CONSULTATION ON COLLECTION AND DEBT SETTLEMENT SERVICES ACT REGULATION REFORM

RESPONSE TO MINISTRY BY:

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Christensen Law Firm ("CLF") is a law firm regulated by The Law Society of Upper Canada ("The Law Society") and restricts its practice to providing litigation-based debt collection services to creditors in Ontario.

CLF was founded in 1993 to provide a litigation-based recovery service as an alternative to the traditional bifurcation between collection agencies and law firms by skipping the collection-agency stage and going right to law-firm collection action driven by court enforcement of suit-worthy accounts where the debtor has the ability to pay but will not do so voluntarily. We believe our model provides debtors and creditors the enhanced protections afforded by court oversight and adherence to The Law Society's by-laws and *Rules of Professional Conduct*. CLF conduct has not resulted in a single valid complaint against it and we have a perfect record of regulatory compliance.

QUESTION 1: PARALEGALS AND LAWYERS

Do you agree with the proposed approach to the exemption of lawyers and paralegals?

Yes, with critical modifications.

Our view is that lawyers who restrict their practice to litigation-based debt collection are in the same category as mortgage brokers and others given exemptions in proposed sections 19.3 to 19.7. We create no harm to consumers that justifies an extra layer of regulation. Law Society oversight and regulation are sufficient. We are aware of abuses by lawyers whose debt collection practices are not litigation-based and lawyers who provide debt settlement services (particularly paralegals that work under their umbrella) that in our view have caused harm to consumers. We believe you are already aware of the individuals we are referring to and their practices, but if that is not the case we will supply you with details upon request.

Our firm and similar ones have created no such harm and would prefer to not be caught by these amendments to the *Collection and Debt Settlement Services Act,* R.S.O. 1990, c. C. 14 ("CDSSA") to avoid the administrative burdens of maintaining a second set of registrations and monitoring and ensuring compliance with a second regulatory regime.

CLF has from the outset voluntarily complied with all regulations under the CDSSA and its predecessors, other than where they conflicted with the existing law of costs with respect to

holding intransigent debtors with the ability to pay their debts liable for their creditor's legal fees incurred to collect the debt. Our hope is that you will either (1) adopt our suggestion below to exempt collection lawyers whose process includes actually suing intransigent debtors who have the means to pay their debts, or, in the alternative, (2) amend the wording of section 25(1) of the CDSSA to harmonize with section 7(11) of the federal *Credit Business Practices* regulation SOR/2009-257 (http://laws-lois.justice.gc.ca/eng/regulations/SOR-2009-257/page-1.html) under the *Bank Act* S.C. 1991, c. 46 (http://laws-lois.justice.gc.ca/eng/acts/B-1.01/) and other parallel federal acts governing financial institutions and thus avoid the CDSSA conflicting with the established statutory and case law governing legal costs.

The fundamental principle of the law of legal costs in Ontario with respect to intransigent debtors is expressed by Justice Sheppard in *Shier v. Fiume*, 1991 CarswellOnt 1068; 6 O.R. (3d) 759 (Gen. Div.) at para. 12:

> If, as here, there was no evidence to support a reasonably arguable case, then that person may still have his day in court, if he so wishes, but he should reasonably be expected to fully indemnify another whom he compels by his instransigent [sic] nature to meet him in court.

This principle was affirmed and expanded by Justice Lane in *Banihashem-Bakhtiari v. Axes Investments Inc.* (2003), 66 O.R. (3d) 284 (S.C.J.) at paras. 19 and 33 and the Ontario Court of Appeal in *Banihashem-Bakhtiari v. Axes Investments Inc.* (2004), 182 O.A.C. 185 (C.A.) at paras. 40-41.

The law of costs has developed to incent parties to settle matters prior to adjudication. In addition to the common law rule expressed in *Shier v. Fume* and *Banihashem* providing that intransigent pecunious debtors are required to fully indemnify creditors for their legal costs incurred to collect delinquent debts, statutory law requires a judge to order an unreasonable litigant to substantially indemnify the successful party for its legal costs in enforcing its claim. The mechanism is set out in rule 49 of the *Rules of Civil Procedure,* O. Reg. 575/07, s. 6 (1) (https://www.ontario.ca/laws/regulation/900194): where a plaintiff obtains judgment as favourable or more favourable than the terms of an offer to settle, it is automatically entitled to an order that the defendant substantially indemnify the plaintiff for its legal costs from the date the offer to settle was served and partially indemnify for legal costs up to that date. A similar mechanism is provided in rule 14 of the *Small Claims Court Rules,* O. Reg. 258/98 (https://www.ontario.ca/laws/regulation/980258).

These rules of court and the related case law (see *Rooney (Litigation Guardian of) v. Graham,* 2001 CarswellOnt 887 (C.A.) at para. 44) allow the creditor to place escalating cost pressures on intransigent pecunious debtors thus protecting honest creditors' access to justice against unprincipled debtors while also protecting scarce judicial resources. Implicit and fundamental to the approach is that the intransigent debtor can be required to pay costs he or she has forced the creditor to incur up to the point he or she accepts the offer to settle. Consequently, it is not a solution to exempt only judgments which comprise these court-ordered cost awards. This would result in an incentive for creditors to eschew pre-judgment settlements, abrogating the intention of the common law and the legislature to reward parties for settling claims voluntarily based on the merits prior to adjudication; it would, in our view, result in both incenting creditors to obtain judgment and a cost award regardless of a debtor desiring to resile from intransigence and in unnecessarily consuming scarce judicial resources. Ironically, we expect this could cause real harm to intransigent consumers who may end up with higher cost awards against them if the mature and proven law of costs is adversely impacted by casting the net of the CDSSA wider than it needs to be to protect consumers against actually-observed harms referenced above.

Another variable to consider is the risk of creating a two-tier debt collection litigation bar. If litigation lawyers who restrict their practices to debt collection are denied the ability to recover reasonable legal fees from intransigent debtors, creditors will have an incentive to retain generalist litigators with less expertise in debt collection litigation law and processes. We expect this may both harm the livelihoods of debt collection-only litigators and their staff members and result in inefficiencies that will escalate costs awards against consumers. It could also result in the inequity of lawyers that focus on debt collection within larger general-service law firms not being caught by the CDSSA and its potential interference with lawyers' established ability to recover legal costs for their creditor-clients while single-lawyer or debt-collection-litigation-only law firms are caught and unfairly adversely impacted.

Also worth noting is that in our view the premise of proposed section 18.1(2)(a) is flawed. Exempting licensees from registration where their primary activity is collecting "a debt recognized in a court judgement" is no exception at all. The reality is that many licensees are capable at obtaining judgments but not collecting them. Our observation is that consequently creditors currently employ collection agencies to collect judgments obtained by licensees. To exempt licensees whose primary activity is obtaining and collecting judgments, the apparent purpose of this exemption, would require an exemption for debt-collection

litigators/licensees whose non-litigation debt-collection services are incidental to obtaining and enforcing court judgments to recover debts.

As a final comment, in our view all litigation is debt collection; all litigation is engaging the force of the state to adjudicate how much is owed by one party to another and where the debtor party has the means to do so, causing that debt to be paid. We suggest that the only difference between recovering damages from a tortfeasor and damages from a delinquent borrower is that the claim against the borrower is usually liquated, i.e. the quantum of damages is easily discernable and requires no adjudication. Non-liquidated claims require the extra judicial step of quantification, but otherwise the pre-litigation and litigation processes followed and the negotiation and legal skills engaged are identical. Our firm has litigated both simple and sophisticated debt-collection legal matters on behalf of our clients at every level of court including the Supreme Court of Canada and we suggest that the nature of our legal practice is every bit the "practice of law" engaged in by a litigators that restrict their practices to personal injury, construction, employment, real estate, etc.

Our Suggestions:

1. Amend the proposed new section 18.1 to exempt licensees who are genuine debt-collection litigators.

   We suggest modifying the wording of proposed section 18.1(2)(a) to read:

   > (2) Despite subsection (1), a licensee under the *Law Society Act* is not exempt from the application of the *Collection and Debt Settlement Services Act* if,
   >
   > (a) the primary activity of the licensee, or an employee on the licensee's behalf, 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~~ a licensee whose debt-collection activities are incidental to obtaining and enforcing court judgements for debts; . . ..

2. In the alternative to suggestion 1., amend section 25.1 of the *General* regulation under the CDSSA to harmonize with section 7(11) of the federal *Credit Business Practices* regulation SOR/2009-257.

Section 7(11) of the *Credit Business Practices* regulation and reads,

> **(11)** Despite any agreement to the contrary between a debtor and an institution, any charges made or incurred by the institution in collecting a debt, other than charges referred to in section 18 of any of the following regulations, are not considered to be a part of the amount owing by the debtor and may not be recovered from the debtor by the institution:
>
> . . .
>
> **18** If a borrower under a credit agreement fails to make a payment when it becomes due or fails to comply with an obligation in the agreement, in addition to interest, the bank may impose charges for the sole purpose of recovering the costs reasonably incurred
>
> **(a)** for legal services retained to collect or attempt to collect the payment;
>
> **(b)** in realizing on any security interest taken under the credit agreement or in protecting such a security interest, including the cost of legal services retained for that purpose; or
>
> **(c)** in processing a cheque or other payment instrument that the borrower used to make a payment under the loan but that was dishonoured.

In the alternative to suggestion 1. above, our suggested amendment to section 25(1) of the *General* regulation is:

> 25. (1) ~~Charges incurred by a collection agency or collector in collecting a debt and charges incurred by a creditor to retain a collection agency or collector do not form part of the debt owed by the debtor,~~ Despite any agreement to the contrary between a debtor and a creditor, any charges made or incurred by the creditor in collecting a debt are not considered to be a part of the amount owing by the debtor

and no collection agency or collector shall collect or attempt to collect any such charges, subject to subsection (2).

~~(2) A collection agency or collector may collect, as part of the debt owed by a debtor, all reasonable charges incurred by the collection agency or collector in respect of the debtor's dishonoured cheques if~~

~~(a) the agreement between the creditor and the debtor provides that the debtor is liable for such charges if incurred by the creditor and sets out the amount of the charge;~~

~~(b) the creditor has provided information to the debtor, by any method, that the debtor is liable for such charges if incurred by the creditor and the debtor knows or reasonably ought to know of his or her liability for such charges and the amount of the charge; or~~

~~(c) the collection of such charges is expressly permitted by law.~~

(2) If a debtor under a credit agreement fails to make a payment when it becomes due or fails to comply with an obligation in the agreement, in addition to interest, the creditor may impose, and a collection agency or collector may collect, charges for the sole purpose of recovering the costs reasonably incurred,

(a) for legal services retained to collect or attempt to collect the payment;

(b) in realizing on any security interest taken under the credit agreement or in protecting such a security interest, including the cost of legal services retained for that purpose; or

(c) in processing a cheque or other payment instrument that the borrower used to make a payment under the loan but that was dishonoured.

QUESTION 2: CLARIFYING THE ACT'S APPLICATION

Do you agree with the proposed additional exemptions?

Yes.

CLF has no concerns about the additional exemptions and clarifications.

QUESTION 3: REVISED FIRST NOTICE RULES

Do you agree with the proposed approach to first notice?

Yes, with modifications.

CLF is not opposed to the obligation to provide first notice recipients with additional information and the contents of that information. We are concerned, however, about the current framework where that information must be presented as an additional page and attached to any first notice or demand letter.

An obligation to add the additional page will result in a small price increase for all regulated collection agencies. That price increase will be significantly magnified by the volume of letters the agency sends out. This could discourage some agencies from complying due to cost pressures and potentially place compliant agencies at an economic disadvantage. Furthermore, the information may become stale-dated over time, requiring regulatory changes to update the contents of the information page and potentially wasting any pre-printed information pages agencies may use to reduce costs.

Suggestion: We respectfully suggest that collection agencies be given the option to either include the page as proposed or to include a link to a Government of Ontario website that contains the same information.

By allowing the information to be conveyed by way of website link, recipients would still have the means to access the information, the information could be updated more frequently by the government without causing collection agencies to reprint any pre-printed copies of

the information page and eliminate any cost disincentive that might cause a collection agency not to comply.

QUESTION 4: PROHIBITED PRACTICES

Do you agree with the added prohibited practices?

Yes, with modifications.

CLF is in favour of the added prohibition and the modification to the prohibition against communications that impose a cost on the debtor. The clarification that an agency can continue to comply with the regulation by reimbursing the recipient is a welcome reflection of a common practice.

Suggestion: CLF respectfully suggests two additional clarifications to the cost of communication prohibition to provide greater clarity in its application.

Beyond Regular Monthly Costs

The first suggestion is to clarify that the prohibited cost would be any cost that would be above and beyond any regular monthly or annual cost the person normally pays. This clarification is suggested in order to address the scenario by which, for instance, call recipients have a cell phone plan that gives them 200 minutes per month, for which they are charged a fee every month. It is not our understanding that under the proposed modification the call recipient would be entitled to then provide a bill showing a call took up 1 minute, and therefore they are to be reimbursed some fraction of their monthly fee. Instead, it is our understanding that the modification is intended to apply only to users who pay a fixed amount per call or minute, such as a pay-as-you-go user, and not to a user whose monthly bill did not otherwise change after receiving the call.

Reimbursement Time Limit

The second suggestion is to set a fixed time limit on when the call recipient would be entitled to claim back the costs. As it is currently written, there is no restriction on when a person may make a claim for reimbursement, which would allow for a person whose account has been resolved months or even years past to make a claim for reimbursement and place the agency in a position where it may not be able to adequately assess the claim, such as

having access to notes or documents showing the person made specific requests to be contacted through that particular number.

QUESTION 5: FINANCIAL REQUIREMENTS

Do you agree with the proposed revisions concerning bonding and trust accounting?

Yes, with clarifications.

CLF is in agreement with the proposed changes.
Suggestion: CLF respectfully suggests a clarification be made to define when money is considered "received" as when the agency has the funds in an account under their control and the ability to attribute those funds to a specific debtor or account.

Two common practices by debtors to make payments are: 1) to send an email money transfer; or 2) if the agency is listed as a bill payee with their bank to make a payment through their bank's bill payment system. Both of these systems can, however, cause payments to appear to the debtor to be received by the agency when in fact the agency is not able to actually identify the source of and process the payment and thus cannot transfer it into a trust account within the required two-day time limit.

Email money transfers
Debtors sending funds by way of email money transfer are required to set up a secret question and answer. The agency must then know the correct answer to claim the funds. It is not uncommon for debtors to forget the answer they have set, not spell the answer correctly, set an answer other than what the debtor and agency have previously agreed to, or not communicate that answer to the agency.

While the funds have already been withdrawn from a debtor's account, the agency does not yet have control over that money. It would be misleading to consider the funds received by the agency until such time that the agency has the correct answer required to claim the transfer. The proposed clarification would address this issue.

Bill Payee
The bill payee system allows debtors to easily transfer funds from their account to the collection agency. Unfortunately, many banking systems process these transfers without

requiring the debtor to provide accurate identifying information. The banking system will, in many cases, simply transfer the funds to the correct account, but may not include information like the debtor's name or the number of the delinquent account the debtor was intending to pay. This is particularly problematic when such transfers are done at the teller. As a practice, agencies will often require debtors to send proof of payment in the form of an email or fax showing the transfer slip or confirmation page from their bank website. This allows the agency to properly attribute the funds to the right account. Without this information, the agency cannot credit the debtor with the payment, as it risks crediting the wrong debtor for the payment, even though the funds have left the debtor's account and are in an account controlled by the agency. The proposed clarification would address this issue.

QUESTION 6: AMENDMENTS REFLECTING REGULATION OF DEBT PURCHASERS AND ENDING COLLECTOR REGISTRATION

Do you agree with the proposed approach to implementing regulation of debt purchase and ending collector registration?

Yes.

CLF is in agreement with the proposed changes and has no concerns to express at this time.

QUESTION 7: CALL RECORDING

Do you agree with the proposed approach to call recording?

Yes, with some modifications.

CLF has long believed that call recordings are the simplest and easiest way to protect all parties when addressing delinquent accounts. Call recordings ensure that intentions can be reviewed and allows CLF to better train its staff to ensure they accurately interpret what debtors say in a phone call.

Call recordings, however, can also be an unfortunate gateway for private information to leak or be lost. The current proposal could be clarified to help ensure that private information stays private.

A person other than the intended recipient answers the phone

Agencies may communicate with a number of different individuals in their attempts to locate and speak with the debtor such as when a person other than the intended recipient answers the phone. It is not uncommon for agencies to call a number believed to be the number of the debtor, only to find that the debtor is no longer there and that they have instead connected with a former spouse, friend, employee, or family member. Oftentimes those individuals will provide alternate contact information freely.

Another scenario is when the call is transferred or the phone is passed on to the intended recipient after first being picked up by someone else. Again it is not uncommon for the person who initially picked up the phone to make unsolicited comments that they may not wish to be repeated or made available to the final call recipient. Those individuals would have a reasonable expectation of privacy in their call or their parts of the call and would not reasonably expect that their call recordings would be available to any other person.

Suggestion: While the current proposal addresses the issue somewhat through its use of the word "person" instead of "debtor", CLF respectfully suggests that the proposal be amended to clearly state that a person is not entitled to any call recording or any part of a call recording for which they were not a participant in the phone call. This would allow agencies to redact or withhold non-relevant parts of the call recording when disclosing to the requesting person.

Credit Card Numbers

Many agencies will often allow debtors to make payments on their debt by credit card. To do so, the agency must be PCI compliant. A recording of a debtor providing a credit card number would be highly sensitive information and require extreme care in the storage of that number. Instead of implementing the required security practices to allow that number to be stored, many agencies instead opt to block that number out of their call recordings, either by overwriting the number with a generic tone, stopping the call recording when the number is given, or deleting that section of the recording after the fact.

Not having access to the credit card number would not significantly affect a person's ability to review the call and would not likely limit their protection in any significant way.

Suggestion: CLF respectfully suggests the current proposal be amended to allow the agency to block, remove, or redact any part of the conversation that contains credit card information.

QUESTION 8: ADMINISTRATIVE PENALTIES

Do you agree with the proposed approach to administrative penalties?

Yes.

CLF is in agreement with the proposed changes, though we note that there is a minor discrepancy between the consultation paper and the proposed wording of the regulation related to the time to calculate a "repeated contravention". The consultation paper indicates that any contravention within 2 years of a previous contravention would be considered a repeat, while the regulation indicates the time period to be 1 year instead.

CLF is in favour of the modification to the regulations in its currently proposed format.

QUESTION 9: PHASE-IN PERIOD TO IMPLEMENT RULES

Do you agree with the proposed time frame for agencies to come into compliance with the new rules?

Yes.

CLF is in agreement with the proposed changes and has no concerns to express at this time.