stronger interest in closely tracking the shipping and delivery).

**Question**: What specific information should businesses be required to provide to consumers when they change a price in accordance with a price escalation clause in the consumer contract? Do you agree with the ministry's suggestions above?

**Comments:**

Please see our comments regarding contract amendments and continuations. Any additional notice obligations (whether in relation to price escalation or otherwise) should be carefully circumscribed to avoid further administrative burden on suppliers (and consumers, who may now be receiving far more notices—and far longer ones—than they are accustomed to receiving) and to reduce flexibility for consumers.

***Contract Amendments and Continuations***

**Question**: Do you support the proposed requirements for businesses when they seek to amend or continue a fixed-term consumer contract? Is there other important information that should be shared with consumers before they decide to accept or decline a contract amendment or continuation?

**Comments:**

The proposed language for express consent, including the extensive notice and pre-disclosure requirements, arguably creates a greater burden on suppliers than executing a new contract with a consumer. The detailed rules also risk creating a scenario where both the consumer and supplier could explicitly agree to amendments—including amendments

that are beneficial to the consumer—and yet despite this "meeting of the minds", such amendments could be void by statute and subject to a further potential cancellation right where the updated contract is not delivered to the consumer. One risk of an overly burdensome amendment process is that it may be more efficient for a supplier to terminate the existing contract altogether and simply enter into a new contract with the consumer, which would limit the additional protections these provisions purport to introduce. Additionally, this complex process may have the unintended impact of slowing the delivery of innovative products and services to Ontario consumers if suppliers opt to run out existing agreements rather than amend existing ones.

We recommend:

- This section should be simplified to make it more meaningful. Suppliers and consumers will not be able to make use of this section if it is as onerous as executing a new agreement, and—unlike this provision—suppliers are already broadly familiar with how to execute new agreements.

- The detailed notice obligations should be pared down, and focus should shift to how express consent is obtained. We should allow suppliers and consumers to come to their own agreements on amendments of contracts but should ensure consent is properly obtained.

- The cancellation right set out at s. 8 of the proposed "Amendments and Continuations" regulation should clarify that any reimbursement available to the consumer is retroactive only to the date of the void amendment—not back to the execution of the original agreement.

**Question**: Are the proposed conditions for amending an indefinite-term contract sufficient? Should the ministry be considering other items that need to be set out in the initial contract to allow a supplier to amend a contract by notice rather than by obtaining the express consent of the consumer?

**Comment:**

The proposed conditions are too complex and confusing to be consumer- or business-friendly. Instead of considering further items to be set out in the initial contract, the ministry should strongly consider whether its goals can be more appropriately achieved by establishing a clear and direct obligation on suppliers instead of the indirect approach of mandating very specific content be inserted into consumer agreement provisions.

For example, for most amendments to indefinite term contracts, instead of creating a direct notice obligation on suppliers for contract amendments, the proposed language instead attempts to do this indirectly by creating very specific (and very confusing) content requirements on specific amendment provisions.

From a consumer perspective, if a supplier complies with the contract content requirements but still provides late notice (e.g., 15 days in advance instead of 30), the consumer's remedy is not statutory but is limited to private contractual remedies. Confusingly, this is not the case for amendments that do not change either party's obligations or amendments to comply with requirements of law: the notice obligation for these changes is a direct statutory obligation on the supplier.

From a business perspective, the notice content requirements are long, repetitive, and—in short—will be an operational nightmare for suppliers – particularly small- and medium sized businesses. This process ensures that notices will be difficult to construct and will be very long (which will also be frustrating for consumers). Ontario is already an outlier in Canada by virtue of the amendment process set out in Section 42 of the current General Regulation; now, the ministry is suggesting a move from a single provision (in the current regulations) to a series of interlocking conditions and obligations related to contract amendments, including the new cancellation right set out in s. 8 of the proposed "Amendments and Continuations" regulation. It may be burdensome for some Ontario suppliers to amend their terms with consumers—even to make changes that are beneficial to the consumer—as it may involve significant administrative and legal effort. This will put a freeze on service improvements or developments and ensure that any supplier with customers in multiple jurisdictions will have to surmount an additional hurdle if they wish to offer services in Ontario. Creating additional obstacles to providing or updating services in Ontario is not beneficial to businesses or consumers.

Even the expert consumer protection lawyers at the OBA Consumer Law Committee struggled to parse the complexity of the proposed language. We strongly recommend that the ministry decide what it would like to achieve with these changes—whether notice obligations or any potential new termination rights—and draft succinct, clear obligations on suppliers that can be understood by both suppliers and consumers.

We recommend:

- Establishing clear and direct process requirements on suppliers for amendments instead of mandating very specific content for amendment provisions. It may be

burdensome for some suppliers to amend their contracts solely for Ontario, as many suppliers use terms that apply across multiple jurisdictions. Furthermore, making existing consumer contracts longer and more detailed does not ensure that consumers will read the new language or understand their new rights, especially when their rights are restricted to contractual remedies that are based on those new contractual provisions.

- To the extent the above-noted process requirements include a notice obligation, establish a single, consolidated and clear notice requirement for amendments that can be made by notice (instead of different notice obligations for different types of amendments and continuations). The notice obligation should be a direct requirement on suppliers, and the content should be general enough to allow flexibility to accommodate the various types of amendments that are foreseeable.

**Question**: Are there other exceptions to the express consent rules for amendments where providing notice to a consumer would be beneficial?

**Comments:**

As presently drafted, the proposed language could go further to make meaningful distinctions between amendments that are beneficial to consumers and amendments that are detrimental to consumers. Additional language could be added to regulation to better clarify whether all amendments that are beneficial to consumers are subject to a carve-out. The carve-out for amendments where no obligations have increased on the consumer and no obligations have decreased on the supplier may not capture all amendments that are beneficial to consumers. For making certain amendments that are beneficial to consumers, this carve-out may set an extremely high standard that may be unworkable in practice. Furthermore, even meeting that standard requires a statutory notice to be provided.

All other amendments to consumer agreements are treated in the same manner with the same administratively burdensome obligations. Furthermore, by only providing these limited carve-outs, the ministry is strongly incentivizing that all consumer contracts be for an indefinite term, which is not always appropriate for certain services or suppliers and may not be consistent with the ministry's policy goals. The carve-out that would permit notice (rather than express consent) if the initial indefinite contract specified the elements of the contract that can be amended by notice will likely result in lengthy contracts that try to capture as many elements as possible.

We recommend:

- Broadening the availability of "amendment by notice" to more specifically include changes to consumer contracts—including both fixed-term and indefinite term contracts—that are immaterial or beneficial to the consumer. The proposed language restricts amendments by notice to indefinite term contracts that contain very specific language, which excludes many contracts and amendment types.

- Restricting the notice obligations more specifically in instances where the amendment is immaterial or beneficial to the consumer. We recommend above that the ministry establish a single, consolidated notice requirement for all amendment notices. Certain of these notice requirements should not apply for these types of amendments. For example, if the amendment increases the obligations on the consumer or decreases the obligations on the supplier, the notice must also include information on such changes (but not otherwise).

- Clarifying that amendments that are immaterial or beneficial to the consumer are exempt from certain requirements imposed on other forms of amendments, including requirements tied to potential cancellation rights. As presently drafted, consumers could potentially exercise a right to cancel the entire consumer contract if a beneficial amendment is made without respecting the strict language of the regulatory provisions. This concern could be addressed by removing the obligation to send a copy of the amended contract for these types of amendments.

**Question**: Is the distinction between a minor and substantive change adequately described? Please explain.

**Comments:**

Additional language could be added to better clarify whether all amendments that are minor and non-substantive are subject to a carve-out. Although the carve-out noted above (where no obligations have increased on the consumer and no obligations have decreased on the supplier) may capture certain minor and non-substantive changes, there is no additional differential treatment in the proposed language between minor and substantive changes. All amendments that may not neatly fit in the carve-out noted above are treated identically, regardless of how material the change is and regardless of whether it is beneficial or detrimental to consumers.

Furthermore, there is no indication of how these provisions interact with the unsolicited services provisions, if at all. For example, could a supplier comply with the "amendment by

notice" provisions and provide a compliant notice but still require separate, express consent to the change from the consumer because the amendment to ongoing services is considered a "material change" pursuant to the unsolicited services provisions in Section 11? This should be clarified.

We recommend:

- Broadening the availability of "amendment by notice" to include changes to all consumer contracts that are immaterial or beneficial to the consumer, restricting the notice obligations in such cases, and removing the cancellation right set out in s. 8 of the proposed "Amendments and Continuations" regulation in such cases.

- Clarifying the relationship between the amendment provisions and the material change provisions. For example, if the amendment provisions will address the supplier's obligations based on the materiality of the amendment, the "material change" qualifications to the unsolicited services provisions in Section 11 may no longer be required. Alternatively, the amendment provisions should clarify that if a supplier complies with the express consent or notice obligations mandated therein, any such amendment will not be considered a "material change" for the purposes of the unsolicited services provisions in Section 11.

**Question**: Will the information included in the notice to amend an indefinite-term consumer contract equip consumers with sufficient information to choose whether to accept the amendment or terminate the contract? Do consumers need additional information to make that decision?

**Comments:**

As noted above, in our opinion, the proposed language already includes too much information. Consumers do not need to be provided with the amendment in several different ways in the same notice. We strongly recommend limiting the notice content obligations to create more clarity for the consumer and less administrative burden on suppliers.

We recommend:

- As noted above in our responses above, we recommend that the ministry establish a single, consolidated and clear notice requirement for amendments that can be made by notice. The notice obligation should be a direct requirement on suppliers, and the

content should be general enough to allow flexibility to accommodate the various types of amendments that are foreseeable. The proposed language is too detailed and repetitive—the focus should be on ensuring the consumer understands what is changing, not a 7-part notice that will be too long to be meaningful.

**Question**: Do suppliers have any concerns about including this information in their notices to consumers regarding intended contract amendments?

**Comments:**

As noted above, the main concern is the extreme complexity in the proposed language. Ontario is already an outlier in its notice requirements, and the proposed regulatory language would create a significant obstacle for many businesses looking to provide services in Ontario—indeed, millions of existing consumer contracts in Ontario may need to be amended to account for the new legislation, and the new rules will create a large administrative and legal burden on every single current and future Ontario supplier.

We recommend:

- We recommend establishing process requirements (as opposed to a contractual requirement) on suppliers regarding amendment notices. While this will not address the complexity of the proposed notice requirements, it would allow suppliers to comply with the obligations without significant amendments to their consumer contracts that are intended to apply across multiple jurisdictions (and that consumers frequently do not read anyway).

**Question**: Does allowing suppliers to continue fixed-term contracts for an indefinite term, provided that consumers have the right to terminate the contract, balance the provision of ongoing goods and services with the consumer's option to terminate the contract if they no longer wish to continue?

**Comments:**

If the ministry wishes for consumers of indefinite-term contracts to be able to exercise a termination right in certain circumstances, we recommend making that clear and explicit within the regulatory language instead of attempting to achieve it indirectly through amendment and notice obligations.

We recommend:

- If the ministry intends to create contract content obligations on certain contract types—including obligations tied to a mandatory termination right for consumers in indefinite term contracts—it should clearly state so in the regulations, instead of attempting to do so indirectly through amendment and continuation requirements. This will allow suppliers to more clearly respond to their potential new obligations. All contracts will need to be amended at certain times. So, if proposed provisions setting out new amendment obligations are tied to termination rights, that should be more clearly communicated within the regulation, as the new amendment obligations could effectively apply to nearly all suppliers (even if they do not yet realize it).

**Question**: Do suppliers have any concerns about including the proposed information in their notices to consumers regarding the indefinite continuation of the contract?

**Comments:**

This language is confusing to parse, and it establishes yet another distinct notice obligation. However, the impact appears to be an effective prohibition on all continuations except in this one specific scenario. By doing so, the ministry is heavily incentivizing that all consumer contracts be for an indefinite term, which is not always appropriate for certain services or suppliers and may not be consistent with the ministry's policy goals.

There is no clear indication of whether the concept of "renewal" exists—any other attempt to renew a contract will require express consent, as if a new contract were being signed. If this is the ministry's intention, it could be made much clearer and more direct by simply establishing term-based requirements for fixed-term and indeterminate-term contracts.

We recommend:

- Folding the concept of "continuation" into our proposed approach to notice requirements outlined above. If there were a single, consolidated notice requirement for amendments, it could be clear that such an amendment might include a change to the contract's "term" (whether converting a fixed-term into an indefinite-term contract or otherwise). This would simplify the many different notice requirements proposed by these provisions.

- Making clear what the ministry intends to do with term length and renewal, instead of attempting to create indirect obligations on consumer contracts through notice requirements. If there is to be a prohibition on fixed-term renewal aside from the "continuation by notice" scenario (which we do not support but which appears to be the intention), that should be made explicit. If consumers of indefinite-term contracts are to have the ability to exercise a cost-free termination right in a wide array of circumstances (which we do not support but which appears to be the intention), that should be made explicit.

***Purchase-Cost-Plus Lease Rules***

**Question**: In respect of purchase-cost-plus leases, do you have any specific comments or suggestions on the ministry's proposals for contract requirements, standardized first-page disclosure and advertising rules?

**Comments:**

The suggested disclosures do not address key features of these types of contracts.

For example, the suggested disclosures deal only with the goods. However, many of these contracts will have mandatory repair and service maintenance plans, as the lessor may not be prepared to have its equipment go without servicing over the economic life (such as 12 years or more for a furnace).

The issue of services (either optional or mandatory) for PCPLs is not addressed in the discussion paper, and this leaves open matters such as:

- What is the correct calculation of the "total amount payable" when services may be 40% or more of the monthly payment?

- What happens when the consumer buys out the leased goods before the end of the term when not in default of the agreement? Do services continue, or is the whole contract at an end?

- What happens when the full amount of the declining balance owed on the goods is paid at, for example, the end of the 12-year economic life? Does the payment for goods cease but the amount owed for the monthly service component continue? Or does the whole contract terminate?

Upon default, the amount owed should be limited to the balance owed on the declining balance and enforcement costs, excluding anything for services that won't be delivered.

We recommend:

- To require suppliers to clearly separate the cost of the good from the cost of services. This will avoid the current issue where suppliers blend the cost of goods and services together.

- Specify that the "total amount payable" excludes the cost of services that will not be received if the lease is terminated.

    - Separating the cost of goods and services would make this simple. Consumers should not be on the hook for service charges that they will never receive.

    - This also provides clarity on annual increases – the difficulty in disclosing this amount relates to the services bundled into the price. Separate prices for the good and service would fix this.

- Clarify whether upon buyout, the end of the economic life of the good, or termination either for default or end of term, all aspects of the lease are ended, including the service charges that won't be provided after the deal ends .

    - Consumers should have the right to cancel both optional and mandatory services if the contract comes to an end (buyout, declining balance reaches zero, or payout after default).

    - For defaults, the amount owed should be limited to the balance owed on the declining balance schedule, plus the permitted contract-end charges, excluding the cost for services that will not be delivered.

**Question**: For the purposes of a standardized disclosure for purchase-cost-plus leases, would you recommend the ministry set a standardized format (e.g., a consumer information box similar to that required for credit cards issued by federally-regulated financial institutions) or would a requirement to include the information on the first page of the agreement be sufficient?

**Comments:**

We support having a standard contract disclosure as the front page of the contract, as is the case now for payday loans. This standard form would provide increased ease of understanding by the consumer and a basis for the consumer's comparison shopping. Furthermore, a standard form should allow regulators to more readily oversee compliance.

We recommend:

- Adopting a standard contract disclosure to increase understanding and awareness among consumers, and simplify compliance oversight.

**Question**: Are there any specific fees/costs outlined that should not be considered as part of the potential total amount payable by a consumer for the purposes of determining whether the lease is a purchase-cost-plus lease under the new CPA?

**Comments:**

The PCPL is defined to be a lease of goods where the total amount payable is more than 90% of the estimated or actual cash price of the goods (but not services). To do this calculation, the lessor needs to calculate the cost of funds included in the lease payments for the cost of money over the term of the lease. In short, this is similar to a present-day Part VIII lease which requires disclosure of the "implicit finance charge", being the total amount payable by the lessee (including the APR).

The proposed PCPL provisions are more akin to making these leases into something resembling a conditional sale contract that allow a buyout based on the declining balance owing and a right to cancel optional services. It would be accurate to describe these PCPL products as "time purchase financing", and the Ministry should regulate them accordingly, with disclosure of the APR and "cost of borrowing".

The annual increases making the "total amount payable" hard to disclose only relate to the services. It is clearer and simpler for the consumer to have one cash price for the goods it is paying for over the term, and a separate maintenance and repair contract with a variable

amount formula linked to CPI for the increasing costs of service and repairs over the term, and which maintenance contract may survive the termination of the goods contract upon early payout, end of term or default.

We recommend:

- Considering regulating PCPLs as a time purchase "credit agreement" as now found in the CPA, 2002, given there is a declining balance on the price of the goods and the option to cancel optional services as it better reflects the true arrangement of these types of contracts.
    - This is simpler than evaluating a lease against the definition of a PCPL.
    - This would avoid the unintentional capture of many consumer leases that would result from the current overbroad definition of PCPLs.
    - Also consider maintaining a list of goods, such as the explicit list of goods provided in the CPA, 2002 which directly targeted goods preferred by bad actors. Without reference to the suppliers who are the intended targets of the PCPL regime or the goods they utilize, and only trying to have a generalized section to address these concerns, the PCPL definition may unintentionally capture leases that are not the intended targets of the PCPL regime.
- As stated above, require the cost of goods and services to be separated, and specify that "total amount payable" only includes the cost of goods.

**Question**: Are there other lease arrangements beyond those proposed that may need to be considered for full or partial exemptions from the PCPL rules?

**Comments:**

The present CPA adds extra provisions for a list of regulated goods (mostly devices installed in a residence such as a furnace or air conditioner) where there have been some bad actors causing consumers real harm.

These new CPA provisions have a very broad definition of PCPL that captures most leases, including those not often connected to bad actors, and now the exemptions need to be broad enough to keep these leases out of the added PCPL rules. The present CPA list of regulated goods, with the ability to add new goods to the list when needed, was a better and more readily understood set of rules for suppliers and financing institutions.

The exemption for "motor vehicle" leases needs to ensure that the definition of "motor vehicles" is largely based on the one used in the *PPSA* with some modifications to ensure that all devices that operate by other than human muscle power are under this exemption. This is especially important for rural, remote and farming Ontario.

If the Ministry's intention is that the new PCPL regime should exclusively target suppliers in industries where bad actors have operated historically, such as suppliers of home comfort appliances, the exemptions should also include leases of technology such as new large screen TVs, home entertainment systems, personal computers, hearing aids and other hearing devices (which can be leased), and smart devices such as phones and watches.

Alternatively, if the Ministry's intention is that the new PCPL regime should be broader in application and should apply to suppliers who might use PCPL mechanisms in other, novel ways to harm consumers in the present and future, then the exemptions might remain more narrow.

We recommend:

- The exemption for "motor vehicle" leases should be based on the one used in the *PPSA*, with some modifications to ensure that all devices that operate other than by human muscle power are under this exemption.
    - ATVs, snowmobiles, riding lawn mowers, riding landscaping equipment, riding snow plowing and hobby farm machines. A *Highway Traffic Act* definition reduces this exemption to largely only plated road machines.
    - Plus, goods not included in the PPSA's definition, such as watercraft, small aircraft, and tractors (snow plowing, hobby farm equipment).
- There should also be exemptions provided for leases of technology (televisions, home entertainment systems, personal computers, hearing aids and other hearing devices (which can be leased), and smart devices)

**Question**: In respect of buyout requirements, are six months of payments in addition to the estimated retail cost of the good, adequate for the maximum buyout cost? Please provide detailed information as to what, if any, alternatives the ministry could consider.

**Comments:**

The regulations should make it clear that the buyout schedule provides the maximum buyout price of the goods upon any of the following events:

- exercise of an early purchase option before the end of the lease term;
- termination of payments related to the goods at the end of the lease term or economic life on the date set out in the declining balance schedule reaching zero; or
- amount due upon default and enforcement.

The right of the lessor to be paid if the lease is terminated inside the first year of the term, whether by exercise of an early buyout or default, should be capped at the amount remaining owing for the goods on the declining balance schedule, enforcement costs (if applicable), removal costs (if applicable), and 6 months of payments.

After the end of the first year, the lessor should have recovered sufficient payments to cover its delivery and installation costs. After the first year it would be onerous to add 6 months of payments.

As stated above, nothing is provided in the proposals on the treatment of any services provided with the lease upon the happening of early termination, end of payment for the goods or default. It would be cleaner to mandate a lease of the goods and a separate services contract.

We recommend:

- The buyout schedule clearly stating that it provides the maximum buyout prices of the goods upon any of the following events:
    - exercise of an early purchase option before the end of the lease term;
    - termination of payments related to the goods at the end of the lease term or economic life on the date set out in the declining balance schedule reaching zero; or
    - amount due upon default and enforcement.

- If the lease is terminated in the first year of the term, the buyout should be capped at the amount remaining owing for the good on the declining balance schedule, permitted contract-end costs, and 6 months of payments.
    - If the lease is terminated after the first year of the term, the additional 6 months of payments should be removed. The lessor should have recovered sufficient payments to cover its delivery and installation costs and will be compensated for the cost of the good.

**Question**: Is the recommended default buyout schedule in cases of non-compliance with the requirements of the new CPA an adequate remedy for consumers?

**Comments:**

The addition of a mandatory declining balance for the amount owed for the goods over the term of the contract is a very helpful addition. Recent marketplace practices in residential HVAC equipment include contracts charging the balance of all payments under the contract on early buyout or default, charging for both for the goods, carrying costs of the cost of funds, and for the services over the full term of the contract, even though those services would not be provided after default. We support adding a fixed payout amount for increased consumer protection.

The present CPA provides that a consumer may terminate a time purchase financing contract at any time under the term without notice, bonus or any penalty. That would be a good addition to PCPLs for early purchase buyouts for the subject goods.

The lease should provide that if the lessee pays the balance owed under the buyout schedule either before the end of term or when the balance reaches zero, then the lease should confirm the lessee becomes owner of the goods.

The present CPA provides that a consumer may terminate optional services under purchase financing contracts. PCPLs might provide that consumers have the right to cancel both optional and mandatory services if the contract comes to its end whether by early payout, reaching the declining balance to zero, or payout after default.

We recommend:

- Explicitly stating that a consumer may terminate a PCPL at any time without notice, bonus or penalty – this would further protect early purchase buyouts of the goods.

- Explicitly stating that if the lessee pays the balance owed either before the end of the term or when the balance reaches zero, the lessee becomes the owner of the goods.

- Reiterating above comments: separating the cost of the good from other costs like the cost of interest, repair or service plan charges, etc.

**Question**: Is the recommended termination right for consumers in the case of a product's end-of-life in line with industry practices?

**Comments:**

On its own, the buyout schedule is mostly helpful but not a full source of recovery for the consumer. For example, the consumer may not be paying because the furnace is a 'lemon', or the lessor has failed to provide the required maintenance work to correct the problem. The consumer may not want the goods or to pay the buyout amount.

Breach by the lessor of the CPA provisions, such as failure to deliver goods fit for purpose, won't be cured by the buyout schedule alone.

The right to void the contract may still be needed in egregious situations. The remedy of the supplier to set the consumer back to zero if the contract is voided, as if it had never been, is a serious cost burden to the supplier and a serious inducement for suppliers to comply with the CPA.

In the marketplace, lessors will continue to take payments from consumers even though the goods have surpassed their stated economic life. The new buyout provisions should be explicit that the lease of the goods ends when the declining balance reaches zero. If the consumer wishes to continue a service contract after the goods are paid for, that is a separate issue.

We recommend:

- Covering situations beyond the "end of product life" or failures of the supplier to provide required maintenance work, such as when a consumer stops paying because the good was a "lemon".

- Considering the right to void a contract in egregious situations.

- That the new buyout provisions mandate that the lease ends when the declining balance reaches zero. This would avoid lessors continuing to take payments from consumers after the goods have surpassed their stated economic life.

**Question**: Is it appropriate to allow suppliers to charge "permitted contract end charges" in cases where the product has reached the end of its life, and the consumer exercises this termination right?

**Comments:**

The consumer should not have to pay any end of term or end of economic life charges to the lessor for the goods when the declining balance schedule is at zero. The consumer at this point should be the legal owner of the formerly leased goods.

The charges should arise only where the consumer seeks an action from the lessor such as:

- The consumer wants the goods to be detached and removed from their home;
- Disposal charges for the removed goods - waste disposal charges, used tire disposal charges or similar environmental waste charges imposed by regulatory bodies;
- Repairs to the home by reason of the detaching of the goods (e.g., wiring or electrical safety items);
- A reasonable administration fee to cover the lessor's costs for things like the discharge of any PPSA registration made for the lease and mandatory copy of the discharge provided to the lessee, sending a letter to release any insurance coverage naming the lessor as loss payee, or terminating any pre-authorized debit form filed with the lessee's financial institution; or
- Any amount owed to the lessor called for by the lease but not yet paid. For example, an unpaid parts invoice or interest on late payments.

We recommend:

- Specifying that the consumer should not have to pay any end of term or end of economic life charges when the declining balance schedule reaches zero. The consumer, at this point, should be the legal owner of the formerly leased goods. The charges should only arise where the consumer seeks an action from the lessor, as stated above.

***Proposed Application***

**Question**: Do you have any comments or concerns with the ministry's proposal to clarify that the new CPA's monetary thresholds would be pre-tax amounts? If so, please explain your answer.

**Comments:**

Additional explicit clarity on the treatment of taxes in relation to the monetary thresholds is welcomed. Further clarity could be provided by specifying that the pre-tax amount excludes any other levy charged on the purchaser by legislation. This broader concept would capture more of what the ministry intends to capture.

**Question**: If an existing contract formed under the current CPA includes a term that would be prohibited under the new CPA, should such a term be deemed void once the new CPA comes into force?

**Comments:**

The list of prohibited terms includes clauses that are very common in internet service agreements and are likely to show up in most consumer contracts. While many (but not all) of these clauses are already unenforceable in Ontario, given the widespread use of these clauses, we recommend that the industry be given an interim or transitional period to amend their contracts accordingly.

We recommend:

- Providing impacted suppliers with sufficient time—at least one year after finalizing the new CPA and regulations—to amend their contracts and processes to account for the new legislation.

- Clarifying any resulting amendments to carve out the prohibited terms for Ontario consumers will be "amendments to comply with law" and therefore subject to the "amendment by notice" regime.

**Question**: Should it be considered an offence if those terms remain in the consumer contract, after the new CPA is proclaimed into force?

**Comments:**

Given the widespread use of these clauses in consumer contracts, this approach would leave many online suppliers doing business in Ontario offside the law immediately on proclamation. Even if the ministry delays its own enforcement of the provisions, the legal risk of consumer claims may be significant for Ontario suppliers. As noted above, we recommend that the industry be given an interim or transitional period to amend their contracts accordingly.

We recommend:

- Providing impacted suppliers with sufficient time—at least one year after finalizing the new CPA and regulations—to amend their contracts and processes to account for the new legislation.

- Clarifying any resulting amendments to carve out the prohibited terms for Ontario consumers will be "amendments to comply with law" and therefore subject to the "amendment by notice" regime.

**Question**: If a contract formed under the current CPA is amended or continued after the new CPA comes into force, should that amended or continued contract be deemed a new consumer contract that is governed by the new CPA from the day the contract is amended or continued?

**Comments:**

We recognize the importance of ensuring the new CPA gradually applies to all existing consumer agreements. However, given the significant impact of the new CPA, we recommend that the industry be given an interim or transitional period to amend their contracts accordingly, as proposed above.

**Question**: What provisions of the new CPA, if applied to contracts formed under the current CPA, would result in unfairness to suppliers disproportionate to any benefit to consumers?

**Comments:**

As noted above, the list of prohibited contract clauses includes a series of provisions that are in nearly all service agreements formed over the internet, particularly those for multi-jurisdictional suppliers. Most of such clauses are already unenforceable in Ontario and are not disadvantaging consumers. If all consumers were to suddenly gain new rights contemplated by the new CPA with respect to contracts formed under the current CPA, it could severely damage the Ontario operations of countless online businesses. Even if the ministry delays its own enforcement of the provisions, the legal risk of consumer claims may be significant for Ontario suppliers.

**Question**: Do you support expeditiously transitioning from the current CPA to the new CPA? What costs arise when considering transition from the current CPA to the new CPA?

**Comments:**

We do support expeditiously transitioning to the new CPA, provided the industry be given an interim or transitional period to amend their contracts accordingly. There are major costs involved in updating the significant number of affected contracts, including legal costs, administrative costs, training, software updates, and translation. Any transitional period will need to be long enough to allow suppliers to spread these costs over an appropriate amount of time (e.g., at least one year).

**Question**: Are there any provisions of the new CPA that, if not applied to contracts formed under the current CPA, would raise concerns with consumers?

**Comments:**

As a general comment, the OBA takes a principled position against the retroactive and retrospective application of legislation and regulations. These provisions can fundamentally modify or extinguish the rights and obligations of contracts, contrary to the understanding of the parties when they entered into the contract. Being able to rely on contractual rights is essential to a functioning economy and retaining business in Ontario. The *Consumer Protection Act 2023* should avoid retroactive and retrospective application as much as possible.

***Increasing Transparency***

**Question**: Do you have any comments or concerns with the ministry's proposals to increase transparency of the public record? If so, please explain your answer.

**Comments:**

We support the overall goal of making the Consumer Beware List more meaningful. However, we have concerns that posting notices to the List when the ministry merely "intends" to commence action risks damaging the reputation of suppliers before it has been established that any offence has been committed. This concern is amplified by the potential that such notices may include the names of all registered officers and directors. Posting such information to a list explicitly titled the "Consumer Beware List" prior to any offence determination could do unwarranted reputational damage. If directors and officers that are not directly the subject of the compliance activity or enforcement action are to be disclosed, it should be outlined in clear and predictable policies and limited to egregious or repeated issues (this was alluded to – but clarity is needed).

We recommend:

- Not posting Notices of Proposal indicating merely that the Ministry "intends" to commence action. The impact to reputation can be irreversible, regardless of any disclaimers about the right to a hearing, appeal, or review. Notices should be posted only when action has commenced or when wrongdoing has been established (or is being alleged). Alternatively, at the very least, the proposed list should be separate from the "Consumer Beware List" (or this list should be renamed to avoid reputational damage).

- The discretion to post director/officer information—even if they are not directly the subject of compliance activity or enforcement—should be limited to egregious or repeat contraventions and be informed by factors that are publicly available.

- We support expanding the scope of legislation that the public record applies to, and the tiered posting periods depending on the severity of the enforcement or compliance action.

***Informing Future Regulations***

**Question**: Should the government require businesses to provide a contract cancellation option that is available through the same method and is as expedient as the method used to enter the contract?

**Comments:**

We support establishing rules for how consumers may cancel agreements.

**Question**: Should the business be entitled to contact a consumer to dissuade them from cancelling their contract?

**Comments:**

Yes. This approach is both business- and consumer-friendly. From a business perspective, it allows the supplier to make its case to keep the customer. From a consumer perspective, it may allow the consumer to take advantage of retention offers that would not otherwise be available. We support clarifying that the supplier is not prohibited from contacting a consumer.

**Question**: If so, should this contact be limited, such as only being permitted to make contact once before processing the cancellation request?

**Comments:**

If a consumer indicates they are not interested in any offers to continue, and that they wish to cancel the contract, that should end the back-and-forth.

**Question**: Should businesses be required to provide consumers with clear cancellation instructions at the time of entering a subscription?

**Comments:**

We support this approach but caution that such instructions may change over time. A business may evolve from bricks-and-mortar or from telephone sales to an online environment, and a change in the approach to cancellation may not correspond with an amendment to the underlying agreement. The ministry should consider a different approach whereby cancellation instructions are readily available to consumers (instead of requiring them to find their original agreement).

We recommend:

- Establishing an obligation on suppliers to make cancellation instructions readily available to consumers instead of at the time of contracting, whether through the supplier's contact information or website.

**Question**: Should a business be required to adjust the timing of the reminders based on different billing cycles, such as bi-weekly, monthly, or annually, especially when the billing cycle does not align with the subscription period (e.g., a bi-weekly billing for an annual subscription)? What should such adjustments be?

**Comments:**

It is difficult to establish a rule of general application for renewal reminders with the variety of renewal terms available in the market. This would suggest that an approach based on billing cycles may make more sense. However, many subscription contracts are monthly, and it may be excessive for consumers to receive notices every month (especially if the standard notice period—30 to 90 days—is longer than most months). Therefore, we recommend creating thresholds that do not overly burden suppliers and consumers with frequent notices that will eventually become meaningless.

More importantly, it is not clear that any such policy is possible with the proposed language regarding continuations and amendments, which effectively removes the concept of automatic renewal. Under the proposed language, any renewal of a fixed-term agreement would require explicit consent (making any renewal reminder unnecessary). All other contracts are either indefinite term contracts (which are not strictly "renewing") or fixed-term contracts that are "continuing" into indefinite term contracts (and already subject to a notice requirement).

We recommend:

- Clearly establishing what it means to "renew" an agreement under the current proposals regarding amendments and continuations.

- Carefully establishing any billing reminder thresholds and obligations to avoid deluging consumers with notices and overburdening suppliers who will already have a much higher administrative burden in Ontario than in any other Canadian province.

***Feedback and Next Steps***

**Question**: Are there any administrative costs associated with compliance, such as time spent learning about the regulatory proposals or revising contracts? If yes, please explain.

**Comments:**

Given the significant changes to standard clauses that are now prohibited and amendment provisions/processes that must now be heavily edited, there are significant costs involved in updating the large number of affected contracts, including legal costs, administrative costs, training, software updates, and translation.

**Question**: How much time do you estimate is necessary to fully prepare for the implementation of the new CPA?

**Comments:**

As noted above, given the significant changes required, any transitional period will need to be long enough to allow suppliers to spread these costs over an appropriate amount of time (e.g., at least one year).

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