



Collection and Debt Settlement Services Act
regulation reform

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Consumer Services

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ONTARIO
BAR ASSOCIATION
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Executive Summary

The Ministry has proposed regulations that would have the effect of regulating lawyers as collection agencies under the *Collection and Debt Settlement Services Act*. This submission identifies how the Act and its regulations would apply to lawyers in the province of Ontario, and goes on to propose an alternative regulatory approach.

The OBA proposes a model in which lawyers who engage in certain prohibited collection activities do not enjoy an exemption from liability as set out under the Act. In addition, lawyers acting in a capacity other than their professional capacity as lawyers when engaging in collection activity, would not enjoy an exemption from the application of the Act's regulatory regime.

The OBA proposes the following provisions for the regulations under the Act that, if adopted, would apply to lawyers in Ontario:

Application of Act

18.1 (1) A licensee under the *Law Society Act* is not exempt from the application of the following sections of the *Collection and Debt Settlement Services Act*:

- (a) sub-sections 22 (b), (d), (e) and (f); [Prohibited Conduct]
- (b) Section 22.1 [No waiver of rights under the CDSSA]
- (c) Section 27 [Director may obtain Order to Comply]
- (d) sub-section 28(1)(b), (c) and (d); [Offences]
- (e) section 29.0.1(1) through (5), and (7) through (9) [Administrative Penalties]

18.1 (2) A licensee under the *Law Society Act* is not exempt from the application of the following sections of this regulation:

- (a) Section 20; [definitions]
- (b) sub-section 22 (3) through (9); and, [contacting debtors relations, employer, timing of contact]
- (c) section 24 [false or misleading information].



18.2 (1) A licensee under the *Law Society Act* is not exempt from the *Collection and Debt Settlement Services Act* where:

- (a) the licensee advertises himself, herself or itself as a person who obtains or arranges for payment of money owing to another person or who holds oneself out to the public as providing such a service except in his or her professional capacity as a lawyer on behalf of a client; or,
- (b) the licensee has purchased the debt from another person, or the debt has been assigned to the licensee by another person, and the licensee is seeking to collect the debt on their own behalf and not in their professional capacity as a lawyer on behalf of a client.

A comprehensive analysis of the proposals and their policy rationale, is set out below.



Introduction

The Ontario Bar Association (the “**OBA**”) is pleased to provide comments to the Ministry of Government and Consumer Services (the “**Ministry**”) in respect of proposed regulations under the *Collection and Debt Settlement Services Act*,¹ (the “**CDSSA**” or the “**Act**”).

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents over 16,000 lawyers, judges, law professors and law students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist the government of Ontario with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was prepared primarily by members of the OBA’s Insolvency Law and Family Law sections, with input from the OBA’s Civil Litigation section. Members of these sections represent the broadest possible range of clients, including debtors, creditors and others, providing services that can only be provided by a licensee under the *Law Society Act* and services incidental to providing those services.

Background

As you know, the Act regulates the conduct of collection agencies, the collection of debts and the delivery of debt settlement services. As set out in more detail below, lawyers (and their employees) were previously exempted from the application of the Act.

However, the Act was amended in the spring of 2017 and, on a day to be named by proclamation of the Lieutenant Governor, the exemption for lawyers (and their employees) will now be “subject to the regulations”.² We understand that the intent in bringing forward this legislation was to “ensure that consumers with debt in collection are better protected from overly aggressive debt collection practices.”³ New regulations under the amended Act are proposed to, amongst other things, define “when lawyers,

¹ R.S.O. 1990, c. C.14.

² See Bill 59, *Putting Consumers First Act (Consumer Protection Statute Law Amendment)*, 2017.

³ Ontario, Legislative Assembly, [Hansard](#), Parliament 41 Session 2 (November 16, 2016) at 0920.



paralegals and law firms must register under the Act in order to carry out collection activity.”⁴

While we would support the goal of protecting consumers from overly aggressive debt collection practices, in our view, the proposed regulation creates an administrative and regulatory framework that is unclear, inconsistent and overbroad in its application to lawyers. In fact, as we will outline below, there appear to be several instances in the proposed regulation that would appear to directly conflict with a lawyer’s professional obligations.

The submission that follows outlines several concerns that we have identified in the proposed regulation. The submission then outlines alternative regulatory approaches that, we believe, will achieve the Ministry’s policy goals while avoiding these negative effects.

We would be pleased to work with the Ministry to ensure that any regulation that comes into force is effective at meeting the Ministry’s policy goals, while respecting the important role that lawyers play representing clients in Ontario’s civil justice system.

The CDSSA Regime

The Act regulates the conduct of collection agencies, and the collection of debts and the delivery of debt settlement services. The essence of the Act is to protect consumer debtors from unfair collection practices and to ensure that consumer debtors who engage the services of debt settlement services are protected.

The Act defines a “collection agency” as a person who

- (a) obtains or arranges for payment of money owing to another person or who holds oneself out to the public as providing such a service,
- (b) sells or offers to sell forms or letters represented to be a collection system or scheme, or
- (c) provides debt settlement services; or
- (d) purchases debts that are in arrears and collects them⁵.

⁴ Consultation on Collection and Debt Settlement Services Act regulation reform, [Ontario Regulatory Registry](#).

⁵ Item (d) arises from an amendment that is not yet in force.



Debt settlement services are defined to mean:

*offering or undertaking to act for a debtor in arrangements or negotiations with the debtor's creditors or receiving money from a debtor for distribution to the debtor's creditors, where the services are provided in consideration of a fee, commission or other remuneration that is payable by the debtor.*⁶

The Act prohibits any person from carrying on business as a “collection agency” without being registered under the Act and regulates the conduct of registrants.⁷

Exemption for lawyers removed

The CDSSA currently provides a blanket exemption for lawyers.⁸ However, upon proclamation of certain amendments the Act will be amended to make that exemption “subject to the regulations”. There is a proposal to amend the Act and the Regulations to the Act (the “**Regulations**”) to provide that a lawyer or law firm is exempt from the CDSSA regime only if all services provided by the lawyer or law firm are,

- (a) services that can only be provided by a lawyer under the *Law Society Act*,
or
- (b) services that are incidental to providing such services.

There is, however, a significant exception to this exemption such that the CDSSA regime will be applicable to lawyers and law firms who are providing legal services to their clients. A lawyer or law firm will not be entitled to an exemption where:

- (a) the primary activity of the lawyer, or an employee of a law firm, for any client is to act as a collection agency or collector, or to offer debt settlement services in respect of a debt, other than a debt recognized in a court judgement; or
- (b) the lawyer or law firm advertises himself, herself or itself as a collection agency or collector or as providing debt settlement services.

The Regulations therefore define the Act's application such that where a single lawyer in a firm (whether a partner or associate) acts as a collection agency or offers debt settlement services to a single client, the entire firm may be subject to the CDSSA regime.

⁶ CDSSA, s. 1(1). Note that the negotiation of legal interest, rights or responsibilities is included in the definition of “legal services” under the *Law Society Act*, R.S.O. 1990, c. L.8.

⁷ CDSSA, s. 4(1).

⁸ CDSSA, s. 2(1)(a)



Uncertainty of application

The application of the CDSSA regime to lawyers and law firms would depend on the “primary activity” of the lawyer or any member of the firm. The term “primary activity” is undefined and its meaning is uncertain.⁹ Is, for example, the primary activity of an insolvency lawyer who represents debtors 75% of the time and creditors the other 25% the provisions of debt settlement services? Is a lawyer’s “primary activity” the issue to be determined on a year-by-year or some other basis?

Scope of application

The current exemption is clear insofar as it exempts lawyers “in the regular practice” of their profession. However, in our view, the proposed amendments will effectively eliminate the exemption for most lawyers and law firms on Ontario. In particular, as will be described below, firms that practice family law, that engage in collection activity, or that have insolvency lawyers that represent debtors are not likely to remain exempt under the proposed regulation.

A law firm will be exempt from the application of the CDSSA only if all of the services provided by a law firm are services that can be provided only by a lawyer under the *Law Society Act* or are incidental to those services. This general exception will not apply, however, where the “primary activity” of any lawyer in the firm is to collect debts on behalf of clients or offer “debt settlement services”.

By way of example, it is important for the Ministry to consider that the *Family Law Act*¹⁰ is commonly referred to as a “debtor-creditor statute,”¹¹ and creates debtor-creditor relationships with respect to property, as well as in respect of support payments. With respect to property, the *Family Law Act* creates a regime which, following events like separation, divorce or the death of a spouse, triggers a valuation date. If, at the valuation date the net family property of one spouse is less than that of the other, then the spouse with the lesser net family property is entitled to one-half the difference between them.¹² Family law lawyers are frequently retained by clients to obtain so-called ‘equalization payments’. Similarly, with respect to support payments, the *Family Law Act* creates a regime under which a spouse becomes obligated to make support payments to their former spouse or children. Family law lawyers are frequently retained to obtain these payments. It is important to note that, in many instances, a court order is not necessary

⁹ *Consultation on Collection and Debt Settlement Services Act Regulation Reform* uses the term “most of”: see p 4.

¹⁰ R.S.O. 1990, c. F.3

¹¹ See, for instance, *Taus v Harry*, 2016 ONSC 219 (CanLII) at para. 28.

¹² See *Stone v. Stone*, 2001 CanLII 24110 (ON CA) at para. 26, quoting *Rawluk v. Rawluk*, 1990 CanLII 152 (SCC).



before lawyers are called on to obtain the payments.

Similarly, in practical application, few, if any, of the mid- to large-sized “full service” firms in the province would be entitled to an exemption under the proposed regulation. The definition of “debt settlement services” is, for example, so broad that would capture any lawyer who represents a debtor in an insolvency proceeding. The primary role of a debtor lawyer is to act for a debtor in negotiations with creditors and this is not an activity that can be provided only by a lawyer under the *Law Society Act*. Most firms with an insolvency practice have lawyers who could be described as “primarily” acting for debtors in negotiations with creditors. Inconsistent regulation

The CDSSA regime would only apply to lawyers whose “primary activity” is collections or acting for debtors and to firms who have a partner or associate whose “primary activity” is collections or acting for debtors. This will create an inconsistent regulatory regime for lawyers in the sense that lawyers and law firms who engage in debt collection or insolvency practice for debtors as only a small part of their practice will not be subject to the CDSSA regime.

Impact of the application of the CDSSA regime to lawyers

The impact of the application of the proposed regulation, and the CDSSA regime to lawyers and law firms would result in a significant increase, and often duplication, in regulatory requirements. In addition, as set out below, the application of the CDSSA regime would materially impact the ability of lawyers to serve their clients, and civil justice in Ontario. We note the following, in no particular order of significance:

Cross-border impact. The CDSSA applies where either (a) the “collection agency” or “collector” or (b) the debtor is “located in” Ontario.¹³ In the context of a law firm, this would make law firms located in other provinces who act on behalf of an insolvency debtor who is “located in” Ontario in dealing with their creditors in that other province subject to requirements of the CDSSA.

Practice restrictions. The Regulations prohibit registration under the CDSSA unless the individual registrant or someone in management “has had at least two years of actual experience in each phase of the collection agency business, or has related experience that, in the opinion of the Registrar, is equivalent to that actual experience” and requires that registrants pass a written examination.¹⁴ This could, if there is no exemption for lawyers, effectively restrict qualified lawyers from

¹³ CDSSA, s. 2(0.1).

¹⁴ Regulations, ss. 12(1) and 15.



providing collection or insolvency-related services to their clients.

Conditions of practice. There may be conditions imposed on a registration by the Registrar.¹⁵ This power could be employed in a manner that would permit the Registrar to impose restrictions on the ability of a lawyer to represent his or her client or effectively prohibit a lawyer from acting on instructions given by a client.

Disclosure of precedents. The Regulations require that:

*Every applicant for registration as a collection agency shall file with the Registrar copies of all forms and form letters that it proposes to use in dealing with debtors, as well as copies of forms of agreement that it proposes to use in its dealings with persons for whom it acts or proposes to act.*¹⁶

Disclosure of financial information: The Regulations require that:

*Where an applicant for registration is a corporation, a copy of a current financial statement prepared by a person licensed under the Public Accounting Act, 2004, or where the corporation is recently incorporated or is a sole proprietorship or partnership, an opening financial statement prepared by a person licensed under the Public Accounting Act, 2004 shall be attached to the application.*¹⁷

Segregation of books and records. The Regulations require that registrants keep the books and records relating to their activities relating to debt collection and debt settlement services separate and apart from books and records relating to other activities.¹⁸

Inspection and search warrants. The CDSSA provides the Registrar, or any person designated by the Registrar, with the ability to conduct an inspection of the business premises of a registrant “at any reasonable time” and mandates that the person conducting the inspection:

- (a) is entitled to free access to all money, valuables, documents and records of the person being inspected that are relevant to the inspection;
- (b) may use any data storage, processing or retrieval device or system used in carrying on business in order to produce information that is relevant to the

¹⁵ CDSSA, s. 6(2).

¹⁶ Regulations, s. 13(4).

¹⁷ Regulations, s. 13(5). See also ss. 13(6) and 14.

¹⁸ Regulations, s. 13(12.1).



inspection and that is in any form; and

- (c) may, upon giving a receipt for them, remove for examination and may copy anything relevant to the inspection, including any data storage disk or other retrieval device in order to produce information, but shall promptly return the thing to the person being inspected.

There are also provisions in the CDSSA that provide for the issuance of search warrants and for the seizure of documents. In our view, when applied to lawyers' files the Act does not go far enough to preserve client confidentiality and solicitor-client privilege.

Debt settlement services agreement. The CDSSA requires that a registrant providing debt settlement services enter into a debt settlement services agreement that meets prescribed criteria.¹⁹

Regulation of fees. The CDSSA and the Regulations regulates payment for debt settlement services²⁰. If applied to a lawyer, the CDSSA regime would, among other things: (a) restrict the ability of a lawyer to accept a retainer or obtain security from a debtor/client²¹; and (b) restricts the amount that a registrant may charge to a debtor for "debt settlement services."²² The *Solicitors Act*²³ already provides for the Court to have oversight over amounts charged by a lawyer to her or his clients.

Restrictions on practice/interference with the solicitor-client relationship. The Regulations impose restrictions on the methods by which a lawyer may demand payment from a creditor and on the ability of a lawyer to advise her or his client. Subsection 23(2), for example, would prohibit a lawyer from recommending to a creditor client that legal proceedings be commenced without first telling the debtor of his or her intention to make that recommendation.²⁴ In our view, this would conflict with a lawyer's duty to their client.

Restrictions on service of process. The Regulations, when applied to lawyers, would prohibit a registrant lawyer from in any way contacting a debtor who denies owing a debt.²⁵ This would prevent a lawyer from, for instance, delivering a statement of claim to a debtor.

¹⁹ CDSSA, s. 16.5 and Regulations, ss. 26 and 27

²⁰ CDSSA, s. 16.6.

²¹ CDSSA, s. 16.6(1) and Regulations, s. 28(1)

²² Regulations, ss. 28(3)-(5).

²³ R.S.O. 1990, c. S.15.

²⁴ Regulations, s. 23(2).

²⁵ Regulations, s. 22(1).



Sanctions for non-compliance. The CDSSA imposes penal liability for failure to comply with the CDSSA or the Regulations.²⁶ The CDSSA also provides for several absolute liability administrative monetary penalties.²⁷

Onus on client. The CDSSA appears to impose on clients an obligation to determine whether a lawyer they retain is required to be registered under the CDSSA.²⁸ There are serious sanctions for failure to comply. Depending how this provisions is applied, it may place an unfair onus on clients and subject client to unfair sanctions.

Duplication in regulation. The CDSSA regime would, if applicable to lawyers and law firms, create a duplicate regulatory regime. For example:

Discipline. The CDSSA subjects registrants to discipline by the Registrar.²⁹

Advertising. The CDSSA addresses advertising by registrants and provides the Registrar with oversight over advertising including the ability to order a registrant to stop any offending advertising.³⁰

Trust funds. The CDSSA and the Regulations require that a registrant maintain a separate trust account.³¹

Regulation of fees. The CDSSA and the Regulations regulate the fees that may be charged for “debt settlement services”.

Licensing. The Regulations require that registrants pass a written examination.³²

Application Beyond Consumer Debt

The CDSSA regime is primarily intended as consumer protection legislation. As currently drafted, however, the regime would be applicable to lawyers and law firms providing advice to large sophisticated debtors attempting to deal with their creditors (for instance, in bankruptcy matters or proceedings under the *Companies' Creditors Arrangement*

²⁶ CDSSA, s. 28.

²⁷ CDSSA, s. 29.0.1.

²⁸ CDSSA, s. 24(1).

²⁹ See CDSSA, ss. 7-9, and 12, 13 and 15.

³⁰ CDSSA, ss. 25(1) and (2) and 21.

³¹ Regulations, ss. 17 and 18.

³² Regulations, s. 15.



Act³³). The definition of “debt settlement services” is not restricted to individuals attempting to deal with consumer debt.³⁴

Exemptions Maintained for Certain Professions

We note that exemptions to the CDSSA regime are maintained for certain professions. For example, there is a blanket exemption for insurers and insurance agents, real estate agents and brokers, mortgage brokers, credit unions and banks, and licensed insolvency professionals.

In our view, this will create an uneven regulatory environment. In the insolvency context, for example, a licensed insolvency professional dealing with a debtor to assist that debtor in dealing with his or her creditors would not have to be registered under the CDSSA, but the debtor’s lawyer would.

While the proposed amendments appear intended primarily to protect the public from unfair debt collection practices, there appears to be no rationale to apply the full CDSSA regime to lawyers generally.

Indeed, in our view, the type conduct that the Regulations address regarding collection activity by registrants³⁵ is, in the case of a lawyer, already addressed through existing mechanisms, such as the by *Rules of Professional Conduct*. For instance, rule 2.1-1 of the *Rules of Professional Conduct* provides that lawyers have a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity. The Rule is aimed at dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice and could be applied in the context of unfair collection practices by a lawyer.

Alternative Regulatory Approaches

To consider alternative regulatory approaches, it is important to clearly understand the means by which the CDSSA applies in Ontario to lawyers under the scheme that will come into force upon proclamation by the Lieutenant Governor. Section 2(0.1) states:

This Act applies to a collection agency or collector that deals with a debtor if either

³³ R.S.C. 1985, c. C-36 (the “CCAA”).

³⁴ CDSSA, s. 1((1). While this would not address all of the concerns referenced in this document, restricting the definition of “debt settlement services” to individual debtors and consumer debt would at least limit the application of the CDSSA regime to consumers.

³⁵ See Regulations, ss. 21-25.



the debtor or the applicable one of the collection agency or the collector is located in Ontario when the dealing takes place.

Subject to proclamation, section 2(1)(a) of the CDSSA will state as follows:

This Act does not apply, (a) subject to the regulations, to a barrister or solicitor in the regular practice of his or her profession or to his or her employees;

Also subject to proclamation, section 30(1) will state, in part, that the Lieutenant Governor in Council may make regulations:

(b) exempting persons or classes of persons from this Act or the regulations or any provisions thereof in addition to those exempted under section 2;

(b.1) specifying requirements that a person must meet, in addition to those set out in any of clauses 2 (1) (a) and (h) to (m), in order to be exempt from the application of this Act under those clauses;

(b.2) specifying provisions of this Act and the regulations, except for subsection 4 (1) of this Act, to which a person described in any of clauses 2 (1) (a) and (h) to (m) is subject in the circumstances specified in the regulations;

In short, these provisions grant a broad regulation making authority to the Lieutenant Governor in Council to specify requirements that a lawyer must meet to be exempt from the application of the CDSSA, and to specify individual provisions that apply to a lawyer under the circumstances specified (and despite the lawyer's exemption from the rest of the Act).

Importantly, in the absence of a regulation addressing the application of the CDSSA to lawyers, the CDSSA would continue to exempt lawyers. It is therefore incumbent on the Ministry to take active steps to define how the CDSSA will apply to lawyers in Ontario.

Having established the broad regulation making power under the CDSSA, we must now turn to determining how to achieve Ministry's stated policy goal, being to ensure that consumers with debt in collection are better protected from overly aggressive debt collection practices. In this regard, we turn to an explanation of two models employed that are instructive, the British Columbia *Business Practices and Consumer Protection Act*³⁶ model (the "**BC Model**"), and the Ontario *Mortgage Brokerages, Lenders and Administrators Act* (the "**Mortgage Broker Model**").

³⁶ SBC 2004 c. 2. ("BPCPA"). Online: http://www.bclaws.ca/civix/document/id/lc/statreg/04002_00



The BC Model

In the BC Model, both debt collection and settlement services are regulated under the BPCPA. Individuals are normally required to obtain a licence and comply with the licensing regime where they act as a “collection agent” or a “debt repayment agent”. However, lawyers are exempt from the requirement to obtain a licence, and from the associated licensing regime, where they act as a collection agent or debt repayment agent “in the regular practice of their profession.” Despite their licensing exemptions, lawyers are not exempt from the portion of the legislation which prohibits overly aggressive debt collection practices, such as harassment and communicating with a debtor at their place of employment. Appendix A sets out a detailed review of the relevant sections of the BPCPA.

The Mortgage Broker Model

In Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “**MBLA Act**”)³⁷ regulates mortgage dealing, trading, lending and administration. It requires that individuals and entities wishing to provide those services obtain licenses as set out in the MBLA Act. Licensees under the MBLA Act are required to comply with licence conditions and standards of practice prescribed by regulation.

Lawyers are exempt from the requirement to obtain a licence under the MBLA Act where they deal in mortgages, trade in mortgages or administer mortgages in Ontario, as long as they act in their professional capacity as a lawyer on behalf of a client and do not hold themselves out as dealing, trading or administering mortgages except in their professional capacity for their clients. A lawyer’s employees are exempt from the requirement for a licence where they deal or trade in mortgages for their employer.

Lawyers are, however, not exempt from the requirement to obtain a licence under the MBLA Act where they engage in mortgage lending, as defined in the MBLA Act. Similarly, a lawyer’s employees are not exempt from the requirement to obtain a licence to engage in mortgage lending, or mortgage administration. Appendix B sets out a detailed review of the relevant sections of the MBLA Act.

Application to the Proposed Regulations

In our view, there is much to commend about the BC Model, and the MBLA Act with respect to collection activity. Lawyers who engage in prohibited collection activities as set out under the BPCPA do not enjoy an exemption from penalty as set out under that act. This should have the effect of deterring this kind of conduct. Similarly, lawyers acting in a capacity other than their professional capacity as lawyers when engaging in collection activity, should not enjoy an exemption from the application of the CDSSA. In our view,

³⁷ S.O. 2006, c. 29 (the “[MBLA Act](#)”).



this model could be implemented with a few changes the proposed regulation.

It is, however, important to note here that lawyers provide “debt settlement services” as defined under the CDSSA as a core service on behalf of their clients in several areas of law. Given that lawyers are already subject to regulations on practice and professionalism that apply in the provision of these services, our view is that the CDSSA should not apply to lawyers in respect of debt settlement services.

We will now attempt to set out our view of the various sections of the regulation, with an explanation of the rationale for each proposal. Section 18.1 of the regulation should be amended to read as follows, with respect to the application of the CDSSA to lawyers:

Application of Act

18.1 (1) A licensee under the *Law Society Act* is not exempt from the application of the following sections of the *Collection and Debt Settlement Services Act*:

- (a) sub-sections 22 (b), (d), (e) and (f); [Prohibited Conduct]
- (b) Section 22.1 [No waiver of rights under the CDSSA]
- (c) Section 27 [Director may obtain Order to Comply]
- (d) sub-section 28(1)(b), (c) and (d); [Offences]
- (e) section 29.0.1(1) through (5), and (7) through (9) [Administrative Penalties]

Section 22 of the CDSSA sets out “Prohibited Conduct”. As with the BC Model, lawyers could be subject to these restrictions. With respect to proposed section 18.1 (a) above, lawyers should not be subject to section 22 (a) of the CDSSA because they may attempt to collect “money in addition to the amount owing by the debtor” in the form of legal costs. While normally recognized in a court judgment, costs are often negotiated as between counsel in the settlement of disputes. Similarly lawyers should not be subject to section 22 (c) given the use of so-called forbearance agreements, which a lender may agree to delay enforcing its rights against a debtor, such as in the mortgage enforcement context. Section 22 (d) may require amendment for application to lawyers. For example, it could be amended to indicate that lawyers must deal with a debtor in a name authorized by the *Law Society Act*.

With respect to the application section 29.0.1, we submit that absolute liability administrative penalties should not apply to lawyers acting reasonably, and not without an opportunity for a hearing. Therefore section 29.0.1(6), which imposes administrative



penalties in an absolute liability basis, and sub-section 29.0.1(10), which restricts a penalized person's right to a hearing, should not apply to lawyers. Indeed, we have previously raised concerns about the creation of absolute liability offences in the context of other submissions to government. Although taken from a submission with respect to immigration matters, the reasoning in the following paragraph applies equally in the context of collection and debt settlement legislation:

The appearance of liability for behaviour that is not intentional, or even culpable, may deter reputable organizations and individuals from participating in immigration programs, while being unlikely to deter bad actors who count on not being caught. In our view, at the very least, [the relevant legislation] should be amended to ... explicitly provide that representatives will not be liable when acting reasonably and honestly.³⁸

The remaining sections listed above set out provisions that, in our view, would be necessary to apply to lawyers in order for the regime to prohibit and penalize inappropriate collection activity.

Section 18.2 of the proposed regulation should be amended to read as follows, with respect to the application of the regulation to lawyers:

18.1 (2) A licensee under the *Law Society Act* is not exempt from the application of the following sections of this regulation:

- (a) Section 20; [definitions]
- (b) sub-section 22 (3) through (9); and, [contacting debtors relations, employer, timing of contact]
- (c) section 24 [false or misleading information].

Importantly, sub-sections 22(3) through (9) set out the bulk of the conduct prohibited under the Regulations, and lawyers would be liable for conduct including improperly contacting a debtor's spouse (s. 22(3)), employer (s. 22(4)), or contacting a person by telephone at an inappropriate hour (s. 22(6)).

However, several sections should not apply to lawyers. In our view, sections 21, 21.1 and 21.2 would interfere with a lawyer's ability to act for their clients and send demand letters to debtors in the regular practice of their profession. Indeed, inappropriate

³⁸ Ontario Bar Association, *Comment on Draft Regulations (Phase 2) Under the Ontario Immigration Act, 2015*, January 2015.



content or conduct by lawyers in their communications with members of the public are already subject to oversight by rule 7.2-4 of the Rules of Professional Conduct:

7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.³⁹

Sub-section 22(1) is not compatible when applied to lawyers as it would prohibit a lawyer from serving a debtor with a properly issued statement of claim or other court process in the event that a debtor denies owing a debt. Lawyers are already required to comply with the requirement set out in sub-section 22(2), as under the *Rules of Professional Conduct* lawyers must, in general, communicate with a represented person's lawyer at all times.

Section 23 is incompatible when applied to lawyers, as lawyers are required to act on client instructions in determining when to issue a claim or commence a legal proceeding.

Similarly, section 25 of the regulation is incompatible when applied to lawyers, as it would appear to conflict with the concept of court costs.

We also propose that a new section be added to the regulation. In proposed section 18.2 of the Regulation, below, we set out instances in which lawyers should not be exempt from the CDSSA as a whole. Two such instances have been identified. First, when the lawyer holds themselves out as arranging for payment of money owing other than in their capacity as a lawyer, and secondly, where the lawyer has purchased or been assigned the debt, and is seeking to collect the debt on their own behalf.

In our view, this formulation is contingent upon the solicitor-client relationship being formed as between the lawyer and their client, and would not catch instances where lawyers (and law firms) are collecting debts owed to the lawyer (or law firm) since those debts are not purchased or assigned to the lawyer. Our proposed draft regulation reflects this approach:

18.2 (1) A licensee under the Law Society Act is not exempt from the Collection and Debt Settlement Services Act where:

(a) the licensee advertises himself, herself or itself as a person who obtains or arranges for payment of money owing to another person or who holds oneself out to the public as providing such a service except in his or

³⁹ Rules of Professional Conduct. Online: https://www.lsuc.on.ca/with.aspx?id=2147502075#ch7_sec2-responsibility-to-lawyers-and-others



her professional capacity as a lawyer on behalf of a client; or,

(b) the licensee has purchased the debt from another person, or the debt has been assigned to the licensee by another person, and the licensee is seeking to collect the debt on their own behalf and not in their professional capacity as a lawyer on behalf of a client;

Conclusion

Thank you for the opportunity to make these submissions. As stated above, we would be pleased to work with the Ministry to ensure that any regulation that comes into force is effective at meeting the Ministry's policy goals, while respecting the important role that lawyers play representing clients in Ontario's civil justice system.



Appendix A: The BC Model

The *Business Practices and Consumer Protection Act*⁴⁰ regulates a broad range of activities, including Debt Collection in part 7 of the BPCPA. Part 7 has two divisions: Division 1 regarding “Prohibited Debt Collection Practices” and Division 2 regarding “Collection Agents and Debt Repayment Agents”.

Division 1, regarding prohibited practices, in section 113 defines a “collector” as a “person, whether in British Columbia or not, who is collecting or attempting to collect a debt.”

Section 114 to 123 set out prohibitions on conduct that a collector must not engage in, such as harassment (s. 114), collecting without proper disclosure (s. 115), communicating with a debtor at their place of employment (s. 116).

Division 2, section 125 defines “collection agent” and “debt repayment agent” as follows:

"collection agent" means a person, whether in British Columbia or not, who

(a) in the course of business collects or attempts to collect payment of a debt for another person, or

(b) in the course of business takes an assignment of a debt due to another person for the purpose of collecting or attempting to collect payment of the debt,

and includes a bailiff;

"debt repayment agent" means a person who acts for or represents, or offers to act for or represent, a debtor in arrangements or negotiations with the debtor's creditors, which arrangements or negotiations may include receiving money from the debtor for distribution to the debtor's creditors, in consideration for a fee, commission or other remuneration that is payable by the debtor.

Part 14 of the BPCPA governs licences and the general power to make regulations. Section 142 and 142.1 permit the LGIC to “designate”, by regulation, any “business, industry, trade, profession, occupation or employment,” subject to exemptions for activities to which certain acts already apply, including the *Legal Professions Act*, under which lawyers are regulated as lawyers.

Section 143 states that a “person must not engage in a designated activity unless the person is (a) licensed to engage in the designated activity, or (b) exempted by regulation

⁴⁰ SBC 2004 c. 2. (“BPCPA”). Online: http://www.bclaws.ca/civix/document/id/lc/statreg/04002_00



from the requirement to be licensed.”

Section 194(3) provides that the LGIC may make regulations “exempting a person from the application of all or part of this Act or the regulations or establishing circumstances when all or part of this Act or the regulations do not apply.”

Section 1.1 of the *Debt Collection and Repayment Regulation*⁴¹ designates a collection agent and a debt repayment agent as designated activities for the purposes of section 142 of the BPCPA.

Section 3(a) of the Regulation, however, provides that “lawyers in the regular practice of their profession” are exempt from the requirement to have a licence.

⁴¹ B.C. Reg. 295/2004. Online: http://www.bclaws.ca/civix/document/id/complete/statreg/295_2004



Appendix B: The MBLA Act

The MBLA Act regulates dealing in mortgages in Ontario, trading in mortgages in Ontario, carrying on business as a mortgage lender in Ontario and carrying on the business of administering mortgages in Ontario, and provides for four types of licences to be issued by the Superintendent of Financial Services for individuals and entities wishing to provide those services. Licensees under the MBLA Act are required to comply with their licence conditions and with the standards of practice that are prescribed by regulation. Exemptions are provided for financial institutions and their employees, as well as persons and entities that provide simple referrals if they provide specified information to the prospective lender and prospective borrower and comply with additional requirements that may be prescribed by regulation. Other exemptions from the requirement to be licensed, including exemptions for lawyers, have been prescribed by regulation. Details of the regime are provided below.

The MBLA Act – Mortgage Dealing, Trading, Lending and Administration

Section 2 of the MBLA Act defines when a person or entity is dealing in mortgages in Ontario, and sets out prohibitions on dealing in mortgages without an appropriate licence, or an exemption from the requirement to have such a licence. Dealing in mortgages includes:

- soliciting another person or entity to borrow or lend money on the security of real property;
- providing information about a prospective borrower to a prospective mortgage lender, whether or not this Act governs the lender;
- assessing a prospective borrower on behalf of a prospective mortgage lender, whether or not this Act governs the lender; and,
- negotiating or arranging a mortgage on behalf of another person or entity, or attempting to do so.

Section 3 of the MBLA Act defines when a person or entity is trading in mortgages in Ontario, and sets out prohibitions on trading in mortgages without an appropriate licence, or an exemption from the requirement to have such a licence. Trading in mortgages includes the following:

- soliciting another person or entity to buy, sell or exchange mortgages.
- buying, selling or exchanging mortgages on behalf of another person or entity.
- buying, selling or exchanging mortgages on the person's or entity's own behalf.



Section 4 of the MBLA Act defines when a person or entity is mortgage lending (i.e. a mortgage lender) in Ontario, and sets out prohibitions on mortgage lending without an appropriate licence, or an exemption from the requirement to have such a licence. A person is mortgage lending when they lend money in Ontario on the security of real property, or hold them self out as doing so.

Section 5 of the MBLA Act defines when a person is administering mortgages in Ontario, and sets out prohibitions on mortgage administration without an appropriate licence, or an exemption from the requirement to have such a licence. Mortgage administration includes:

- receiving payments from a borrower under a mortgage on behalf of another person or entity, and remitting the payments to or on behalf of that person or entity.

Sections 2, 3 and 5 also permit additional activities to be prescribed by regulation that constitute dealing, trading and administering mortgages by way or regulation, that would be subject to the prohibitions in those sections, in the absence of an appropriate licence or exemption.⁴²

Section 6 of the MBLA Act sets out several exemptions from the requirements to have licences under sections 2 through 5 of the MBLA Act.

Section 6(6) of the MBLA Act indicates that “[I]awyers are exempted from the requirement in sections 2, 3 and 5 to have a licence in such circumstances as may be prescribed.” Section 1 of the MBLA Act defines “Lawyer” as “a person who is authorized to practise law in Ontario.

The MBLA Regulations

Regulation 406/07 has been prescribed to set out additional activities that are prohibited under sections 2, 3 and 5 of the MBLA Act.⁴³ The only additional activity that has been prescribed in this regulation is a prohibition under section 5 of the MBLA Act that prohibits taking steps on behalf of another person or entity, to enforce payment by a borrower under a mortgage (“mortgage enforcement”).⁴⁴

Exemptions for lawyers have been prescribed under the MBLA Act in Regulation 407/07 for lawyers dealing in mortgages, trading in mortgages and administering mortgages.⁴⁵ Section 3 of the Licensing Exemption Regulations provides an exemption from the requirement for a lawyer to have a licence under section 2 of the MBLA Act if “both of the

⁴² See MBLA Act ss. 2(1)(5), 3(1)(4) and 5(1)(2).

⁴³ O. Reg 406/07 (the “[Additional Activities Regulation](#)”).

⁴⁴ Additional Activities Regulation s. 1(1).

⁴⁵ O. Reg. 407/07 (the “[Licensing Exemption Regulations](#)”).



following circumstances exist:”

1. The lawyer, acting in his or her professional capacity as a lawyer on behalf of a client,
 - i. solicits a person or entity to lend money on the security of real property, or
 - ii. engages in an activity described in paragraph 2, 3 or 4 of subsection 2 (1) of the Act.
2. The lawyer does not hold himself or herself out as engaging in any activity described in subsection 2 (1) of the Act, except as described in paragraph 1 of this section, or otherwise as dealing in mortgages.

Section 4 of the Licensing Exemption Regulations provides an exemption from the requirement for a lawyer to have a licence under section 3 of the MBLA Act if “both of the following circumstances exist:”

1. The lawyer, acting in his or her professional capacity as a lawyer on behalf of a client, engages in an activity described in paragraph 1 or 2 of subsection 3 (1) of the Act.
2. The lawyer does not hold himself or herself out as engaging in any activity described in subsection 3 (1) of the Act, except as described in paragraph 1 of this section, or otherwise as trading in mortgages.

Section 5 of the Licensing Exemption Regulations provides an exemption from the requirement for a lawyer to have a licence under section 5 of the MBLA Act if “both of the following circumstances exist:”

1. The lawyer administers mortgages, acting in his or her professional capacity as a lawyer on behalf of a client.
2. The lawyer does not hold himself or herself out as administering mortgages, except as described in paragraph 1 of this section.

Section 10(2) of the Licensing Exemption Regulations provides an exemption for a lawyer’s employees when dealing or trading in mortgages solely for their employer. However, that section does not provide an exemption for such a person to permit them to administer mortgages on their employer’s behalf.

Section 18 of the Licensing Exemption Regulations provides an exemption for collection agencies as follows:



A collection agency that is registered under the *Collection Agencies Act* is exempted under subsection 6 (9) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* from the requirement in section 5 of the Act to have a mortgage administrator's licence if both of the following circumstances exist:

1. In the course of acting as a collection agency, the agency takes steps, on behalf of another person or entity, to enforce payment by borrowers under mortgages.
2. The agency does not hold itself out as engaging in any other activity described in subsection 5 (1) of the Act or otherwise as administering mortgages.