CONSUMER PROTECTION in the DIGITAL MARKETPLACE

LCO Consultation Paper

June 2023

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L’ONTARIO

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The Law Commission of Ontario (LCO) is Ontario's leading law reform agency.

The LCO provides independent, balanced, and authoritative advice on complex and important legal policy issues. Through this work, the LCO promotes access to justice, evidence-based law reform and public debate. The LCO evaluates laws impartially, transparently and broadly. The LCO's analysis is informed by legal analysis; interdisciplinary research; contemporary social, demographic and economic conditions; and the impact of technology.

The LCO is located at Osgoode Hall Law School, York University, Toronto.

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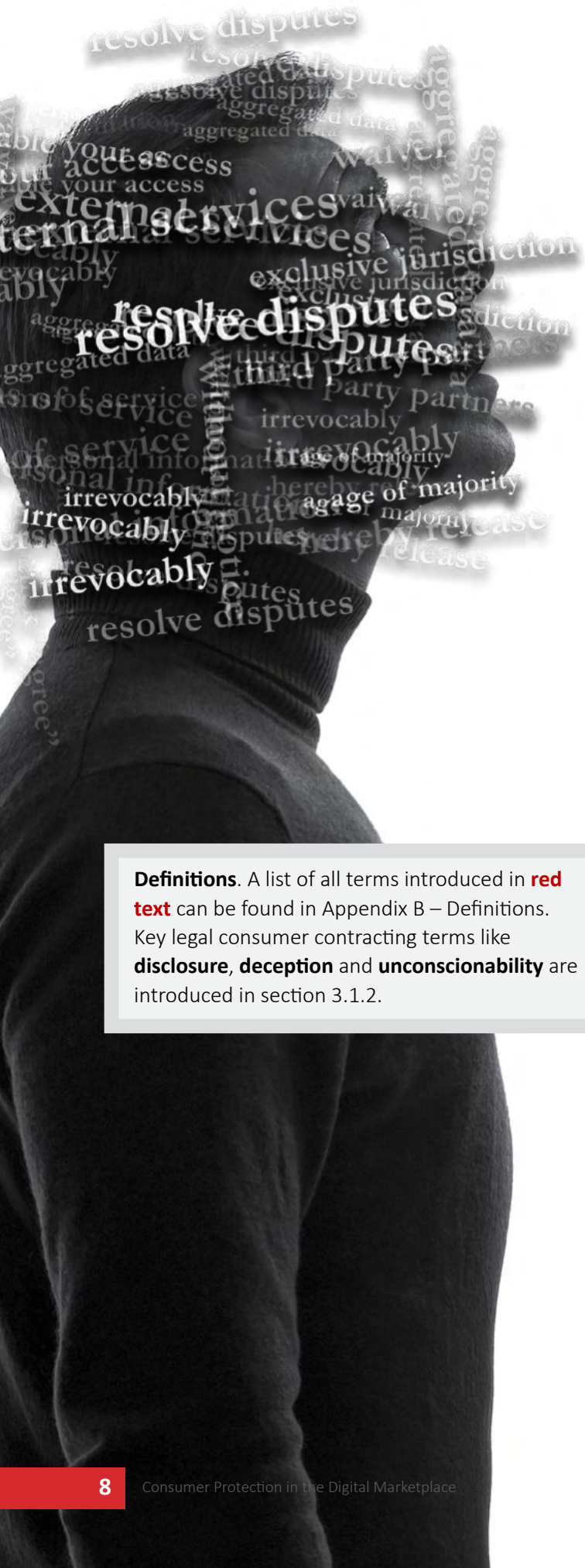
Contents

List of Acronyms

AIDA	Federal *Artificial Intelligence and Data Act*
ALI	American Law Institute
CPA	Ontario *Consumer Protection Act*
CPPA	Federal *Consumer Privacy Protection Act*
DAU	Daily Active Users
DMA	European Union *Digital Markets Act*
DPWRA	Ontario *Digital Platform Workers' Rights Act*
DSA	European Union *Digital Services Act*
FTC	United States Federal Trade Commission
GDPR	European Union *General Data Protection Regulation*
LCO	Law Commission of Ontario
OECD	Organization for Economic Cooperation and Development
PIPEDA	*Personal Information Protection and Electronic Documents Act*
ToS	Terms of Service consumer contracts
UCPD	European Union *Unfair Commercial Practices Directive*



1. Introduction

1.1 The LCO's Consumer Protection in the Digital Marketplace Project

This is the Consultation Paper for the Law Commission of Ontario's (LCO) Consumer Protection in the Digital Marketplace project. This project considers legal strategies and law reform options to improve consumer protection in **terms of service** (ToS) contracts for digital products and services.

ToS , "click consent" and other types of standard form contracts are ubiquitous features of the **digital marketplace**. Hardly a day goes by that consumers in Ontario are not asked to click, tap, scan, or otherwise confirm "I ACCEPT" when presented with a contract for an online product or service.

ToS contracts have many advantages: they are often fast, consistent, efficient, and transparent. These attributes make ToS or standard form contracts ideal for high-volume, routine consumer transactions of many kinds.

In recent years, however, many ToS contracts have been criticized by consumers, businesses, courts, and governments due to their length, complexity, opacity, and inclusion of terms which may be confusing, deceptive, misleading, or unfair. These criticisms are particularly acute for ToS contracts in the digital marketplace, where frequent and routine transactions are governed by new technology, contracting arrangements, and business practices which have been shown to undermine traditional consumer protections.

Definitions. A list of all terms introduced in **red text** can be found in Appendix B – Definitions. Key legal consumer contracting terms like **disclosure**, **deception** and **unconscionability** are introduced in section 3.1.2.

"Every day, we click the "I Agree" button when we sign up for online services, but we often have no idea what we're consenting to—and no option to use the service if we don't click that button."

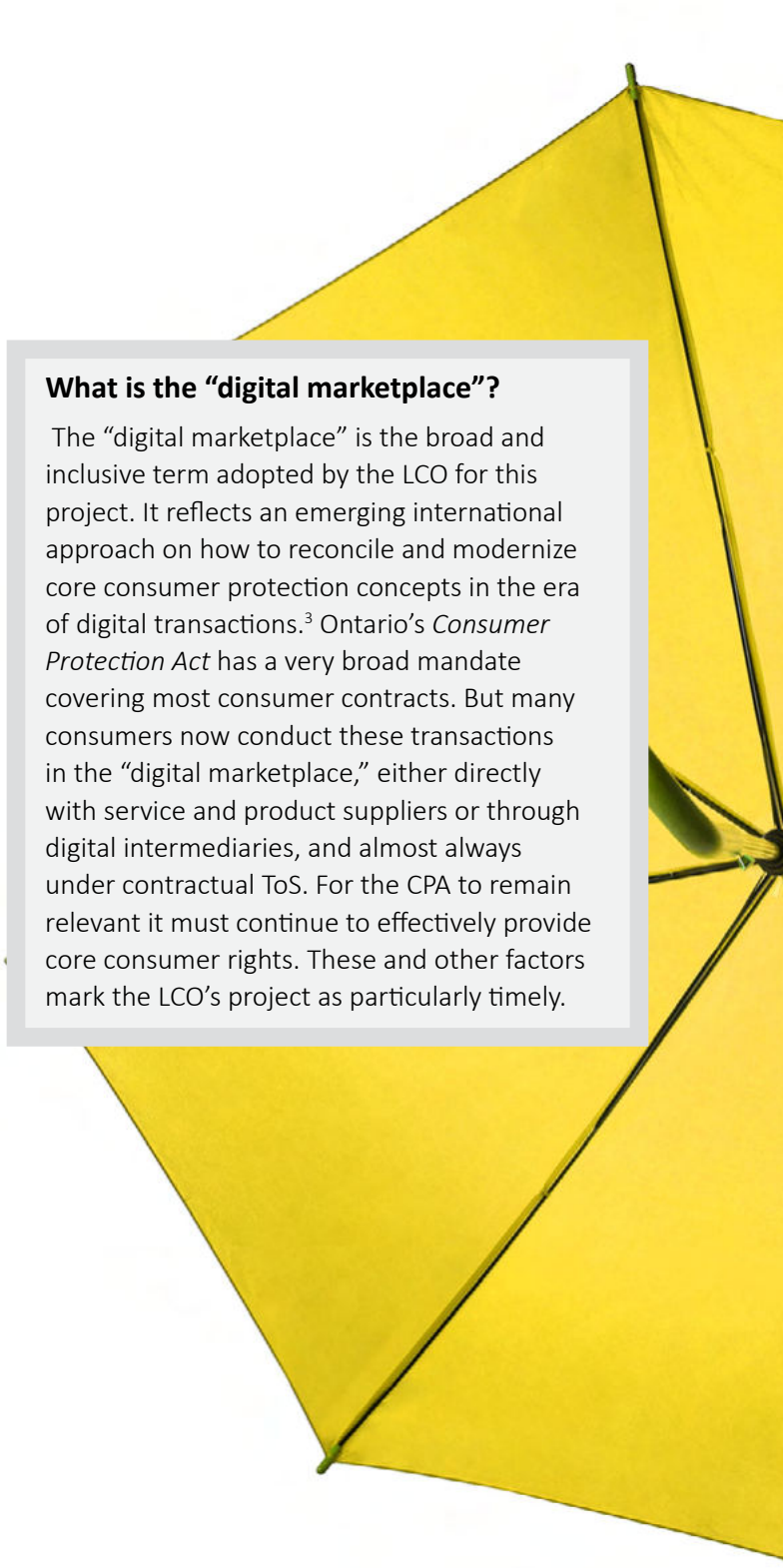
– Government of Ontario, *Building a Digital Ontario.*[1]

In broad terms, the LCO's project considers if or how Ontario's *Consumer Protection Act* should be updated to better protect consumers in the digital marketplace. More specifically, the project considers how to update traditional consumer protections such as notice and disclosure requirements, deception and unconscionability rules, and consumer enforcement in light of the new, complex, and expansive range of consumer risks in the digital economy.

The LCO's research also suggests an emerging consensus around key law reform principles and proposals that form the basis of our Consultation Paper. These are sometimes described as being part of a "new consumer agenda" which has gained significant momentum in the United States, European Union, and UK.[2] The LCO believes that Ontarians need the opportunity to be heard in this discussion. The trans-national nature of digital marketplace services and products mean regulatory activities in other jurisdictions will have a spill-over regulatory effect on Ontario – unless Ontario makes choices for itself.

Ontario's *Consumer Protection Act* (CPA) was enacted in 2002 and has not been substantially amended in 17 years.[4] Since then, Ontario's digital economy has grown substantially. Ontario's "digital marketplace" relies on many new contracting arrangements and marketplace practices that did not exist when the CPA was last updated.

Significantly, the Government of Ontario appears committed to consumer protection reform. The provincial government of Ontario has acknowledged that more must be done "to ensure that the laws governing the marketplace are in tune with our times."[5] And further that there is need to "strengthen protection for consumers, adapt to changing technology and marketplace innovations, and streamline and clarify requirements to improve consumer and business understanding and compliance."[6]



What is the "digital marketplace"?

The "digital marketplace" is the broad and inclusive term adopted by the LCO for this project. It reflects an emerging international approach on how to reconcile and modernize core consumer protection concepts in the era of digital transactions.[3] Ontario's *Consumer Protection Act* has a very broad mandate covering most consumer contracts. But many consumers now conduct these transactions in the "digital marketplace," either directly with service and product suppliers or through digital intermediaries, and almost always under contractual ToS. For the CPA to remain relevant it must continue to effectively provide core consumer rights. These and other factors mark the LCO's project as particularly timely.

In May 2023, the provincial government concluded consultations on a range of important CPA reforms. The provincial government's 2023 Consultation Paper includes several proposed updates to the CPA. The LCO commends the province for this initiative. However, the LCO believes that the provincial government's proposed reforms do not consider or address many consumer protection issues specific to the digital marketplace, including the complexity of online ToS contracts; issues relating to online disclosure, notice and consent; deceptive "**dark pattern**" sign-up and consent practices; online consumer remedies; etc.

The LCO's project reflects our view that the provincial government proposals should be expanded to address the needs of consumers and businesses in the modern digital marketplace. This is necessary to ensure provincial consumer protection laws remain relevant and accessible for Ontario's consumers and businesses.

The LCO is mindful that not all ToS are opaque and inscrutable. Many terms strike a fair bargain between transactional expediency and consumer clarity. Many transactions also take place where consumers can foresee risks, benefits, and make a reasonably informed decision. Nevertheless, we have concluded there is an urgent need for law reform.

The LCO's project will conclude with an independent, evidence-based, and comprehensive analysis of these issues. The LCO's Final Report will recommend reforms to laws, policies, and/or practices where it is appropriate to do so.

1.2 About the LCO

The Law Commission of Ontario (LCO) is Ontario's leading law reform agency. The LCO provides independent, balanced, and authoritative advice on complex and important legal policy issues. Through this work, the LCO promotes access to justice, evidence-based law reform, and public debate.

The LCO evaluates laws impartially, transparently, and broadly. The LCO's analysis is informed by legal analysis; multi-disciplinary research; contemporary social, demographic, and economic conditions; and the impact of technology.

This is the latest in a series of LCO projects and reports considering the impact of technology on Ontario's justice system. An abbreviated list of LCO "digital rights" projects and reports include:

- Artificial Intelligence in the Criminal Justice System
- AI in the Civil/Administrative Justice System
- Accountable AI: Final Report (2022)
- Regulating AI: Critical Issues and Choices (2021)
- Defamation Law in the Internet Age (2020)

The LCO is also undertaking projects addressing:

- Environmental Accountability: Rights, Responsibilities and Access to Justice
- Improving Protection Orders
- Last Stages of Life for First Nation, Métis and Inuit Peoples: Preliminary Recommendations for Law Reform.

The LCO is located at Osgoode Hall Law School, York University, Toronto.

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1.3 Catalysts for Reform

Ontario's CPA was enacted in 2002[7] and has not been substantially amended in 17 years.[8]

Since then, Ontario's online or digital economy has grown substantially. The "digital marketplace" now facilitates a multitude of consumer transactions which rely on new contracting arrangements, technologies, business models, and marketplace practices. Many, if not most, of these arrangements and practices are not addressed in Ontario's CPA.

As mentioned above, the Government of Ontario appears committed to consumer protection reform. Government consultations conducted in May 2023 proposed a range of important CPA reforms. The LCO commends the province for this initiative. That said, the LCO believes that the provincial government's proposals do not go far enough. In our view, comprehensive consumer protection reform must address a broad range of complex issues specific to the digital marketplace. This is necessary to ensure consumer protection laws remain relevant and accessible for Ontario's consumers and online businesses.

The section below summarizes the major catalysts driving the LCO's project.

1.3.1 Digital ToS Contracts May Undermine Traditional Consumer Protections and Principles

Consumer Consent May Be Illusory

Academic research and practical experience demonstrate that ToS contracts are often long, not read and/or inaccessible to many consumers. As a result, consumer consent to digital ToS may often be illusory.

A survey conducted in April 2021 identified 155 online marketplaces for goods with over one million monthly visitors.[9]

What Are Consumers Concerned About?

In 2021, the Organization for Economic Cooperation and Development (OECD) surveyed 28 countries and 15 leading companies about issues with the digital marketplace. Leading causes of consumer complaints in the digital marketplace included "misleading marketing practices," "dispute resolution or lack thereof" and "unfair terms and conditions."[10]

Quick Facts About ToS Contracts

According to research:

- 91% of adults and 97% of younger adults (18-34) accept legal terms and services without reading them.[11]
- The average American consumer would need over 250 hours to read through all the ToS they agree to in a year.[12]
- ToS have become so sophisticated that an average consumer requires a minimum of 14 years of education to comprehend them.[13]
- Changes to ToS in the digital marketplace happen more frequently (and unilaterally) than consumers can be reasonably expected to understand. Services like the website *Terms of Service; Didn't Read* show how frequently and consequentially changes can be made – yet consumers are often unaware of such changes or don't read them.[14]

Dark pattern Design.

A 2019 survey of 1,760 retail websites and apps determined that 429 (24%) deployed potential dark patterns, i.e., user interface designs that can lead consumers to make decisions that may not be in their best interests.[25] Several studies suggest the practice is widespread. For instance, dark patterns have been found on 80% of children's apps, 95% of the most popular apps on leading app stores, and all 105 of the most popular online services in the Google Play Store that featured both an app and website.[26] The practice is also lucrative. One study of an event ticket reseller found consumers spent 20% more on tickets if hidden fees were not disclosed until the final step in completing the transaction.[27]

Dark Pattern Regulation.

The United States Federal Trade Commission (FTC) recently developed policy guidance on dark patterns and began landmark enforcement measures. The policy stated that dark patterns practices are "designed to trick, trap, and mislead consumers" through tactics that include "disguised ads, difficult-to-cancel subscriptions, buried key terms, and tricks to obtain consumer data."[28] A subsequent 2023 FTC investigation into the consumer ToS of a leading global videogame company, Epic (developers of Fortnite), found multiple instances of exploitative dark patterns and unfair terms. Epic's practices tricked video gamers (including children) into unwanted charges and then punished those who raised consumer disputes (like parents) by punitively deleting gamer accounts, stranding digital assets, and threatening credit scores.[29] The FTC investigation resulted in fines and penalties totalling $US 520 million for Epic's use of exploitative dark patterns, unfair terms, and exploitation of child privacy.[30] The amount includes $US 245 million to refund consumers.[31]

Digital Notice and Disclosure May Not Protect Consumer Interests

It is increasingly clear that many "traditional" consumer protection strategies – including consumer notice and disclosure – do not effectively protect consumer interests in the digital marketplace.[15] ToS contracts may also change frequently and unilaterally, further limiting meaningful notice to consumers.[16] Cumulatively, consumers may face hundreds of changes across dozens of ToS for products and services.[17]

Consumers May Have Little or No Ability to Negotiate

ToS contracts are often presented to consumers who have little practical choice but to "take it or leave it" with few other options.[18] Consumers also frequently encounter circumstances that induce acceptance of a ToS, such as mandated digital services in the workplace, at school, or to access government services.[19] Proprietary digital formats and "free to use" platforms can also "lock-in" consumers to specific products and services.[20] Consumers often lack the effective means to review or negotiate contractual terms and conditions and perceive little incentive to file consumer complaints.[21]

Deceptive "Dark Patterns" May Undermine Notice and Consent

"Dark patterns" are subtle or invisible ("dark") design practices used in contracts, software, and user interfaces to "pattern" or "steer, deceive, coerce, or manipulate consumers into making choices that often are not in their best interests."[22] "Dark pattern" software and user interface design may include "frictionless" sign-up practices that minimize notice of risks to the consumer; consent boxes and user settings checked by default; unclear preference options; and settings buried deep within multi-layered menus or websites. [23]

Research demonstrates that dark patterns are very effective at "subverting or impairing consumer autonomy, decision-making or choice"[24] and can undermine consumer protection practices.

Consumers Using No-Cost and Low-Cost Services May Not Be Protected

Many digital services are provided on a low-cost or no-cost basis to the consumer. Such business models may avoid the regulation and scrutiny of consumer law as they fall short of monetary thresholds that trigger legislative oversight.[32] These services may also rely on business models that monetize users through data harvesting, user profiling, and targeted content or advertisements – practices which are often unseen and unknown to consumers.

ToS May Restrict Legal Remedies and Access to Justice

Notwithstanding consumer protection legislation, ToS may include terms attempting to restrict consumer's ability to seek legal remedies. ToS may include terms stating that disputes are governed by foreign laws or must be initiated in foreign jurisdiction. Many ToS also specify that disputes must be resolved through internal dispute resolution mechanisms or binding arbitration, or that class action rights are waived.

Consumer Protection Laws May Conflict and Overlap with Other Laws

A significant proportion of consumer transactions are now conducted through digital intermediaries. Many people use digital services for work, education, recreation, communication, or to find jobs and housing. As a result, consumer protection law often overlaps with, or is in conflict with, privacy law, employment law, labour law, competition law, human rights law, and internet platform regulation.

1.3.2 The Need for a Better Environment for Business

The 2020 and 2023 Ontario CPA Consultation Papers recognize that updated consumer protection legislation benefits both consumers and businesses.[33]

Consumer protection legislation establishes baseline requirements for transparency, dispute resolution, jurisdiction, and regulatory compliance. This fosters a more competitive playing field for businesses, avoids a race to the bottom, and improves consumer confidence.[34]

Many businesses believe consumer protection reform will assist them identify and manage legal risks, mitigate reputational risks, improve customer satisfaction, promote fair competition, and promote regulatory compliance in the digital marketplace.[35]

The Organization for Economic Cooperation and Development (OECD) recently emphasized that regulation of certain digital marketplace practices – like dark patterns – can lower business risks without imposing new obligations.[36]

Businesses are not monolithic. Major entities in the digital marketplace are positioned "at the center of e-commerce and now serve as essential infrastructure for a host of other businesses that depend upon it."[37] Smaller businesses face potential competitive disadvantages without laws that impose common requirements on all suppliers and business intermediaries. Many businesses are also concerned about unfair competition if regulatory obligations are not enforced on less scrupulous suppliers.[38]

1.3.3 Emerging Strategies to Improve Consumer Protection in the Digital Marketplace

Many consumers and businesses around the world are facing the same ToS issues as Ontarians.

Ontarians can learn from these experiences and draw upon the broad range of law reform options that have been implemented elsewhere. For example, many jurisdictions have modernized consumer protection legislation and regulations to:

- Update consumer notice and disclosure requirements for digital ToS
- Update lists of potentially deceptive or unconscionable contractual terms
- Address so-called "dark patterns" in online contracting that undermine consumer consent
- Prohibit a range of contracting practices or create set standard terms for practices that may easily exploit consumers
- Improve oversight, accountability and access to justice, including more proactive and systemic enforcement of consumer protection legislation.

1.4 Project Focus and Consultation Issues

Questions about ToS contracts and the digital marketplace have a potentially very wide scope and are often linked to privacy, internet platform liability, employment law, competition law, privacy, and other areas of law.

The LCO's project is focused on potential reforms to Ontario's *Consumer Protection Act*. As such, it addresses what might be considered classic or traditional consumer protection issues in digital ToS contracts, including central consumer protection legal principles related to:

- Notice and disclosure
- Deception and unconscionability
- Unilateral changes to contracts
- Contracting with vulnerable groups
- Access to justice, dispute resolution, and systemic oversight.

Several of these issues are raised in the Government of Ontario's 2020 and 2023 CPA consultations. The LCO's Consultation Paper both responds to the provincial government's initiative and addresses new, far-reaching issues that were not raised in the government's consultations. In this respect, the LCO's project both complements and builds upon the provincial process.

Of necessity, this Consultation Paper considers the effect and impact of important technological and business practice developments – such as privacy, dark patterns, network effects,[39] platform lock-in, data portability, data brokering, and algorithmic content shaping – that may be unfamiliar to many readers. These developments challenge many traditional principles of consumer protection law, often with inconsistent and unpredictable results.

The organization of the Consultation Paper is straightforward.

Section 2 is an overview of the rationale and objectives of consumer protection law, including "boilerplate" and "standard form" contracts and their relation to contemporary ToS practices. Section 2 includes the LCO's plain-language summary of several common terms and conditions that exist in many current ToS. Section 2 also presents a case study demonstrating how ToS may be misleading and harmful to consumers.

Section 3 is an overview of Ontario's *Consumer Protection Act* and related legislation across Canada.

Section 4 summarizes the LCO's analysis of gaps in Ontario's current consumer protection framework.

Sections 5-11 set out our consultation issues and questions, including:

- The definition of the online marketplace
- Notice and disclosure
- Dark patterns
- Consumer protections for youth and vulnerable consumers
- Deception and unconscionability
- Oversight, enforcement, and access to justice.

Appendix A is a complete list of consultation questions.

Appendix B is a glossary of key terms.

Throughout the paper, the LCO provides examples, reform proposals, and lessons learned from jurisdictions outside Canada.

The LCO has also prepared a series of short infographic and two- and three-page summaries of each section of this paper. All project materials are available on the LCO's dedicated project website at: https://www.lco-cdo.org/digitalmarketplace.

1.5 Project Deliverables

This project will produce an independent, evidence-based, and comprehensive analysis of consumer protection in the digital marketplace. The LCO's final report will recommend reforms to laws, policies, and/or practices where it is appropriate to do so.

The final report and accompanying materials will be distributed widely. The LCO will also produce a range of user-friendly, accessible, and web-based materials that will explain the project, final report, and recommendations.

All project materials are available on the LCO's dedicated project website at: https://www.lco-cdo.org/digitalmarketplace.

1.6 Consultation Process and Next Steps

The release of this Consultation Paper is the start of LCO's consultation process.

The LCO wants to hear from a broad range of stakeholders including lawyers and legal organizations, NGOs, industry representatives, academics, government and justice system leaders, and individual Ontarians interested in consumer protection issues.

To this end, the LCO will be organizing several consultation processes over the next several months.

The LCO is strongly committed to partnering with interested organizations and stakeholders to develop consultation initiatives. Individuals or organizations interested in working with the LCO are encouraged to contact our Project Lead.

More information about the consultation process and how to get involved is on our website: https://www.lco-cdo.org/digitalmarketplace.

Written Submissions

The LCO encourages written submissions. Written submissions can be sent to the LCO's general email address at LawCommission@lco-cdo.org.

The deadline for written submissions is **September 1, 2023**.

The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO expects to post written submissions on our project webpage, subject to limited exceptions. Individuals or organizations wishing to provide a written submission may want to contact the LCO for further information prior to their submission.

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2. Consumer Protection Law: Background

2.1 Rationale and Objectives

Consumer protection laws are intended to regulate transactions between consumers and businesses (often called "suppliers"). These laws exist because private contracting between consumers and suppliers has inherent limitations, including:

- The party's unequal negotiating position
- Unequal access to information, and
- Consumer's potential lack of sophistication.

In these circumstances, consumers may be unaware of what they are agreeing to or be vulnerable to unfair transactions, deceptive practices, or coercive terms.

Consumer protection legislation attempts to address these inequities in order to promote a trustworthy marketplace for consumers, fair competition among businesses, and marketplace efficiency.

Over time, consumer protection law developed a series of coherent, interdependent, and long-standing assumptions, principles, and objectives, including:

- Consumer interests (and potential consumer harms) can be identified, anticipated, and balanced against the needs of suppliers and the public interest
- Minimum standards may be necessary to regulate transactions between parties of unequal bargaining strength to balance information inequities, reduce deception and coercion, or ensure consumer choice
- Marketplace competition promotes consumer welfare, marketplace efficiency, and the public interest through consumer choice that encourages lower cost and higher quality goods and services.

Consumer protection law has typically met these objectives through a range of legal (and self-regulatory) strategies, including:

- Defining standard contractual terms and baseline protections which consumers can rely on universally without having to negotiate.
- Defining standard terms and baseline protections for transactions that are particularly risky for consumers, such as mortgages and auto sales, or where consumers have no practical bargaining power, such as electrical utilities.
- Ensuring notice and disclosure of certain information up-front, such as information about risks and consequences, and information needed to make a properly informed decision.
- Limiting terms and conditions that are excessively one-sided or exploitative.
- Providing "cool off" periods for consumers to change their mind as a check (and disincentive) to engage in coercive or deceptive sales tactics.
- Establishing consumer protections on a sector-by-sector basis where specific practices need regulating, such as time-share properties, tow trucking, door-to-door sales, credit agreements, etc.
- Establishing sectoral governance and regulatory bodies (such as those for funeral homes and financial services).
- Establishing best practices or certification standards, such as the Canada Standards Association, the Vintners Quality Alliance (VQA), etc.
- Establishing standard rules and processes to govern consumer disputes, including prohibitions on jurisdiction shopping, mandatory arbitration, or waiver of class action rights; government complaint and dispute resolution services; government investigations of specific and systemic issues; and other such measures. [40]

2.2 Standard Form Contracts

Many of the provisions and protections described above have contributed to the development of "standard form" or "boilerplate" consumer contracts.

The benefit of standard form contracts is that they are fast, consistent, efficient, and transparent. These attributes make standard form contracts ideal for high-volume, routine commercial and consumer transactions of many kinds.

Historically, the legal invention of "mass contracting" had clear economic benefits for both businesses and consumers. Over time, consumers have become accustomed to seeing simple and standardized "terms of service" posted at parking lots, printed on sales receipts, or provided on the back of event tickets.[41]

"Mass contracting" law adapted to transactions involving digital goods. By the mid- to late-1990s, courts in Canada and the United States accepted so-called "shrink-wrap" contracts as a standard form contract for software sales.[42] These contracts were called "shrink-wrap" because consumers could see through the transparent plastic wrap sealing floppy disks and CD-ROMs and take notice of a simple page of terms and conditions. Removing the plastic wrap acted as a form of acceptance. "Shrink-wrap" cases are direct predecessors to today's digital "click-consent" ToS.

Regardless of format, the legal principle at the heart of standard form contracts is "notice." Notice occurs when the supplier provides the consumer with some form of disclosure of the contractual terms that govern the use of a product or service. Notice may provide a complete set of terms, such as a sign posted at a parking lot or on the back of a ski ticket. Notice may also provide that consumers have "read and accepted" a longer set of terms, typically available through hyperlink, webpage, or printed copy of the terms.

For consumers to reasonably accept the notice, the notice must be obvious (visible); clear (comprehensible); and make any risks to the consumer apparent (foreseeable). Consumers can choose to accept the notice, review contractual terms in detail, negotiate new terms, or decline the offer of goods or services.

Over time, it appears that "notice" has become an acceptable legal alternative to fully "informed consent" for standard form contracts. As a result, within certain limits, it is not legally necessary for a consumer to have read or explicitly consented to ToS, only that the ToS *could have been* read. This principle underpins many ToS contracts in the digital marketplace today.

2.3 Examples of Terms from Existing ToS Contracts in Canada

ToS contracts can be intimidating: their length, complexity, and jargon can confuse or frustrate consumers.

This section summarizes a dozen terms commonly found in real-world ToS contracts. The LCO has synthesized each term from our review of several leading digital marketplace contracts that bind millions of consumers across Canada each day. Each term is briefly explained in plain language, and introduces consequences and complications that may not be immediately obvious or clearly disclosed to consumers.

Terms and Conditions Used in Many ToS

A contemporary ToS contract in the digital marketplace may contain sections addressing one or more of the following topics:

- Definition of key words and phrases
- User rights and responsibilities
- Proper or expected usage of the service, and a definition of misuse
- User notification upon modification of terms, if offered
- Accountability for online actions, behavior, and conduct
- Privacy policy outlining the collection and use of personal data
- Payment details such as membership or subscription fees, etc.
- Opt-out policy describing procedure for account termination, if available
- An arbitration clause detailing the dispute resolution process and limited rights to take a claim to court
- Disclaimer/Limitation of Liability clarifying the site's legal liability for damages incurred by users

EXAMPLE TERMS

"Your Reasonable Use of the Digital Service"

"User cannot use any means to get unauthorized access to the service/product, crash the service/product, manipulate, or interfere with the working of the service/product"

"Reasonable use" terms are intended to prohibit interfering with a product to ensure stable, reliable performance and integrity.

However, terms like this may be used to inhibit "fair use" of the service product by the consumer.

For instance, such terms could limit the "right to repair" and, as noted by the Government of Canada, may prohibit consumers from making some uses of their products, including installing or developing interoperable add-on products"[43] or software.

"Reasonable use" terms also mean that user accounts can be suspended or cancelled for perceived violations and solely at the discretion of the vendor. "Reasonable use" terms have been used to justify consumer suspensions for trying to enforce consumer rights[44] or posting reviews of products.[45]

Should this happen, digital assets of users or professional content creators can be "stranded," and businesses can be harmed.[46] In one notable example, people have been remotely locked out of their electric cars because they were disputing repair bills.[47]

"User is of Legal Age"

"You must be age 13 (or equivalent minimum age in your Home Country, as set forth in the registration process) to create an account and use our Services."

Some contracts indicate a minimum age for use (often 13), while others require the person has the maturity to understand and consent to the ToS. Still others may require "A parent or legal guardian who is creating an account for a minor should review this Agreement with the minor to ensure that they both understand it."[48]

These terms are problematic because many ToS contracts are too complicated for adults to understand, let alone children. Equally important, parents are often unaware of the considerable risks to their children online, meaning that they may often not know what they are consenting to, irrespective of the ToS.[49] *Research also demonstrates that some businesses violate their own terms and intentionally target the vulnerabilities of children to make their products more addictive.*[50]

In many jurisdictions, children are required to use a specific service for school, which effectively overriding age consent provisions.[51] *Canadian guidelines have been developed in relation to youth consent and concerning content. Several industry initiatives have also developed standards for marketing, etc. To date, these are voluntary standards.*[52]

"Consent to Collection, Use, Disclosure and Deletion of Data"

"You agree that an app store licensor may collect and use technical data and related information—including but not limited to technical information about your device. Licensor may use this information, as long as it is in a form that does not personally identify you, to improve its products or to provide services or technologies to you. Deleting your account may not fully remove the content you have published from our systems and may remain stored on our servers and accessible to the public."

Consumers often presume their digital activities are anonymous, too trivial to be worth tracking, or are well served through the privacy commitments of suppliers. Research demonstrates that ToS frequently that mask sophisticated data collection operations with far reaching (and undisclosed) consequences.[53] *These practices may go well beyond the collection of "technical information" required to "improve products" or "provide you with more relevant marketing & offers."*

Such terms may be used to justify location-tracking users "to within a few yards and in some cases updated more than 14,000 times a day,"[54] *and may do so even when not using an app, resulting in 24/7 consumer surveillance.*[55]

Databases can also be linked, correlating consumer movements and online browsing records to income tax and other personal financial data.[56] *The wealth of accumulated data may create unique consumer "fingerprints" that may persist despite the "anonymization" or "de-identification" of data.*[57]

These consumer profiles can also shape what individual consumers see – such as differential pricing, job listings, and available rental housing – with considerable risk for bias and discrimination.[58]

Content shaping may also have broader social impacts, including propagation of misinformation, political polarization, election interference, and self-harm (including children).[59]

ToS may also authorize transfer of data to data brokers who can sell services across borders (where consumers in Canada have no expectations of rights or redress)[60] *or who make data available to police forces without a warrant.*[61] *Data may also outlast the consumer / supplier relationship. Data deletion may remove information from public view while platforms keep a private copy for their ongoing use.*[62]

"Use of Automated "Bot" Accounts"

"You represent, warrant, and agree that you will not exploit the Service or collect any data incorporated in the Service in any automated manner through the use of bots, metaspiders, crawlers or any other automated means."

A robot or "bot" is the term commonly used for a software agent that, once programmed and run, may perform certain automated tasks.[63] Bots are typically used to automate tasks or processes that software can perform more quickly and efficiently than humans, particularly repetitive, iterative, or voluminous tasks.[64]

Bots can be beneficial, for example, automating the comparison of prices from several suppliers, or actively monitoring websites for changes and providing automatic notice.

But bots can also be harmful. Policies and terms on the use of automated content bots are important to counter-act the propagation of artificial content and misinformation. A recent UK study confirmed, for instance, that two-thirds of anti-vax propaganda online was created by just 12 influencers – most of whom were based in the United States.[65] Meanwhile Twitter recently deactivated 70 million bot accounts masquerading as real people to propel political narratives and misinformation campaigns.[66]

While laudable, the efficacy of these terms is questioned. Litigation over the purchase of Twitter for instance revealed that the problem is an order of magnitude larger than earlier disclosed, and endlessly ongoing.[67]

The policy can also be used to inhibit actions that are in the public interest, such as academics studying platforms and more transparently reporting on the issue.[68] Consumers, meanwhile, may be routinely consuming deceptive content. California has taken steps to address this with a bot labeling law coming into force in 2023, but critics are wary of how effective it will be.[69]

"Governing Law and Dispute Resolution"

"Except to the extent expressly provided in this agreement, you agree to be governed by the laws of the State of California, excluding its conflicts of law provisions. You and the business agree to submit to the personal and exclusive jurisdiction of the courts located in California to resolve any dispute or claim arising from this Agreement."

Terms like this can either assert or make it appear that disputes are resolved in foreign jurisdictions. Whether this is true or not, critics highlight that the term can mislead consumers and dissuade them from ever raising a dispute given perceived costs, complexity, and risk. In Canada, gig economy platforms have used their ToS to define the employment status of workers as outside the ambit of employment and labour laws. Similarly, Facebook sought to exempt itself from privacy legislation in British Columbia. In many cases, it appears actions like these are intentional.[70]

"Contract Changes"

"The business reserves the right at any time to modify this agreement and to add new or additional terms or conditions on your use of the services. Such modifications and additional terms and conditions will be effective immediately and incorporated into this agreement. Your continued use of the Services will be deemed acceptance thereof."

Terms like this not only assert the right to unilaterally change any part of the contract but to do so without any notice and plain-language summary provided to the consumer. Consumers are considered to consent by simply continuing to use the service as usual while they may be wholly ignorant of any changes to the ToS. This can trigger consumer backlash and reputational risk to businesses where consumers discover and object to such terms.

"Accounts, Passwords and Security"

"User might need to open an account and is responsible for maintaining the confidentiality of the password. The business is not liable for any losses if the user does not do so. Users agree to be governed by the business' privacy policy and should know that nothing is ever totally secure on internet even if the transaction claims to be encrypted."

Terms like this suggest that a user is responsible for not only the integrity of account passwords but also accept any losses from using the system, even where the system "claims" to be encrypted. Businesses are

responsible for creating security systems that cannot be breached through phishing, hacking, and other techniques that the user has little control over. Any losses, abuses, or exploitation a consumer faces may be deemed to be their own fault and waived by the same business that created the security system. Businesses may also bind consumers to privacy policies. These are often referenced as separate documents (requiring further clicking or downloading to read) and themselves can be thousands of words long. One constellation of ToS amounts to over 70,000 words, comparable in length to Harry Potter and the Sorcerer's Stone.[71]

"Terms of Content Services and Sales"

"This Agreement governs your use of the business' services through which you can buy, get, license, rent or subscribe to content, Apps, and other in-app services (collectively, "Content"). It is your responsibility not to lose, destroy, or damage Content once downloaded. We encourage you to back up your Content regularly."

Terms like this use common words with common meaning – but may obscure practices that consumers are unaware of. For instance, litigation is taking place in which a content vendor is arguing that "buy" doesn't mean "to own," but rather only means a right to access "licensed" content that the corporation can unilaterally rescind at any time. In one documented case, a consumer lost over $20,000 of purchased iTunes content.[72] *Back-ups may also be unreliable. Back-ups may also be governed by "Digital Rights Management" that can still leave a file inaccessible if rights are revoked. Backups of content may require the user to keep the content on proprietary platforms and isn't necessarily portable.*

"Research"

"We use platform data, including public feedback, to conduct research and development for our services in order to provide you and others with a better, more intuitive and personalized experience."

Product testing on live users can have potentially life-altering consequences and may occur without any notice to the consumer. Research ethicists recently noted how "tweaks to widely used algorithms can become social engineering experiments" with one recent example "affecting job prospects in ways that are invisible" to the consumer.[73]

"Product Pricing"

"The business can change prices or offerings without notice and the products and services are governed by their respective ToS."

Terms like this are reasonably understood to allow for natural variations in pricing from time to time. The term may also be used to authorize practices consumers are less familiar with, such as "variable", "dynamic" or "differential" pricing. These practices may rely on general characteristics or a profile of a specific consumer to set pricing, often with the consumer unaware that the price they see online may be different than others. There are several published examples of practices related to live "variable pricing." Marketplace sites typically use a data profile about a consumer to automatically adjust prices, for instance, charging lower prices to consumer tracked as previously visiting a discount website, or charging higher prices to consumers who reside in wealthier postal codes.[74] *Academics suggest that personalized and dynamic pricing is market inefficient as well as arguably unfair.*[75]

"Disclaimers, Limitation of Liability, and Indemnity"

"The business disclaims all responsibility of problems resulting from using the site. The business is not liable for anything unless prohibited by law and it details the extent of any liability. The business is indemnified against all third-party claims."

These kinds of terms are criticized for broadly waiving consumer rights. These terms can also be used in the dispute resolution process to coerce consumers into accepting losses that they should not be responsible for.

2.4 Case Study: The Tim Horton's App

A recent investigation in Canada is a case study into how ToS can fail to adequately inform consumers, match contractual promises with practices, or fairly balance corporate and consumer interests.

The Tim Horton's app was used by customers to place orders, receive special offers and discounts, collect reward points, and participate in contests and giveaways. From the launch of the app in 2017 through to July 2020, consumers in Canada downloaded the app 8.6 million times with 1.6 million active users.[76]

Customers downloading the app were asked to consent to the following notice of location tracking:

- On Android devices: "Allow Tim Hortons to access your location while you are using the app? We use your location to help you find nearby restaurants and provide you with more relevant marketing & offers."
- On iOS iPhones: "We use your location to help you find nearby restaurants and provide you with more relevant marketing & offers."[77]

No further information was given. The prompt offered a simple "yes/no" option.

In 2020, a single Tim Horton's customer – a journalist – was curious about the prompt and what it meant in practice. He shared his surprising findings in a National Post article detailing how he:

> *… discovered that despite granting the Tim Hortons app permission to access the location functionality of his mobile phone while the App was open, in reality the app was tracking his location even when the app was closed (more than 2,700 times in less than 5 months), to infer his home, place of work, travel status, and when he was visiting a competitor.*[78]

The article triggered a joint investigation of Privacy Commissioners to Canada, Quebec, British Columbia, and Alberta. The Privacy Commissioner's 2021 Final Report makes several findings which helpfully describe the gap that may exist between the ToS consumers (may) read and real-world practice and consequences.[79] Their findings include the following:

The Tim Horton ToS Included Misleading Terms

> *The Tim Hortons app asked for permission to access the mobile device's geolocation functions, but misled many users to believe information would only be accessed when the app was in use. In reality, the app tracked users as long as the device was on, continually collecting their location data… People who downloaded the Tim Hortons app had their movements tracked and recorded every few minutes of every day, even when their app was not open…*[80]

Tim Horton's Failed to Get Proper Consent

> *We found that Tim Hortons did not obtain valid consent… Tim Hortons failed to inform Users that it would collect their location information even when the App was closed… Tim Hortons also failed to ensure Users understood the consequences of consenting to the continual collection of granular location data when the app was closed.*[81]

Tim Horton's Explanations Were Misleading

> *[Tim Horton's] also made misleading statements to Users (in certain permission requests and FAQs) that it would only collect information when the App was open.*[82]

Tim Horton's Shared Third-Party Data With Potentially Systemic Consequences

> *Tim Hortons' contract with an American third-party location services supplier contained language so vague and permissive that it would have allowed the company to sell "de-identified" location data for its own purposes. There is a real risk that de-identified geolocation data could be re-identified… Location data is highly sensitive because it can be used to infer where people live and work, reveal trips to medical clinics. It can be used to make deductions about religious beliefs, sexual preferences, social political affiliations and more.*[84]

ToS Must Be Reformed

> *Organizations must implement robust contractual safeguards to limit service providers' use and disclosure of their app users' information, including in de-identified form. Failure to do so could put those users at risk of having their data used by data aggregators in ways they never envisioned, including for detailed profiling.*[85]

The four privacy authorities recommended that Tim Horton's and any third-party recipients voluntarily delete the collected data; develop an effective privacy management program with clear communication to consumers about practices; and report back on these efforts.[86] Many questioned the strength of these measures.[87]

A class action claim against Tim Horton's was also filed on behalf of consumers in Quebec, British Columbia, and Ontario. The case recently settled. Tim Horton's agreed to compensate app users with "a free hot beverage and a free baked good worth a little under $9 CAD plus tax."[88] The corporation maintains that "the proposed settlement is not an admission of wrongdoing."[89] Others suggest that the "price of privacy" should "add up to more than the cost of a coffee and donut."[90]

What Data Did the Tim Horton's App Collect?

The media report details the kinds of information gathered to create a profile of consumers. For instance, the journalist found various identifiers produced by the app and disclosed in his data profile, including:

- "user.started_traveling" which recorded a trip the author took to Morocco and a hotel stay in Manitoba.
- "user.entered_place / user.exited_place" which tracked when the author went in and out of a restaurant, including details like "confidence:low" if he merely walked past the restaurant and "place_chain_name: Starbucks" if the location was a known restaurant.
- "radar_insights_state_home:True" tracked when the author was at home and at what time of day.
- "user.entered_office / user.exited_office" tracked when the author was at work, including pinpointing the location of his desk in the building. It also used this tag to track when the author visited his girlfriend. [83]

What Is A Consumer Worth?

Digital services companies often measure the value of their "daily active users" (DAU) in terms of their "market value." This represents the per-share market capitalization value of each DAU recorded by the platform. These numbers also reveal revenue and net income per user. [91]

Company	Users (Daily Active Average, Millions)	Net Income Per User	Revenue Per User	Market Value Per User
Facebook	1,820	$13.89	$43.39	**$401.95**
Snap	249	-$4.31	$8.66	**$325.40**
Twitter	187	-$6.63	$18.37	**$204.40**
Pinterest	442	-$0.84	$3.14	**$100.26**

3. Consumer Protection Law in Ontario and Across Canada

3.1 Ontario's Consumer Protection Act

3.1.1 Introduction

Ontario's central piece of consumer contracting legislation is the *Consumer Protection Act, 2002* (CPA).[92] This legislation is intended to support a competitive marketplace while protecting individuals entering contracts for personal, family or household purposes (as distinct from any "business purposes").

The CPA asserts a very broad jurisdiction over consumer activities. The CPA states that it governs all consumer transactions "if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place."[93]

"Consumer transactions" are further defined to include transactions with

> *…an Ontario nexus, with either the consumer being resident in Ontario or the supplier engaging in a transaction with a consumer that is resident in Ontario (i.e., the Act applies to suppliers that are not Ontario-based).*[94]

Consumer transactions also include "consumer agreements and all business dealings with a consumer prior to, at the time of, and after the entering into, of a consumer agreement."[95]

Courts have acknowledged the central remedial purpose of the CPA. In a recent decision, the Ontario Superior Court of Justice stated that consumers are:

> *… relatively unsophisticated, less powerful, and more vulnerable than businesses, and are the very group who the Act was designed to protect… as remedial legislation that should be liberally construed in order to give effect to its objects... an identified class of individuals – consumers.*[96]

> *[Additionally,] [c]onsumer protection legislation is inherently focused on consumers as its main objectives are: (1) protecting consumers; (2) restoring balance in the contractual relationship between suppliers and consumers; and (3) eliminating unfair and misleading practices.*[97]

A second Ontario Superior Court further held that:

> *A court or tribunal must look at the real essence of the transaction and disregard the technical or formal nature. This provision* [CPA section 3, an "anti-avoidance" provision] *attempts to address transactions that are structured in an attempt to avoid the application of the Act, as well as instances where it is not expressly clear that the agreement or transaction falls within the purview of the Act.*[98]

3.1.2 General Protections and Standard Terms

The CPA sets out many explicit protections and standard terms to ensure basic fairness to consumers, including:

- Establishing and protecting basic consumer rights with respect to consumer agreements.[99]
- Banning unfair practices like deception and unconscionable terms where "the consumer transaction is excessively one-sided in favour of someone other than the consumer," where "the terms of the consumer transaction are so averse to the consumer as to be inequitable," and where "the consumer is being subjected to undue pressure to enter into a consumer transaction."[100]
- Establishing forms of notice and disclosure, including which contracts must be in writing, what information must be provided, and additional rules governing specific types of contracts.[101]
- Protecting vulnerable persons where "the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors."[102]
- Facilitating access to justice through a complaints and investigation mechanism at the Consumer Protection Ontario (under the Ministry of Public and Business Service Delivery), and the right to commence actions through the Superior Court of Justice.[103]
- Prohibiting terms that would require mandatory arbitration of disputes[104]
- Prohibiting terms that would waive the right to commence or become a member in a class action.[105]

To achieve these objectives the CPA adopts a mix of legislative and regulatory provisions. CPA Parts 2 and 3 establish rules governing consumer agreements in general, while CPA Parts 4 – 8 establish specific rules governing certain types of commercial activity and transactions.

Parts 2 and 3 of the CPA are generally applicable to most transactions. Part 2 includes several prohibitions or limitations on issues arising with ToS contracts, including:

- No waiver of substantive and procedural rights, meaning the legislation prevails over any agreement or waiver to the contrary.[106]
- A right to participate in class proceedings despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent.[107]
- Expectations for the basic quality of services to a "reasonably acceptable" standard and a prohibition on waiving that expectation.[108]
- Any ambiguities in the consumer agreement that might lead to more than one reasonable interpretation are interpreted to the benefit of the consumer.[109]
- Relief from legal obligations in relation to the use or disposal of unsolicited goods or services.[110]

Part 3 of the CPA aims to protect consumers from unfair practices in a wide array of contexts. This includes limitations or prohibitions against:

- False, misleading, or deceptive representation, such as product or service endorsements, performance characteristics, benefits, necessity (such as a repair), or uses.[111]
- Unconscionable representation, such as exploiting consumer vulnerabilities related to disability, ignorance, illiteracy, and language barriers; excessively one-sided terms in favor of the seller; grossly inflated pricing; misleading statements or terms to the detriment of the consumer; or undue pressure to enter into the transaction.[112]
- Renegotiation of price or the terms of service through coercion, such as withholding goods.[113]
- The right to rescind an agreement due to unfair practices of the kind described above, among others.[114]

Crucially, consumer protections under Parts 2 and 3 of the CPA apply irrespective of whether a service was provided to a consumer for payment or for free. This is an important distinction in the digital marketplace because many digital goods and services are provided on a low-cost or no-cost basis. These issues are discussed extensively later in the Consultation Paper.

3.1.3 Specific Protections (CPA Parts 4 – 8)

The CPA also includes provisions and consumer protections targeted to specific kinds of consumer agreements, businesses, or transactions. These are defined in Parts 4 through 8 of the CPA. These sections include provisions governing:

- Direct sales contracts (such as door-to-door sales) (CPA s. 41-43)
- Remote sales contracts (such as by mail or telephone) (CPA s. 44-47)
- Internet sales contracts (formed by text-based internet agreement) (CPA s. 37-40)
- Credit agreements and protections (CPA s. 66-85)
- Time share agreements (CPA s. 27-28)
- Reward points (CPA s. 47.1)
- Motor vehicle dealers and repairs (CPA s. 55-65)
- Vehicle towing and storage (CPA s. 65.1-65.21)

3.2 Other Legislation and Instruments Protecting Consumers in Ontario

The CPA is not the only legislation protecting consumers in Ontario.

There are many examples of non-CPA provincial and federal legislation protecting consumers in specific industries and sectors. Common examples at the federal level include the:

- Consumer Product Safety Act
- Consumer Packaging and Labeling Act
- Wireless Code
- Financial Consumer Agency of Canada Act.[115]

Ontario also has many specific pieces of legislation to protect consumers beyond the CPA. Examples include the:

- Payday Loans Act
- Funeral, Burial and Cremation Services Act
- Condominiums Act
- Ontario New Home Warranties Plan Act
- Real Estate and Business Brokers Act
- Travel Industry Act
- Energy Consumer Protection Act.[116]

In many areas, the provincial government sets specific standard terms where consumers are prone to exploitation. A well-known example of regulated terms and contracts in Ontario are rental tenancy agreements (under the *Residential Tenancies Act*), and the provision of a model standard residential tenancy agreement to promote compliance with the Act.[117]

Consumers may also rely on "trustmark" systems. These act as plainly visible certification and labeling schemes. Examples of this in Ontario include the VQA standard for locally produced wines.[118] A federal example is the CSA seal of approval for electrical device safety.[119]

3.3 Consumer Protection Legislation in Other Provinces

Like Ontario, every other Canadian province and territory have general legislation protecting consumers entering into a contract.[120] The LCO's national survey of provincial consumer protection demonstrates strong similarities between these statutes.[121] Notably, provincial legislation has developed alongside federal consumer legislation through the principle of "mutual modification" which guides shared jurisdiction for transactions of services and goods.[122]

Like Ontario, other provinces have generally adopted an array of "hard" and "soft" law instruments to govern the relationship between suppliers and consumers, including:

- "Cooling off" periods, mandatory warrantees, etc.
- Consumer legislation governing specific products, like hot water tanks, auto sales, and mortgages or specific practices, like door-to-door sales
- Corporations Acts
- Personal Property Security Acts
- Industry regulators
- Quality certifications
- Privacy rights.

Finally, most provinces have also enacted laws or policies governing consumer dispute resolution or promoting access to justice, including:

- Complaints to government oversight bodies
- Right to commence lawsuits
- Dispute resolution requirements
- Litigation support for consumers and public interest actors, such as a legal aid clinics or other legal aid services.[123]

The Consumer Protection Landscape Across Canada.

The LCO has compiled a comparative table of all provincial consumer protection laws. We are pleased to make this available to researchers upon request.

3.4 Federal Legislation: Privacy, Data Protection, and the *AIDA*

In addition to provincial legislation, many consumer protection issues are regulated, or influenced, by federal legislation or initiatives. Most significantly, many consumer protection issues with ToS contracts are linked to privacy issues and the data economy.

Digital marketplace services often make their money (in whole or in part) by participating in an economy based on the collection, use, analysis, and disclosure of customer data. Service providers may also offer services and content generated or selected in part by automated systems. As a result, federal legislation governing privacy, artificial intelligence (AI), and algorithms has an important role to play when contemplating modernized consumer protection legislation in Ontario.

The most significant area of complementary federal and provincial jurisdiction is through private sector privacy legislation, including the federal *Personal Information Protection and Privacy Act* (PIPEDA).[124] PIPEDA governs commercial privacy law unless provinces have enacted legislation that is "substantially similar."[125] Ontario does not have private sector privacy legislation and consequently relies on PIPEDA.

PIPEDA is currently being reviewed. In June 2022 the Federal Government introduced new consumer protection and privacy legislation as part of Bill C-27, the *Digital Charter Implementation Act, 2022*.[126] Bill C-27 has three parts addressing three pieces of inter-related legislation, each of which could affect ToS issues in the digital marketplace.

As of June 2023, Bill C-27 is still under legislative consideration. In its current form, however, key elements include:

- Part 1, which enacts the *Consumer Privacy Protection Act* (CPPA). This repeals Part 1 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and sets out a revised regime to govern how private sector entities collect, use, and disclose data. In addition to broad, horizontal regulations, the CPPA includes additional targeted provisions covering specific activities such as anonymized and de-identified data, data portability rights; the right to delete personal information; and stronger protections for minors. CPPA is designed, in part, to better align Canadian law with other jurisdictions, including the European Union's *General Data Protection Regulation* (GDPR).[127]
- Part 2, which enacts the *Personal Information and Data Protection Tribunal Act*. This establishes an administrative tribunal to hear appeals of certain decisions made by the Privacy Commissioner under the CPPA and to impose penalties.
- Part 3, which enacts the *Artificial Intelligence and Data Act* (AIDA). That Act establishes prohibitions on the design, development, use or making available of AI systems that use illegally obtained personal information, and prohibits the making available of AI systems that cause "serious harm" to individuals. AIDA imposes additional transparency and regulatory requirements on a class of "high risk" algorithmic activities, many of which could be implicated in consumer protection issues.

As noted, Ontario does not have its own private sector privacy legislation. Nor does it have legislation governing AI or automated decision-making (ADM), although policies that could set standards for AI and ADM are under development.[128] As a result, CPPA and AIDA could have important consequences for consumer ToS reform in Ontario. For instance, CPPA could:

- Set new standards for consent that could change how digital marketplace service providers disclose or present their ToS in whole or in part
- Prohibit certain data use and sharing practices that alleviate concerns for unconscionable and misleading terms typical to ToS contracts
- Provide more robust and rapid resolution of consumer concerns for data use, potentially alleviating the number of complaints made in relation to a ToS.

4. Catalysts for Reform: Gaps in Consumer Protection in the Digital Marketplace

Ontario's Consumer Protection Act (CPA) was enacted in 2002 and has not been substantially amended in 17 years.[129] Since then, Ontario's digital economy has grown substantially. The "digital marketplace" relies on new contracting arrangements and marketplace practices that did not exist when the CPA was last updated.

There is widespread interest in updating consumer protection legislation to address issues in the digital marketplace. The Government of Ontario has acknowledged that CPA reform is overdue. The provincial government's 2020 Consultation Paper stated "The CPA needs updating to work better in the new marketplace"[130] and that more must be done to "to ensure that the laws governing the marketplace are in tune with our times."[131]

In February 2023, the Government of Ontario reintroduced and expanded the range of consultation issues. The 2023 Consultation Paper reaffirmed the province's commitment to

> *…strengthen protection for consumers, adapt to changing technology and marketplace innovations, and streamline and clarify requirements to improve consumer and business understanding and compliance.*[132]

The 2023 Consultation Paper includes many significant reforms to update the CPA (see section 4.1 below). The LCO commends the province for this initiative. That said, the LCO believes that the provincial government's proposed reforms do not consider or address many consumer protection and rights issues rights specific to the digital marketplace.

LCO research identifies several ways in which ToS contracts in the digital marketplace undermine traditional consumer protections and the CPA. The following subsections outline each of these, highlighting the ways in which:

- Consumer consent may be illusory
- Notice and disclosure may not protect consumer interests
- Consumers may have little or no ability to negotiate
- Deceptive "dark patterns" may undermine consumer choice
- Low-cost and no-cost digital services may conceal important risks, avoid consumer protections
- ToS may restrict legal rights and reduce access to justice
- Consumer protection laws can conflict and overlap with other laws
- Litigation is limited as a consumer tool.

A closer look at these issues reveals opportunities to realign contemporary digital practices with traditional consumer protection principles.

4.1 Ontario's 2020 and 2023 CPA Reform Proposals

The 2020 and 2023 Government of Ontario CPA Consultation Papers make several suggestions to update the CPA to work better in the new "dynamic and evolving [consumer] marketplace,"[133] including:

- Simplifying and consolidating specific contract disclosure rules that apply to different types of contracts – including direct, remote, internet, and future performance agreements – into a single set of core rules that would apply to most consumer contracts, including "a contract entered into online."[134]
- Creating a consolidated disclosure rule specifying that consumer contracts must be in writing; that contents of the contract are disclosed (including "key information in the contract"); and that consumers have the express opportunity to accept or decline the contract before entering into it.[135]
- Enhancing protections against unilateral contract amendments by requiring explicit consent to any amendments or continuation for most contracts, subject to two exceptions: (1) where the changes do not reduce the obligations of the supplier or increase the obligations of the consumer; or (2) when the contract is for an indefinite term and the consumer can cancel at any time without incurring termination costs. In the event of an exception, the supplier unilaterally change the contract by providing with 30 days notice of the change.[136]
- Clarifying that it is unfair and unconscionable to offer "contract-breaking services" to a consumer without first disclosing the consumers' existing rights and cost of the service.[137]
- Clarifying that consumers have one year to rescind a contract after an unfair practice *takes place* (as opposed to the existing right to rescind within one year of *commencing* the contract).[138]
- Explicitly prohibiting businesses from including terms in a contract that appear to waive express consumer rights in the CPA to file a complaint with the Ministry, join a class action or commence an action in court. A new proposal would further prohibit terms that infringe on consumers' rights to make fair public reviews of a business or service.[139]
- Extending compliance orders issued under the CPA to cover any business that facilitates another business' contravention (covering intermediaries such as online platforms and billing services).[140]

4.2 Consumer Consent May Be Illusory

Both the common law and the CPA require adequate disclosure be given to the consumer to read and understand contractual terms and conditions.[141] Notice is a fundamental principle of consumer protection law intended to ensure consumers have the opportunity to read and consent to contractual terms.

However, academic research and practical experience demonstrate online ToS are often long, not read, and/or inaccessible:

- **Digital ToS have a cumulative footprint and are often very long.** It has been estimated that the average American consumer would need more than 250 hours to read through every ToS they agree to in a year, equivalent to a part-time job.[142] It has been stated in the Canadian context that the likelihood consumers actually read ToS in the digital marketplace is "statistically never."[143] Recent US studies show that 91% of adults and 97% of younger adults (18-34) accept legal terms and services without reading them.[144]
- **Digital ToS can be very difficult to understand.** In addition to their length, ToS contracts require a high level of education to understand. It has been estimated that ToS have become so sophisticated that an average consumer would require 14 years of education to comprehend the terms.[145] Many ToS are written at a level that exceeds the sophistication of books about theoretical physics and philosophy.[146]
- **Digital ToS may exclude diverse and young consumers.** Disabilities, language barriers, literacy levels, income, class, cultural issues and/or other vulnerabilities may worsen barriers to understanding ToS. For example, children and youth are among the highest users of digital marketplace services, yet ToS may not take their vulnerability into account.

As a result, consumer consent to contractual terms and conditions may be illusory.

4.3 Notice and Disclosure May Not Protect Consumer Interests

From time-to-time Ontario's legislature has recognized the need to better protect consumers by making notice and disclosure practices fairer. In 2005, for instance, the provincial government "recognized that numerous business owners were being dishonest and hid important information from consumers" deep within the fine print, or "used language that was ambiguous or difficult for consumers to interpret." [147] The CPA was consequently amended to state that any disclosures mandated under CPA "must be clear, comprehensible and prominent" for consumers to receive fair notice.[148]

Over time, it has become increasingly clear that that more prominent notice and more extensive disclosure may not effectively protect consumer interests in the digital marketplace.[149] In other words, providing more information may not always result in more informed consumer decisions. The OECD summarizes the issue as follows:

> *Online disclosures can play a key role in informing consumer decisions. [And] online disclosure requirements therefore play an important role in a variety of consumer policy issue areas, including e-commerce, product safety, data privacy and financial consumer protection.*
>
> *However, cognitive limitations such as information overload, as well as technical ones such as small screen sizes on mobile devices, may limit their effectiveness. Additionally, businesses may sometimes focus on technical compliance with disclosure requirements rather than maximising their effectiveness in informing consumer decisions.*[150]

Legal researchers agree that conventional disclosure requirements may be of limited assistance in the digital marketplace. Researchers have concluded that disclosure and ToS often

> *…disregarded people's cognitive abilities, literacy levels and/or lack of motivation to engage with information that does not seem to help them achieve a particular goal (e.g. completing a purchase or obtaining access to news content).*[151]

Studies in the digital marketplace have also found that:

- The degree of disclosure has almost no impact on the rate at which consumers read license agreements.[152]
- Consumers who do read ToS are equally likely to purchase a product regardless of the one-sidedness of the contract.[153]
- Only "one or two of every 1,000 retail software shoppers access the license agreement and most of those who do access it read no more than a small portion."[154]
- The "limiting factor in becoming informed thus seems not to be the cost of accessing license terms but reading and comprehending them." [155]
- Mandating disclosure will not by itself change readership or contracting practices to a meaningful degree given that only "0.36% [of consumer ToS are] more likely to be viewed when they are presented as clickwraps that explicitly require assent."[156]

4.4 Consumers May Have Little or No Ability to Negotiate

Online ToS contracts often present consumers with little practical choice but to "take it or leave it" with few other options.

"Contracts of adhesion" offer little opportunity for negotiation, other than the ability to walk away and find similar services elsewhere. This situation gives businesses "both the ability and incentive to unfairly influence consumers."[157] Studies in the United States demonstrate that the market regulatory power of consumer choice is largely ineffective in ensuring fair and balanced ToS.[158]

These issues are compounded by the fact that online ToS amendments can be frequent, consequential, and imposed with ineffective (or no) notice. Cumulatively, consumers may face hundreds of changes across dozens of ToS for products and services, an unreasonable task to manage.[159] Frequent changes may also facilitate deceptive or unconscionable practices. Consumers may also regard frequent changes as an active disincentive to read ToS as the ongoing responsibility to track changes imposes an additional and unreasonable burden.

4.5 Deceptive "Dark Patterns" May Undermine Consumer Choice

"Dark patterns" refer to subtle or invisible ("dark") contracting, software, and user interface design practices that "pattern" or "steer, deceive, coerce, or manipulate consumers into making choices that often are not in their best interests."[160] The prevalence of a range of different dark patterns is found "on e-commerce websites, apps, major online platforms, cookie consent notices and search engines" among other forms of digital transactions.[161]

Typical examples of "dark pattern" software and user interface design include:

- "Frictionless" sign-up practices that minimize notice of risks and consequences to the consumer
- Unnecessary and onerous opt-out procedures such as requiring mailed letters or phone calls with long wait-times
- Consent boxes and user settings checked by default
- Preference toggles with unclear labeling or in/active status
- Preferences and settings buried deep within a multi-layered menu structure or website
- Frequent pop-ups
- Obscured "cancel" or "unsubscribe" buttons
- Very small text

- Using undisclosed practices that lock consumers into a platform, such as proprietary data formats, bundled services, and "network effects" like non-transferable, non-refundable platform currencies
- Unnecessary countdown timers to create an impression of scarcity or a one-time offer. [162]

A recent OECD report identified 24 distinct categories of "dark pattern" design techniques deployed in the digital marketplace.[163] (see s. 8 below, and the table on page 54).

Studies of dark patterns show they are very effective at "subverting or impairing consumer autonomy, decision-making or choice"[164] as well as changing consumer choices and behaviours. Dark patterns can also cause consumers to experience financial loss, psychological stress, and undermine trust in the supplier.[165]

Ultimately the "purpose of dark patterns is to increase business revenue" through deception.[166] Unregulated dark pattern practices "may also pressure online businesses to use dark patterns, particularly where they are not clearly prohibited, to remain competitive" and create a "race to the bottom."[167] Collectively, these practices reflect "mounting concern that dark commercial patterns may cause substantial consumer detriment."[168]

The United States Federal Trade Commission (FTC) recently developed broadly applicable policy guidance on dark patterns and began landmark enforcement measures.

The policy acknowledges that dark patterns are widespread practices "designed to trick, trap, and mislead consumers" through tactics that include "disguised ads, difficult-to-cancel subscriptions, buried key terms, and tricks to obtain consumer data."[169]

During 2022-2023, the FTC undertook an investigation into the consumer ToS of leading global videogame company Epic, developer of the popular video game Fortnite. The FTC investigation resulted in fines and penalties totalling $US520 million for Epic's use of exploitative dark patterns, unfair terms, and exploitation of child privacy.[170] The amount includes $US245M to refund consumers.[171]

An array of similar practices by Epic is now subject to a class action in Canada, which was certified to proceed in late 2022.[172]

Deceptive practices have also attracted fines in the hundreds of millions of euros in France and Italy. Investigations determined that Google, Facebook, and Apple used deceptive dark patterns to enroll customers by minimizing or circumventing adequate notice about key terms and conditions "with clarity and immediacy," as well as frustrating the ability to reject cookie trackers.[173] This investigation explicitly linked the role of legal notice to common but poorly understood business practices in the digital marketplace. Investigators found operators of several major platforms to be:

> *…misleading users who register on its platform by not informing them — "immediately and adequately" — at the point of sign up that it will collect and monetize their personal data… [The] information provided by Facebook was generic and incomplete and did not provide an adequate distinction between the use of data necessary for the personalization of the service (with the aim of facilitating socialization with other users) and the use of data to carry out targeted advertising campaigns.*[174]

Investigations into dark pattern practices have also begun in Canada. For instance, Canadian legal media recently raised the alarm over the ways in which deceptive "dark patterns" in the digital marketplace evade consumer protection principles and are triggering class action lawsuits.[175]

4.6 Low-cost and No-cost Digital Services May Conceal Important Risks, Avoid Consumer Protections

Many digital services are provided on a low-cost or no-cost basis to the consumer. Other services may rely on small "micro-transactions," intermittent subscriptions, platform currencies, credit for user-generated content, and other occasional and non-traditional exchanges of value. Such business models may avoid the regulation and scrutiny of consumer law as they fall short of monetary thresholds that trigger legislative jurisdiction.[176]

These services may also rely on business models that monetize users through data harvesting, user profiling, and targeted content or advertisements, often through vague or misleading terms in the ToS. As noted above, users of such "free" services may pay nothing but be worth hundreds of dollars to the supplier. (See the "What's a consumer worth?" sidebar in section 2.3 above.)

4.7 ToS May Restrict Legal Rights and Reduce Access to Justice

Notwithstanding consumer protection legislation, digital ToS may include provisions attempting to restrict a consumer's ability to seek legal remedies. Many ToS provisions include terms stating that disputes are governed by foreign laws or must be initiated in foreign jurisdictions. Many ToS also specify that disputes must be resolved through internal dispute resolution mechanisms, binding arbitration, or that class action rights are waived.

Consumers may also risk reprisal for asserting their rights. For example, the US FTC investigation into Epic (described in section 4.5 above) found sustained and systemic reprisal by the supplier where consumers asserted legislated or contractual rights. Coercive techniques include locking consumers out of their accounts, stranding digital assets, damaging credit scores by contesting chargebacks, and compelling settlement agreements.[177]

Consumers may also often find it impractical to enforce their rights, particularly for the kinds of routine transactions and activities that take place in the digital marketplace.

Finally, the sheer number and scope of supplier practices is also difficult to police, suggesting the need for proactive and systemic enforcement strategies.

4.8 Consumer Protection Laws Can Conflict and Overlap with Other Laws

More people than ever use digital services for work, education, recreation, communication, or to find jobs and housing. As a result, a significant proportion of consumer transactions are now conducted through digital intermediaries.

The reach of the digital marketplace to all facets of life means that consumer contracts now intersect with many other areas of private and public law. As a result, ToS often mean consumer protection rules may overlap or collide with other laws. Examples include:

- Privacy law
- Human rights law
- Employment and labour law
- Product safety
- Competition law
- Youth consent.

4.9 The Limits of Litigation

In the absence of legislation governing consumer protection in the digital marketplace, some consumers have turned to Canadian courts.

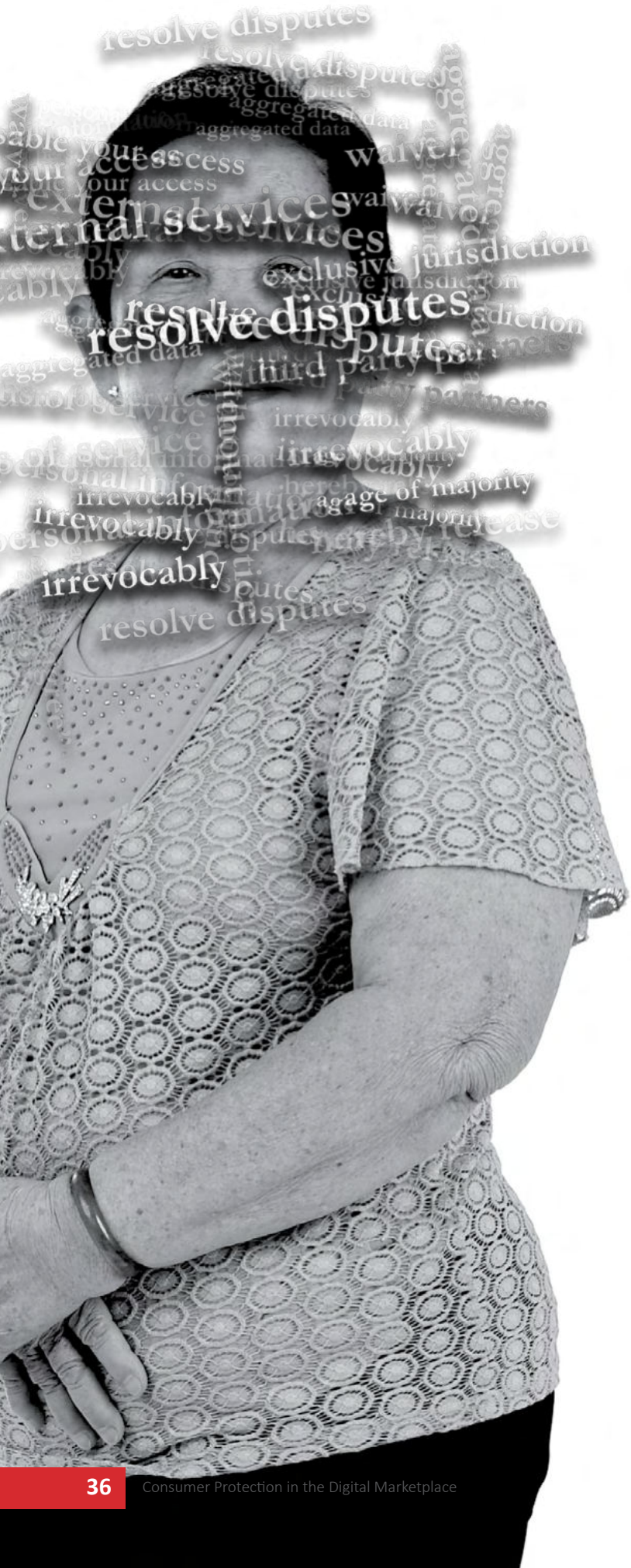
Litigation will always be a fundamental strategy to protect and promote consumer rights. That said, there may be important limits on the benefits of individual or even collective litigation to address consumer hostile behaviour. For example, litigation may lag business practices in the complex, fast-paced, and constantly evolving digital marketplace, meaning that court decisions may have limited impact on the business practices of the defendant or as precedents in other contexts. Less scrupulous actors may also seek to strategically exploit the reactive and slow pace of litigation. It was recently revealed, for instance, that Uber intentionally adopted an aggressive litigation strategy to delay government and allow more time for lobbying and to normalize public perception of their business model in the interim.[178]

The most significant "limit of litigation," however, is rooted in access to justice: Consumer lawsuits challenging online business practices are inevitably expensive, lengthy, and complex legally. Only the best-resourced litigants are likely to be capable of initiating such actions. Individual consumers are unlikely to have the resources, time, or capability to litigate their individual disputes, particularly when the monetary value of these suits is often so low. Some Canadian courts have acknowledged the limits of the judicial process to address the breadth of novel issues in the digital marketplace, particularly given the power imbalance between the supplier and consumer, and the reality that consumers often can't practically choose to participate in many services despite the potential consequences.[179]

Some Canadian courts have also acknowledged the need for a more comprehensive and coordinated approach amidst a provincial patchwork of consumer laws. A BC court recently accepted, for the first time in Canada, inter-provincial jurisdiction over consumer disputes.[180] This decision is likely to be treated skeptically by other governments and courts.[181] Nevertheless, the decision highlights the need for a comprehensive and coordinated approach to digital marketplace regulation.

Despite these limitations, Canadian courts have begun to interpret consumer contract law to account for the digital marketplace. A series of relatively recent provincial and Supreme Court decisions have held that:

- The unequal bargaining power between consumers and digital marketplace suppliers suggests the need for a large and liberal interpretation of legislation in favor of consumer protection.[182]
- Courts should actively consider market environment or **market contexts** shaping supplier/consumer relationships in the digital marketplace, including lack of consumer choice and difficulty of seeking redress for minor transactions.[183]
- Consumer ToS may be found unconscionable where terms prefer the law of foreign jurisdictions, contract out of labour and employment legislation, waive local class action or privacy rights, or impose dispute resolution jurisdictions.[184]
- Separate and distinct considerations are required to interpret standard-form contracts in consumer versus commercial contexts.[185]
- A class action in Canada against Epic for practices like those investigated by the U.S. Federal Trade Commission was certified to proceed as of December 2022.[186]



5. Consultation Issues and Questions

The provincial government's 2023 Consultation Paper includes many significant reforms to update the CPA. As noted, the LCO believes the provincial government's proposed reforms do not go far enough to address many consumer protection issues rights specific to the digital marketplace.

This section identifies and discusses a range of issues and proposals that go beyond the provincial government's CPA proposals. These issues and proposals are sometimes described as being part of a "new consumer agenda" designed to protect consumers against a new, complex, and expansive range of risks in the digital economy.[187]

The range of these issues are explored in the following sections 6 through 11, which discuss:

- Creating dedicated and consistent consumer protection rules for online contracts
- Improving notice and disclosure
- Regulating or prohibiting "dark patterns"
- Providing better consumer protections for youth and vulnerable consumers
- Reducing deception and unconscionable practices, and
- Improving oversight, enforcement and access to justice.

Importantly, the LCO's research and analysis suggests an emerging consensus around several key issues and principles important to consumer protection law reform.

6. Creating Dedicated and Consistent Consumer Protection Rules for Online Practices

The gaps in consumer protection distinct to Ontario's digital marketplace suggest the need to establish dedicated and consistent consumer protection rules for online practices impacting consumer contracts in Ontario. The following sections identify several potential reform proposals to meet that need, including:

- Defining "online" practices and establishing dedicated provisions
- Eliminating the CPA's monetary threshold to better protect consumers using free, low-cost, or occasional cost services
- Regulating unilateral changes to ToS.

6.1 Define "Online" Practices and Establish Dedicated Provisions

The CPA includes at least three types of contracts that may include an online component, including "internet", "remote" and "future performance" contracts.[188] These contracts were added to the CPA in 2002 in response early forms of internet commerce and the need to modernize a CPA otherwise "passed in the [economy of the] 1960s and into the 1970s." Notably, the 2002 legislature confirmed the need to modernize the CPA to ensure an equivalent "level of protection for consumers who shop for goods and services on the Internet to those going to their local corner store... with a face-to-face encounter."[189]

This legislative approach sought to distinguish contracts based on *where* they are formed (i.e., in person, on a phone or by mail, or online). Experience today is that these distinctions aren't always sensical. For instance, a consumer might buy a product in person by confirming

their purchase with their phone in a transaction mediated by an online third party. Consequently, the CPA's current legislative distinctions between different types of contracts overlap. This may cause confusion, undermine various consumer protections, and contribute to regulatory evasion.[190] For instance, one academic reference created 12 tables spread over eight pages to map out the intersections of these laws across various types of transaction.[191]

The provincial government's CPA proposals eliminates statutory distinctions between "remote," "internet," "future consideration" and "direct" contracts in favor of a single set of "core rules" that would apply to most consumer contracts, "including a contract entered into online."[192]

A single set of "core rules" may not effectively anticipate important consumer protection issues in online transactions for two reasons.

First, consumer needs and consumer protection issues in online transactions are unlikely to be addressed in a single definition of "core rules" that "would apply to most consumer contracts including direct, remote, internet, future performance, timeshare, personal development service, loan brokering, credit repair services and certain lease agreements."[193] A generic approach may also inadvertently mislead consumers into a false sense of reliance on incomplete standard terms.

Second, the provincial government's proposals do not define "online" contracts or practices. This gap raises several questions, including whether the CPA's existing protections for internet contracts will continue in whole or in part. For example, the CPA currently provides the following protections for "internet agreements":

- An express opportunity for the consumer to accept or decline the internet agreement
- The accessibility of the mandatory disclosure document
- A seven-day cooling off period to cancel the agreement
- The suppliers name, telephone number, and place of business premises
- The manner of delivery, including the name of the carrier
- The rights and obligations of the supplier in relation to cancelation, returns, exchanges and refunds
- Any other restrictions, limitations, and conditions imposed by the supplier unilaterally.[194]

It is unclear whether a new category of "online" transactions will have equivalent protections.

It is further notable that recent regulations enacted under Part 4 of the CPA *exempt* internet platforms supplying accommodation, public auctions, or perishable food from several long-standing CPA consumer protections.[195] As a result, Ontarians using services such as AirBnB, eBay, Door Dash, and Uber Eats may have fewer consumer protections than for other consumer transactions. These exemptions arguably undermine the principle that consumers should enjoy equivalent protections across the digital marketplace.

In contrast, many jurisdictions have legislated definitions of "online" or "digital" contracts, practices or services to promote better consumer protections in the digital marketplace. In many cases, these jurisdictions have defined legislative provisions which act as "standard terms" applicable to all digital marketplace ToS.

For instance, the European Union (EU) has adopted several dedicated definitions addressing "online" practices and the "digital marketplace," including:

- "digital sector: means the sector of products and services provided by means of, or through, information society"
- "online platform: means a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public"
- "online marketplace: means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers."[196]

These definitions allow the EU to create specific and targeted regulatory responses to digital consumer needs, including greater transparency, more effective notice and disclosure, clearer identification of unconscionable and unfair terms, and online-specific remedies. The EU has used this approach in other consumer-focused legislation as well. For example:

- The *Digital Markets Act* (DMA) defines "platforms" operating at various scales of reach and sophistication and establishes consumer-driven dispute resolution and systemic reporting mechanisms.[197]
- The *Digital Services Act* (DSA) also defines "platforms" and requires platforms to police themselves their platforms for misinformation, disclose content-promoting algorithms, and stop targeted advertising on the basis of ethnicity, religion, or sexual orientation.[198]

The UK is also in the process of finalizing the *Online Safety Bill* which introduces new rules for search engines and any platform that hosts user-generated content.[199] These rules effectively set "standard terms" for search engine and platform ToS which consumers can rely on.[200]

Importantly, Ontario has already established an important precedent example of dedicated digital legislation.

In April 2022, Ontario created and enacted a definition of "online digital platform" in the *Digital Platform Workers' Rights Act, 2022* (DPWRA).[203] The DPWRA establishes the first stand-alone definition of "digital platform" anywhere in Ontario law. The purpose of this legislation is to clarify certain employment and labour rights for those who work for an

> *online digital platform that allows workers to choose to accept or decline digital platform work… for the provision of for payment ride share, delivery, courier or other prescribed services...*[204]

The legislation makes platforms (and hence their ToS with workers) more transparent and balances inequities between the worker and platform. To achieve this, the legislation creates a new category of worker, the "digital platform worker," and ensures workers have access to "key information" and "market contexts" that impact them, including notice and disclosure of how the platform calculates worker pay; notice of removal of the worker from the platform; how algorithmic performance rating is conducted; and freedom from reprisals (such as worker account suspension and de-platforming) when workers raise concerns.[205]

Addressing Technology and Consumer Rights.

The LCO's Consultation Paper considers updates to the CPA to Ontario's consumer protection remains responsive to new digital marketplace technologies and business practices. Recent European reforms, such as the *Digital Markets Act*, *Digital Services Act*, and 2021 Unfair Commercial Practices Directive (UCPD), are more far-reaching.[201] For example, the UCPD includes detailed provisions addressing contracting, technological, and business practices that may violate consumer protection principles, including:

- Misleading information and misleading omissions
- Hidden marketing / failure to identify commercial intent
- Material information provided in an unclear manner
- Use of the claim 'free'
- Free trials and subscription traps
- Influencer marketing transparency
- User reviews
- Data-driven and algorithmic personalisation of content
- Dark pattern design of user interfaces
- Consumer lock-in to proprietary platforms and formats
- Gaming practices including sale of virtual items, in-game marketing, and digital currencies.[202]

There are several potential benefits of applying this approach to modernize online consumer practices in Ontario.

First, adding new and specific CPA definitions of "online" practices could create a legislative and regulatory framework to address the wide range of consumer harms and risks that arise uniquely (or primarily) in the digital marketplace. For example, dedicated definitions and provisions could allow the CPA to identify regulations and practices that address the complexity of online ToS contracts; issues relating to online disclosure, notice and consent; issues related to unconscionability; and "dark patterns." Dedicated definitions and provisions could also allow the CPA to address the impact digital terms of service may have on privacy rights, consumer profiling, content creator rights, platform misogyny, as well as to employment and labour rights.

This approach focuses on what businesses do in online transactions rather than trying to define how or where a contract is formed. Trying to define "online contracts" is very difficult. In reality, most contracts are a hybrid of online and offline activities, like buying something in a store while having the receipt emailed. Instead, the emphasis is on defining practices which take place in the online or digital marketplace that may raise legitimate consumer protection issues.

In this regard, a definition of "online" may be needed to establish a core set of broad and equivalent protection of consumers anywhere in the digital marketplace. This is consistent with long-established foundational principles of consumer protection law that aims to ensure equivalent protection anywhere, thus increasing consumer confidence while limiting harms.

Second, this approach could benefit Ontario businesses by clarifying that "online" CPA provisions would not apply to businesses that do not operate in the digital marketplace businesses or who engage in specified online practices that merit consumer protection. This approach would reduce regulatory uncertainty and burdens for many Ontario businesses and services, satisfying a key provincial priority.[206]

Third, this approach could promote harmonization and reduce compliance costs for businesses and consumers. It would also make compliance for all businesses easier and clearer, and eliminate the "race to the bottom" that disadvantages consumers and honest businesses alike.

Consultation Questions: Defining "Online" Practices and Establishing Dedicated Provisions

Question 1:
What factor or factors distinguish "online" practices from other forms of contract identified in the Consumer Protection Act (CPA)?

Question 2:
Should Ontario create a statutory or regulatory framework to address potential consumer risks and harms in the digital marketplace? If so, should the CPA be amended to add a statutory definition of "online" practices? How should "online" practices be defined?

6.2 Eliminate the CPA's Monetary Threshold to Better Protect Consumers Using Free, Low-Cost, or Occasional Cost Services

At present, some of the CPA's consumer protections are dependent on the monetary threshold of the consumer contract. For example, the CPA current consumer protections for "internet agreements" (listed above) only apply where the value of the transaction is $50 and over.[207]

The provincial government's proposed "contract entered into online" does not clarify whether the CPA's existing monetary thresholds will continue to apply. The lack of clarity regarding online contracts and monetary thresholds potentially undermines consumer protections for many common online services used by Ontario's consumers that are provided free, at low-cost, through indefinite subscription fees, or supplemented through "micro-transactions."[208]

Equally important, many online services rely on non-monetary exchanges of value such as consumer data monetization, reward points, platform tokens or currency, and the like. Regulators have begun to recognize the contractual value of these transactions and how they can contribute to an exploitative and unbalanced (and perhaps unconscionable) bargain between the supplier and consumer.[209] These transactions may be exempt from the CPA's present and proposed definition of "online contract."

When the Ontario CPA was drafted, the $50 threshold was created to avoid imposing too much in the way of formalities on low value contracts.[210] The world of free, low-cost, occasional cost platforms and business models (such as those used by Facebook, Google, Twitter, and many others) was not on the minds of legislators. [211]

Unsurprisingly, courts have struggled to consistently interpret these provisions for the contemporary era. Current case law suggests that some of these situations may satisfy the $50 threshold and thus trigger the protection of the CPA to specific notice and disclosure requirements.[212] Furthermore, ToS contracts may voluntarily be structured to comply with these requirements even if many of the dealings would not need to comply given that the consumer does not pay more than $50. At the same time, case law is equivocal, reactive, and voluntary compliance is inconsistent.[213]

A modern CPA could eliminate its $50 monetary threshold to better protect consumers of free, low-cost or occasional cost services. CPA reforms could also explicitly cover accumulated transactions, such as those through indefinite subscription fees, occasional "micro-transactions."

Ontario could modernize the CPA to account for these situations by adopting the approach taken in British Columbia. The BC *Consumer Protection Act* declines to set a monetary threshold notice and disclosure requirements broadly applicable to ToS contracts.[214] This could achieve an important goal of the 2023 Ontario CPA consultations: to simplify and consolidate of core protections broadly applicable anywhere in the digital marketplace. It could also streamline business compliance and certainty while improving consumer confidence.

Consultation Questions: Modernizing the Monetary Threshold for Protection under the CPA

Question 3:
Should the CPA be amended to eliminate the monetary threshold (currently $50) for consumer protections for "online" contracts? What are the potential benefits and drawbacks of eliminating the monetary threshold?

6.3 Regulate Unilateral Changes to ToS

Ontario's 2023 Consultation Paper includes two proposals to update the CPA's unilateral amendment provisions. The proposals would require explicit consent to any amendments for most consumer contracts, subject to two exceptions:

- Where the changes do not reduce the obligations of the supplier or increase the obligations of the consumer; or
- When the contract is for an indefinite term and the consumer can cancel at any time without incurring termination costs.[215]

These proposals recognize unilateral contract amendment is a significant problem for consumers in the digital marketplace. Unfortunately, the proposals may be too narrow and leave many digital consumers without the benefit of important CPA protections.

For example, the first proposal would only apply to contracts requiring written consent in the first instance. Many digital terms of service contracts do not meet this standard and would thus not be subject to the CPA's unilateral amendment protections. Many other digital contracts only require acceptance of notice, rather than written consent to the contract.

Similarly, the second proposal would allow businesses to make unilateral changes if the consumer is free to cancel the contract at any time without termination costs. At first glance, this proposal appears to strike a sound balance: if a consumer does not like a unilaterally imposed term, she or he can opt-out and choose to go elsewhere.

The difficulty is that digital consumers often have little practical choice to go elsewhere. As a result, Ontario's consumers may effectively be "locked in" to digital contracts due to a lack of marketplace alternatives, propriety formats, externally mandated online contracts/services (such as workplace or school requirements), and/or captured content that make it difficult, impractical, or impossible to transfer data and metadata between products. In these circumstances, Ontario's consumers may effectively have little or no choice to terminate their contracts and thus avoid unwanted unilateral contractual changes.

The LCO acknowledges that businesses need to constantly innovate to improve their products and services. As a result, digital suppliers and businesses must have the ability to change their terms of service to reflect the evolution of their business practices, products, and business relationships. Nevertheless, consumer rights should not be sacrificed.

The LCO's research reveals several promising legal and policy tools available to improve notice and disclosure of unilateral changes in the digital marketplace. These reforms address both 1) the nature and details of notice that must be provided to consumers, and 2) the risks and consequences to consumers of unilateral ToS changes.

First, unilateral changes that involve "key information" and consequential "market contexts" (discussed below in s. 7) could be prohibited or otherwise curtailed in the CPA. This reform would be consistent with the commitment in the 2023 Consultation Paper to "clearly prohibit businesses from including contract terms that appear to waive important consumer rights."[216]

Second, the CPA could require that unilateral changes must be accompanied by plain language explanations and real-world examples of the change's risks and consequences to consumers, effectively disclosing any important "key information" and "market contexts" consumers may otherwise not be aware of. The CPA could also require that unilateral changes be accompanied by notice of how to opt-out of the contract.

Third, unilateral changes could be governed by better ensuring a "duty of good faith" where a business proposes to modify a contract governing an ongoing relationship. Businesses have legitimate reasons to modify contracts – such as routine changes in the business structure or the business model – that may not impact on consumers and are unlikely of interest to consumers. At the same time, consumers and governments need the opportunity to assert themselves when contract amendments amount to bad faith or trickery. The CPA could be modified to allow unilateral modification of a term by the business only if the modification is proposed in "good faith", meaning that it is fair and equitable and does not have the effect of undermining an affirmation or promise made by the business that is consequential to the consumer, or as modifying part of the original bargain between the business and the consumer. Where questioned, this would give rise to a prescribed situation for a consumer to cancel a contract. Such a "duty of good faith" was recently proposed by the American Law Institute as an effective way of ensuring consumer rights in context of unilateral contract changes.[217]

An additional and perhaps complimentary reform would be to establish an online ToS registry where businesses could post their most recent ToS. For instance, the state of California and Federal regulators in the United States propose a variety of consumer contract registration databases, including for privacy policies and terms that week to waive or limit consumer legal protections.[218] Such registries could promote transparency and notice, automate auditing and academic study, or track unilateral changes to improve accountability. (More about this is included in this paper at section 11.2.)

Consultation Questions:
Addressing Unilateral Changes to ToS

Question 4:
Should the CPA be amended to provide more consumer protections against unilateral changes in terms of service (ToS) in the digital marketplace? If so, could this be achieved by:

- *Prohibiting unilateral changes related to "key information" or "market contexts"?*
- *Providing a right to cancel a contract without penalty under proscribed circumstances?*
- *Better ensuring a "duty of good faith" to distinguish routine from consequential unilateral changes?*
- *Creating a ToS registry, consumer welfare agency, or other audit mechanism to review unilateral changes and prepare independent summaries for consumers about potential risks and consequences.*
- *Other potential reforms?*

Question 5:
How should potential reforms to better protect consumers against unilateral changes be balanced against the legitimate interests of online suppliers?

7. Improving Notice and Disclosure

Consumer notice and disclosure is one of the pillars of consumer protection legislation. Notice and disclosure is said to address information asymmetries, improve consumer awareness, and facilitate the exercise of consumer choice. There are many notice and disclosure provisions in Ontario's CPA.

The ubiquity of online contracting / ToS and modern business practices challenge traditional assumptions about why, and how, consumers are provided notice and disclosure. In these circumstances, it is not surprising that notice and disclosure has been perhaps the highest profile and most discussed consumer protection law reform issue.

The CPA's notice and disclosure provisions (and equivalent provisions in other jurisdictions) have been criticized by consumers, business, academics, and courts for being insufficient to meet the needs of contemporary consumers. The challenge is how to reconcile the "more disclosures, more notifications" approach with the many small and large transactions consumers routinely conduct in the digital marketplace. This is particularly urgent in relation to "key information" and "market contexts" distinct to the digital marketplace that may shape consumer behaviour and interests in ways consumers may not be adequately aware of. For instance, whether consumers really own their "digital property" or how user data is monetized and the consequences this may have.

The following sections explore these issues by:

- Outlining current notice and disclosure requirements under the CPA
- Reviewing notice and disclosure reforms proposed by the Government of Ontario
- Discussing criticisms of notice and disclosure regimes, and how they've been litigated, and
- Introducing law reform options that would identify and disclose "key information" and "market contexts" about the digital marketplace to consumers.

7.1 The Consumer Protection Act

Ontario's current CPA reflects what is sometimes called a "more disclosures, more notifications" model. For example:

Consumers have a general right to disclosure depending on specific contexts, such as where the contract was signed (in a place of business, in door-to-door sales, over the internet, etc.) or because of the nature of the business (such as tow trucking, motor vehicle repairs, credit agreements, etc.). The CPA also includes detailed mandatory disclosures for "internet agreements.[219] These disclosures are often minimal and cover only bare formalities of a consumer transaction, such as the name of the supplier, their phone number, an itemized list of prices, taxes and shipping charges, and the like.[220] The CPA may also mandate additional notices and disclosures in specific transactions, such as towing contracts or credit agreements.[221]

Finally, the CPA generally provides that:

> *5 (1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent.*

and

> *15(2)(a) It is an unfair practice to make an unconscionable representation [including] that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors.*

The CPA's notice and disclosure provisions (and equivalent provisions in other jurisdictions) have been criticized by consumers, business, academics, and courts for being insufficient to meet the needs of contemporary consumers. The provincial government has acknowledged these criticisms and proposed important updates the CPA's notice and disclosure provisions. This section discusses these issues and identifies potential law reform initiatives to update notice and disclosure for the digital marketplace.

7.2 Government of Ontario CPA Reform Proposals

The 2023 Government of Ontario Consultation Paper includes three important proposals to update CPA notice and disclosure provisions, including:

- Simplifying and consolidating the many different existing CPA disclosure rules into a single set of core rules that would apply to most consumer contracts, "including a contract entered into online."[222]
- Requiring that the consumer contract is in writing; that the contents of the contract are disclosed; and providing an express opportunity for consumers to accept or decline the contract before entering it.[223]
- Requiring disclosure of "key information in the contract."

The third proposal is perhaps the most far-reaching. The definition of "key information" is not provided in the Consultation Paper, however, the provincial government has committed to "consult during regulatory development on the appropriate information to be required for disclosure purposes and whether some contract categories would require additional rules."[224]

These proposals are intended to work together to standardize and improve consumer notice and disclosure requirements for consumer transactions. The goal, as stated in the 2020 consultation, is that there should be clearer and more consistent rules governing consumer contracts "anywhere.".[225]

The LCO commends these reforms but is concerned that they may not be effective. This is because simply adding *more* consumer notices or disclosures may not address the most common and consequential consumer notice and disclosure issues in the digital marketplace.

Our concerns appear to be shared by many Ontario consumers and businesses:

On March 8th, 2023, the provincial government hosted consultation sessions on its proposed 2023 CPA reforms.

Consumer representatives noted that the traditional emphasis on notice and disclosure rules and practices is no longer effective in the digital marketplace because:

- The number and complexity of digital "terms of service" or "click consent" contracts.
- Most consumers do not understand the nature or consequences of many of the digital contracting practices.
- Consumers often have practically little choice but to accept the terms of online contracts, even if suppliers disclose concerning practices or key information.[226]

Similarly, business representatives emphasized that:

- Consumers *and* businesses experience "consent fatigue" and "consent spam."
- Some businesses may not understand the consequences of many digital terms of service.
- Simply adding more, or more detailed, notice and disclosure requirements may add regulatory burdens on businesses without providing practical assistance to consumers.
- Businesses who comply with additional new or additional notice provisions may be at a competitive disadvantage if there is little enforcement of consumer protection provisions.[227]

7.3 Criticisms of Notice and Disclosure Regimes

The concerns expressed by many Ontario consumers and businesses are consistent with academic analysis of modern digital contracts. Contract scholars write at length about the limitations of effective and meaningful notice and disclosure. Central to this analysis are the concepts of ToS "accumulation" and "overload":[228] Accumulation is the sheer number of ToS presented to consumers in many different areas. Overload is the complexity of ToS and their wide range of structures and formats.

Research has shown that accumulation and overload lessen consumers' "wish to make choices and impairs the quality of choices that they make."[229] As a result, updated CPA requirements that simply *add* additional notice and disclosure provisions may be ineffective or even worsen consumer protection.

Notice and disclosure provisions in ToS contracts have been criticized for many years. In 2013, Margaret Jane Radin, a leading Canadian contracts scholar, concluded that consumers:

- Feel they would notunderstand the terms if they did read them, so it is not worth the time.
- Determine they need the product or service and have no access to a supplier that does not impose onerous clauses, so reading the terms wouldn't make any difference.
- Are often not even aware that they are becoming subject to questionable terms, so don't know that there is anything important to read.
- May simply trust the company not to have included anything harmful.
- Believe that anything harmful would be unenforceable or challenged by others.
- Think the company has power over them anyway and so are simply stuck with what the ToS imposes.
- Do not believe they will ever need to exercise their background legal rights.[230]

A 2021 OECD survey of online shoppers in 13 countries reveals that around 70% of consumers who have faced a problem in e-commerce simply trust the terms and conditions of an online purchase to be acceptable, rather than to actually read them before every online purchase.[231]

More recently, the American Law Institute (ALI) concluded:

> *In a world of lengthy standard forms, which consumers are unlikely to read, more restrictive assent rules that demand more disclosures, more notifications and alerts, and more structured templates for manifesting assent, while required by courts, are unlikely — even if businesses comply with them — to produce substantial benefit for consumers…*[232]

Legal scholars note that expansive ToS disclosures are a logical consequence in the absence of clear legislative or regulatory guidance on disclosure requirements. In other words, businesses often *add* ToS disclosures as a precautionary strategy to fulfill indeterminate legal requirements and insulate themselves from potential liability.[233]

Similarly, the OECD recently found that:

> *…if the number of mandatory (general or sector-specific) disclosure requirements becomes very large, the cost of enhancing the effectiveness of each individual disclosure may become prohibitive, forcing businesses to concentrate on compliance rather than on efficient communication. If the content of the disclosed information is associated with significant costs for the disclosing entity, incentives to disclose effectively may be limited.*[234]

Moreover, simply adding disclosure requirements may complicate or overshadow the need to promote *meaningful* consumer disclosure. The ALI, for example, has highlighted how consumer disclosure practices in the digital marketplace often lack "market context" to make disclosures meaningful.[235]

In the world of digital contracting, "market context" is an important concept. It refers to business models and practices which are often unknown to consumers but which may have important consequences and risks. A common example in the digital marketplace is a online contractual term that a supplier "may share information about you with our partners to improve your experience." Absent disclosure of market context, a consumer may not know that these provisions are often used to monetize the consumer, shape consumer content or prices, and share consumer profiles with other businesses.

Examples Of Key Information And Market Contexts

In 2021 the EU adopted an Unfair Commercial Practices Directive (UCPD).[236] The UCPD provides detailed lists of contracting, technological, and business practices with guidance on how these may violate consumer protection principles. Examples include:

- Misleading information and misleading omissions
- Hidden marketing / failure to identify commercial intent
- Material information provided in an unclear manner
- Use of the claim 'free'
- Free trials and subscription traps
- Influencer marketing transparency
- User reviews
- Data-driven and algorithmic personalisation of content
- Dark pattern design of user interfaces
- Consumer lock-in to proprietary platforms and formats
- Gaming practices including sale of virtual items, in-game marketing, and digital currencies.[237]

How Can the Omission of Key Information Affect Consumers?

Unclear, vague, or complex ToS may be used to mislead consumers about the rationale for certain practices. In the United States, for example, the FTC recently imposed a $150M penalty on Twitter for "breaking its privacy promises – again."[238] The FTC found that Twitter prompted more than 140 million users to their link phone numbers and Twitter accounts under the guise of improving user's account security.[239] Twitter subsequently used the phone numbers to uniquely identify consumers, establish data profiles, and consolidate those profiles across different platforms and services. This practice made Twitter's users more more valuable to data brokers and more valuable advertising targets, resulting in "ads that enriched Twitter by the multi-millions."[240]

7.4 Government, Judicial and Academic Scrutiny

Finally, ToS notice and disclosure provisions are increasingly the subject of government investigations and judicial and academic scrutiny. Governments, for instance, have increased the pace of investigations into notice and disclosure practices specifically in the complex digital marketplace. Examples include the following:

- Italy and France have imposed record fines (in the hundreds of millions of euros) on operators including Facebook, Apple and Google for ToS notice practices found to be deceptive.[241] Operators were found to be intentionally designing sign-up procedures "misleading users who register on its platform by not informing them — "immediately and adequately" — at the point of sign up that it will collect and monetize their personal data..."[242]
- In the United States, e-commerce sites like Amazon have been criticized by the United States Congress and others for not providing meaningful notice to consumers of how opt-in programs like Amazon Prime may inflate and pass additional costs onto consumers.[243]
- Google has been fined in the EU and sued for damages for practices which are not disclosed to consumers, including prioritizing links to Google's shopping platform (with a demonstrable increase in prices of goods by 12-37%).[244]

ToS notice and disclosure provisions have also been criticized recently by Canadian courts and regulators. The recent BC case of *Douez v. Facebook, Inc.* (2022 BCSC 914)[245] addressed the relationship between ToS, consent, and notice provided during the user registration process.

The applicant, Douez, claimed that Facebook did not obtain adequate consent to use her personal image in Facebook's "shared stories" promotions. These would insert images of friends into Facebook promotions to better catch the attention of the user and imply the friend's endorsement of the promoted product. The court agreed that Facebook did not obtain adequate consent to this practice and affirmed several consumer protection principles in the digital marketplace, including that:

- Consumers cannot consent to such practices unless given notice of them in advance.
- Several long-established contractual principles apply to ToS in the digital marketplace, including that terms must be interpreted in the context of the power imbalance between the supplier and consumer.[246]
- Courts can broadly consider factors such as the purpose of the contract, the nature of the relationship it creates between supplier and user, and the environment or market conditions and market contexts it operates in without looking at circumstances specific to each individual agreeing to it.[247]
- Any commitment to give users tools and settings to control their data is misrepresentative unless the control is effective and meaningful (where implemented).[248]

- A reasonable consumer is entitled to read and understand several provisions together. Failure by the operator to meet that interpretation fails to establish express consent.[249]
- Prospective users must receive fair notification where registration for a service constitutes agreement to a ToS, and the user is given the opportunity to read those provisions by clicking on a hyperlink.[250]
- The supplier bears the onus and must be able to show that consent was obtained when a user claims that their privacy has been violated. [251]

Some legal analysts suggest *Douez* confirms that suppliers must effectively disclose *meaningful* risks and consequences to the consumer in order to rely on consumer notice as a form of consent.[252]

Similarly, the recent investigation into the Tim Hortons app by Canadian privacy regulators confirmed that "vague and permissive language" in Tim Horton's ToS undermined effective notice and disclosure. [253] The Commissioners found:

- Notice and disclosure is insufficient where information is being collected and used outside the reasonable expectations of the individual and creates a meaningful risk of residual harm.
- Effective notice should concretely and clearly specify four key elements: the information being gathered; the parties the information is shared with; the purposes of the sharing or use in sufficient detail for individuals to meaningfully understand what they are consenting to, and
- There must be clear notification of risks of harm and other consequences.[254]

Judicial scrutiny of these issues has also struggled to consolidate concerns with notice and disclosure in online consumer contracts. In the United States, the American Law Institute (ALI) recently introduced a new law reform study – the *Restatement on Consumer Contract Law* – to help guide American judges in consistently navigating these issues in consumer contracts.

The ALI restatement proposes that "reasonable notice" can be achieved by protecting "consumers against terms that either overreach or undermine express promises made by the business."[255] This would allow "blanket consent" despite the absence of informed consent to it, "as long as it does not undermine the "dickered terms" and is otherwise not unfair to the consumer."[256] If it is, the notice (and underlying term) will be unenforceable for unfairness. The Restatement includes two new Principles §5 and Principle §8 specifying contemporary expectations for consumer notice.

Principle §5 states that a term can be unconscionable for either "substantive reasons" or "procedural reasons." Substantive reasons are defined as a fundamentally unfair or one-sided term. Procedural reasons include terms that result in unfair surprise or results from the absence of meaningful choice or ability of a "reasonable consumer" to understand and appreciate implications of a term given their legal and financial sophistication, the complexity of the term, etc.[257]

Principle §8 states that where a term (or notice) suggests a fair bargain for the consumer but is inconsistently and unfairly interpreted in practice by the business, the term would not be considered final.[258] The premise of Principle §8 reflects the reality in consumer contracts that "standard contract terms do not result from a combined effort by both parties to draft a negotiated agreement" and there is "less justification to view them as a joint affirmative memorialization of a mutually designed agreement, and thus less reason to allow them to override affirmations of fact or promises made to the consumer."[259] In this manner, Principle §8 would allow consumers to effectively *withdraw* their consent in some circumstances in order to establish a more reasonable and fair interpretation of a contested contractual term.

Finally, these proposals could also be read in conjunction with the ALI proposal reviewing a "duty of good faith" where a business proposes modification to a term, and is required to meet both procedural and substantive requirements proportional to the impact on the contract and the consumer (see discussion in section 6.3).

As evidenced above, it is important to note the close relationship between consumer protection strategies addressing notice / disclosure and deception / unconscionability. Many law reform strategies addressing notice and disclosure are intended, in part, to reduce deception and unconscionability. As a result, many of the issues and strategies discussed earlier (including "dark patterns", "market context", and "key information") have bearing on law reform options to improve deceptive and unfair practices. Indeed, terms and practices identified as "key terms" and "market contexts" for improving notice and disclosure also merit consideration as terms which may be deceptive or unconscionable (see discussion in section 10).

7.5 Law Reform Options

There have been many attempts to update notice and disclosure provisions to improve consumer protection.

For example, Ontario's recent *Digital Platform Workers Rights Act* creates a definition of a "digital platform worker" that legislates several key disclosures of greatest interest, risk and consequences to users, including how pay is calculated, how tips are handled, and the right to a minimum wage.[260] The law also establishes important disclosure requirements addressing how work is assigned and platform's use of performance rating systems.[261] These are examples of "key information" and "market contexts" in action, drawing the attention of the digital worker / consumer to issues of greatest practical relevance, risk and consequence to them where the terms may otherwise not be disclosed or buried in an unread ToS.

A similar approach to reforming digital marketplace relationships have been adopted elsewhere. For instance, EU legislation mandates notice and disclosure of key "market context" information to consumers using digital services platforms, including risks and consequences related to:

- What content moderation systems are in place, and what their rules are
- How the consumer is profiled to target advertisements and automatically rank and select content the consumer sees
- The right of the consumer to opt-out of these activities (while continuing to use the service).[262]

In proposing to consolidate various outdated types of agreements, the Ministry's 2023 Consultation Paper proposes separate regulatory development of "rules for businesses to disclose the terms including key information in the contract."[263] "Key information" is not defined, however, and the Ministry commits to a future consultation "on the appropriate information to be required for disclosure purposes and whether some contract categories would require additional rules."[264]

The LCO supports the need for consumers to receive mandatory notice and disclosure of "key information" prior to consenting to an online contract and important amendments to that contract. ToS accumulation and overload demonstrates how consumers face an insurmountable volume and complexity of contracts in the digital marketplace.[265] Making "key information" better available may improve transparency and ensure consumers are aware of terms which are of concern and consequential to them, and actionable by them.

In the LCO's view, Ontario's consumer protection law must strive to provide "key information" in digital transactions relating to consent, deception, unconscionability, notice and disclosure, the identification of risks and consequences to consumers (including "market contexts" in which the transaction takes place), and risk management by businesses.

Given the range of "key information" that should be disclosed, both legislative amendments and dedicated regulations are likely needed. The LCO believes that "key information" requires both specificity (to target practices of concern) and flexibility (to respond to evolving market conditions and practices). This would better establish a modern and comprehensive legislative framework and brings consumers and businesses back to the original bargain – the balance between transactional expediency, clarity, and foreseeable risks in standard form contracts – while protecting consumers from the unbalanced and new range of structural risks and consequences they face in conducting even minor and inconsequential transactions in the digital marketplace.

Development of a category or categories of "key information" will also be able to target well known and concerning practices in the digital marketplace while leaving honest businesses without further regulatory burdens. These require both explicit notice and consent, and may also identify issues that are, or may be, unfair or unconscionable to consumers in an ever-evolving digital marketplace.

In addition to the examples provided in the EU's UCPD, further contemporary examples of "key information" market contexts crucial to consumers should consider:

- Management of digital property, such as the inability to transfer, trade, or re-sell user purchased digital content; as well as the unilateral right of the supplier to remove or rescind the availability of digital property
- Deceptive online design (so-called "dark pattern" designs) that may systematically set default opt-in settings for crucial issues like collecting and sharing youth data, induce consent through vague blanket statements during sign-up, or tricking users into unwanted charges (discussed in section 8 below)
- Platform lock-in from proprietary formats, intentionally limited interoperability, and bundled services
- Misrepresenting product characteristics and business practices specific to the digital marketplace such as "end to end encryption", data anonymization and de-identification
- Terms that may impact user rights under other legislation, such as employment law, labour law, privacy law, or landlord and tenant law.

A legislative definition of "key information" is also needed to:

- Make it easier for businesses to manage risk and achieve compliance by defining what "key information" includes and to target specific practices of concern in the digital marketplace so as to not impose further burden on honest businesses.
- Facilitate tailored provisions related to specific practices of concern to consumers and particular groups of consumers, such as children and linguistic minorities.
- Modernize the CPA by acknowledging inherent limitations on the traditional role of notice and disclosure as a market regulatory check-and-balance in the digital marketplace.
- Provide consumers with meaningful information about consequential business practices (such as consumer monetization or account suspension practices) otherwise unclear and buried in lengthy contracts.
- Facilitate the definition of more tailored legislative, regulatory and enforcement practices through, among other examples, defining examples of "key information" in relation to specific contemporary unconscionable and unfair practices, standard terms, standardized product labeling, and the like.

Identification of "key information" categories and specific terms also raises significant benefits for consumers and businesses alike. It invites:

- the creation of "standard terms" that consumers can rely on without having to review every ToS
- prohibitions on practices deemed too unfair to consumers
- creates the conditions to standardize labeling or "trustmark" systems, including easier analysis of contracts held in a public ToS registry
- a set of terms that could be subject to default opt-in or opt-out settings.

To be clear, this proposal would only be effective if adopted in conjunction with additional proposals elsewhere in this paper. This includes:

- defining a category of "online" transactions in the digital marketplace which "key information" provisions could be aligned
- regulating dark pattern practices that undermine notice and disclosure (see section 8 below)
- the need for the efficacy of notice and disclosure to be made available and measured in far more transparent and modern ways (see section 11.2.7)
- stronger prohibitions on reprisal and greater access to justice to ensure monitoring and enforcement of these protections (see sections 11.2.3 to 11.2.5).

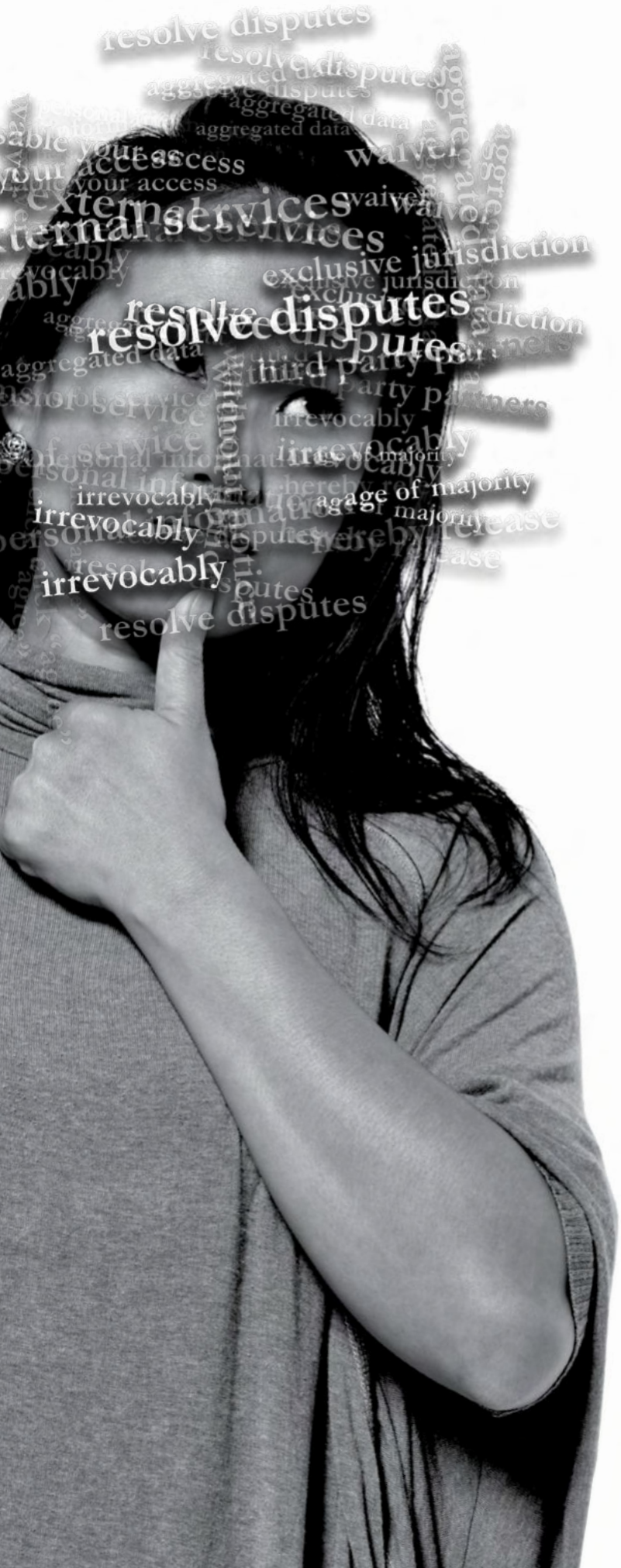
Consultation Questions to Improve Notice and Disclosure

Question 6:
Should the CPA be amended to require online suppliers to provide more meaningful and effective notice of material terms and online consumer risks? If so,

- *What is the best way to improve online consumer notice while avoiding consumer information overload?*
- *What "key information" should be disclosed to Ontario's online consumers?*
- *Should online "market contexts" and "deceptive practices" be disclosed to Ontario's online consumers? If so, what contexts or practices should be disclosed?*
- *Are reforms enacted or proposed in other jurisdictions (such as the EU and by the American Law Institute) appropriate for Ontario?*

Question 7:
There are many other options to improve notice for online consumers, including standard terms, prohibiting certain practices, trustmarks, etc. Which options should be adopted in Ontario, if any?

Question 8:
How should potential reforms to provide better or more meaningful notice to consumers be balanced against the legitimate interests of online suppliers?



8. Regulate Dark Patterns

As discussed above in section 4.5, "dark patterns" are practices that aim to obscure information and coerce or trick consumers into consenting to ToS and other business practices without understanding what they are consenting to.

Leading studies suggest "the core of dark patterns is their objectionable effect on consumers' ability to make free and informed choices, with the likelihood of entailing consumer detriment."[266] This suggests that dark pattern practices play a role in subverting the effective operation of consumer protection principles, including fundamental principles like notice and disclosure.

In response to these impacts, leading studies further find that:

- Market forces alone are unlikely to address dark patterns effectively and may further incentivise use of dark patterns
- Disclosure and transparency measures are not sufficient in isolation to protect consumers from dark pattern coercion
- The effectiveness of certain kinds of disclosures is mixed and strongly dependent on their design. In some contexts, disclosure requirements may harm consumers by, for example, burdening them with "consent spam"[267]
- Complaints-based mechanisms are too narrow, reactive, and slow to effectively regulate practices as varied and widespread as dark patterns
- Priority should be given to regulating "quick wins" for easily defined and obviously deceptive dark pattern practices – like hidden information, false hierarchies, consumer option pre-selections, and choices that are hard to cancel/opt out – while further investigating more subtle and challenging issues.[268]

Examples of dark pattern practices in the digital marketplace

Category	Name of dark pattern	Description
Forced action	Forced registration	Consumer forced to register or tricked into thinking registration necessary
	Forced disclosure / Privacy zuckering	Consumer tricked or forced into sharing more personal information than desired
	Friend spam / Social pyramid / Address book leeching	Manipulative extraction of information about other users
	Gamification	Certain aspects of a service can only be "earned" through repeated use of service
Interface interference	Hidden information	Important information visually obscured
	False hierarchy	Visual prominence given to firm's preferred setting or version of a product
	Preselection	Firm-friendly default is preselected (e.g. more expensive or less privacy-protecting option)
	Misleading reference pricing	Price shown as a discount from a misleading or false reference price
	Trick questions	Intentional or obvious ambiguity (e.g. double negatives)
	Disguised ads	Consumer induced to click on something that isn't apparent advertisement
	Confirmshaming / Toying with emotion	Emotionally manipulative framing to make consumer select a particular option
Nagging	Nagging	Repeated requests to do something firm prefers
Obstruction	Hard to cancel or opt out / Roach motel / Click fatigue / Ease	Asymmetry in ease of signing up/opting in to a product or firm-friendly choice versus cancelling/opting out
	(Price) comparison prevention	Frustrates comparison shopping regarding price or content
	Immortal accounts	Account and consumer information cannot be deleted
	Intermediate currency	Purchases in virtual currency to obscure cost
Sneaking	Sneak into basket	Item consumer did not add is in cart
	Hidden costs / Drip pricing	Costs obscured or disclosed late in transaction
	Hidden subscription / Forced continuity	Unanticipated or undesired automatic renewal of a service
	Bait and switch, including bait pricing	Consumer is offered product or price different from that originally advertised
Social proof	Activity messages	Indications about other consumers' actions, which may be misleading or false
	Testimonials	Statements from other consumers regarding a product, which may be misleading or false
Urgency	Low stock / High demand message	Indication of limited quantities of a product, which may be misleading or false
	Countdown timer / Limited time message	Indication of an expiring deal or discount, which may be misleading or false

From: Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022)

Many existing consumer protection laws – including the CPA – contain general protections against misleading or deceptive conduct, unconscionable conduct, and unfair contract terms, along with mandatory disclosure of certain information. Many of these existing provisions could be employed against dark patterns in the digital marketplace.

However, dark patterns are sometimes difficult to define. A principles-based approach alone will not be effective against dark pattern practices. Nor, in terms of effective oversight and enforcement, can consumers be expected to raise individual or systemic concerns with practices which are, by definition, generally hidden, obscured, and unknown, and related to business monetization practices which consumers can't reasonably be expected to understand the risks and consequences.

The provincial government CPA Consultation Papers do not explicitly acknowledge or discuss "dark patterns."

In contrast, several jurisdictions have adopted dedicated legislation, regulations, or policies to address the risks of "dark patterns." These demonstrate how there are some examples of dark patterns that are clear and could be directly targeted by consumer protection legislation or regulation.

For instance, in the EU and UK:

- EU Digital Services Act (DSA 2022) places new obligations on online platforms and intermediaries and define dark patterns as follows in its preamble: "Dark patterns on online interfaces of online platforms are practices that materially distort or impair, either purposefully or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions." Article 25 further prohibits "online platforms" from "designing, organising or operating online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of recipients of their service to make free and informed decisions."[269]
- The companion EU Digital Markets Act (DMA 2022) similarly places new obligations on very large online platforms ("gatekeepers") including a prohibition on "offering choices to the end-user in a non-neutral manner, or subverting end users' or business users' autonomy, decision-making, or free choice via the structure, design, function or manner of operation of a user interface or a part thereof" (per Article 13). [270]
- A 2022 European Commission study EC advises that the principle-based prohibitions in the EU Unfair Commercial Practices Directive (UCPD) on dark pattern practices that are deemed unfair (because they distort the economic behaviour of the average consumer) are interpreted as misleading actions or omissions (Articles 6 and 7) or as aggressive practices (Articles 8 and 9).[271]
- Annex I of the UCPD also contains a list of specific blacklisted practices, many of which would also apply to specific dark patterns. For example, blacklisted practice 18 prohibits "materially inaccurate statements about market conditions" while dark patterns targeting vulnerabilities of individual or specific groups of consumers could amount to "undue influence" over the consumer (an aggressive practice prohibited under Articles 8 and 9).[272]
- Similarly, the UK Consumer Protection from Unfair Trading Regulations 2008 (CPRs) contain principle-based prohibitions (Part 2), as well as a list of practices that are in all cases prohibited (Schedule 1), both of which largely mirror the UCPD[273]
- And in addition to the UCPD, many dark patterns are likely to violate other EU laws including the GDPR (applicable to several privacy-intrusive dark patterns); the Consumer Rights Directive (applicable to hidden costs or hidden subscriptions); the Unfair Contract Terms Directive (applicable to onerous cancelation processes); and the Audiovisual Media Services Directive (applicable to disguised ads).[274]

In the United States:

- Section 5 of the *Federal Trade Commission Act* has been interpreted by the FTC to challenge dark pattern practices that are hard to cancel, hidden costs, forced continuity, hidden information, preselection, trick questions and disguised ads dark patterns. Section 5 contains principle-based prohibitions on deceptive and unfair acts or practices that may include "any representation, omission, or practice that is both (i) material and (ii) likely to mislead consumers who are acting reasonably under the circumstances" while an unfair trade practice is one that "(i) causes or is likely to cause substantial injury to consumers, (ii) is not reasonably avoidable by consumers themselves and (iii) is not outweighed by countervailing benefits to consumers or competition."[275]
- The FTC also observes that dark pattern practices "that are not obviously deceptive, such as nagging, price comparison prevention, intermediate currency, toying with emotion, or confirm shaming could potentially be challenged under the prohibition on unfair trading practices, though this approach remains untested."[276]
- Other US federal law also provides for express prohibitions on specific practices found in dark patterns, such as on bait and switch practices; continuing to charge a consumer for a good or service after an initial transaction without the consumer's express informed consent; and on making it hard to opt-out of marketers' emails.[277]
- The *California Privacy Rights Act* (CPRA 202) is believed to be the first legislation to define dark patterns as "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation."[278]
- The US federal *Deceptive Experiences To Online Users Reduction* (DETOUR 2019) is tabled legislation and the first proposed in the US. It would make it unlawful for any large online platform "to design, modify, or manipulate a user interface with the purpose or substantial effect of obscuring, subverting, or impairing user autonomy, decision-making, or choice to obtain consent or user data".

These approaches are consistent with the CPA. Many high-risk or coercive commercial activities – such as door-to-door sales and tow-trucking – are subject to specific legislative and regulatory consumer protections in the CPA.

Consultation Questions: Regulating Dark Patterns

Question 9:
Should Ontario's consumers have more protections against "dark patterns" in the digital marketplace? If so, should the CPA be amended to prohibit these practices? How would "dark pattern" practices be defined in the CPA?

Question 10:
In addition to a statutory definition, should the CPA be amended to include a list of "dark pattern" practices that should be prohibited or proscribed? If so, which practices should be identified?

Question 11:
What other reforms or initiatives should be adopted to improve consumer protections in this area?

9. Better Consumer Protections for Youth and Vulnerable Consumers

Research and experience demonstrate that notice and disclosure of a ToS "wall of text" often prevent vulnerable consumers from accessing or understanding contractual terms and conditions.[279] Such vulnerabilities have been identified due to

> *…age, race, ethnicity or gender; low education or literacy; limitations with the native language; mental health problems; physical disabilities; geographical remoteness/living in a low-density region; unemployment or low income.*[280]

The OECD has stated that:

> *"Vulnerable consumers" are consumers who are susceptible to detriment at a particular point in time, owing to the characteristics of the market for a particular product, the product's qualities, the nature of a transaction or the consumer's attributes or circumstances.*[281]

ToS contracts present a challenge for many other consumers too. A recent national literacy survey found that over half of Americans may struggle to comprehend dense, lengthy texts that typify many ToS contracts. [282]

The CPA addresses vulnerable consumers in two sections.

- Section 5 states that where a supplier is required to disclose information, the disclosure must be "clear, comprehensible and prominent."[283]
- Section 15(2) states that a supplier will make an "unconscionable representation" where a consumer is "not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors."[284]

These sections are potentially important protections for youth or vulnerable consumers in the digital marketplace. Unfortunately, they are also unclear. For example,

- Neither the Act, regulations, policy guidance, nor caselaw identify what formats, languages, or features would fulfill CPA s. 5's "comprehensibility" requirement.
- There is no caselaw or legal/policy guidance interpreting CPA s.15(2).
- A consumer's youth or age is not listed as a factor in s. 15(2).

These sections could be updated to better protect young and vulnerable consumers.

The discussion below focuses on contracting with two vulnerable groups: youth and the elderly. In this consultation, the LCO is very interested in engaging with these and other vulnerable groups to learn more about their experience with digital marketplace ToS.

9.1 Youth and ToS

Children and minors present unique and important ToS issues. Children and minors are among the heaviest users of digital marketplace products and services.[285] At present, it appears many ToS agreements do not effectively address the vulnerabilities of youth.[286] Notwithstanding the fact that businesses take on a risk when contracting with anyone under 18 years old, some commentators believe that some businesses go further, and may violate commitments made in their own ToS, or intentionally target children by making their products more addictive.[287]

Many current ToS largely reflect adult conventions. Some ToS specify a minimum age for use (often 13), while others require the person to have the maturity to understand and consent to the ToS.[288] Still others may require that "a parent or legal guardian who is creating an account for a child under the age of majority should review this Agreement with the child to ensure that they both understand it."[289] These provisions are problematic because many ToS contracts are already too long or complicated for *adults*, meaning it may be effectively impossible to summarize ToS for children. It is also problematic to shift ToS enforcement and consent responsibilities to parents who face an additional array of coercive circumstances.[290] This can include institutional pressure, such as schools requiring students to use certain platforms. It can also include social pressure, such as children wanting to participate with friends the latest popular game or social media platform.

Children and parents are also often caught unaware by consequential terms that may not be clear upfront. Children's games and software may use in-game currencies, reward points, loot boxes, and other incremental mechanisms to entice small discretionary purchases that add-up, and which may not be apparent at the time of agreeing to the ToS. Parents may also be surprised that there may be health risks to using a platform, as exemplified in a recent warning from the United States Surgeon General that social media can be a profound risk to the health of youth.[291] These kinds of unexpected costs and risks question the need for improved and mandatory forms of notice and disclosure when youth or parental consent is required. This could include newly mandated disclosure and notice provisions requiring full-cost lifetime projections of an average users costs, as well as other identifiable piece of "key information" and "market contexts" such as health risks or the addictiveness of a product or platform (this is discussed in greater detail in section 7).

As in other jurisdictions and areas of consumer protection, many regulators and courts have begun to act to protect the interests of children and youth by regulating ToS in the digital marketplace:

- The US Federal Trade Commission fined Epic, developer of the popular game Fortnite, penalties totalling $US520 million for Epic's use of exploitative dark patterns, unfair terms, hidden costs, exploitation of child privacy, and reprisal against parents who tried to enforce consumer rights.[292] The amount includes $US245M to refund consumers.[293] An array of similar practices by Epic is now subject to a class action in Canada, which was certified to proceed in late 2022.[294]

- In 2022, regulators in Ireland issued a fine of approximately $400 million to Meta, the social media company formerly known as Facebook, for violating European data protection rules in its treatment of children's data on Instagram.[295]
- In 2022, Denmark's data regulator criticized Google Classroom in part because parents have little or no ability to review its ToS. Denmark has banned Google Classroom pending a full review of the sign-up and consent practices.[296]
- The United Kingdom recently introduced (and continues to debate) the *Online Safety Bill*.[297] The Bill introduces new rules for firms hosting user-generated content and search engines. Platforms likely to be accessed by children are given a duty to protect young people using their services from harmful material such as self-harm or eating disorder content.
- In 2022 California enacted the *California Age-Appropriate Design Code Act*, the first child safety legislation in the United States to impose a wide-ranging set of safeguards for users 17 and under.[298] The law regulates online services that provide products, services, or features for children. It mandates that privacy settings on these sites must be very high by default, limits the collection of children's precise locations, and requires privacy policies to use language that children can understand, among other provisions.[299]
- The United States *Children's Online Privacy Protection Act* (COPPA)[300] prohibits the collection, use, and disclosure of personal information from and about children on the Internet without appropriate parental consent. The law applies to operators of commercial websites and online services (including online advertising) targeted at children under 13.

Another legislative approach has been to explicitly require substitute parental consent on behalf of children. These proposals have, however, attracted controversy. For instance, both Utah and Arkansas have passed legislation requiring youth residents under the age of 18 to obtain parental consent to create a social media account and use their services.[301] Commentators including the Electronic Frontier Foundation raise concerns that strict parental consent laws may violate youth's freedom of expression rights, put vulnerable youth at risk (i.e. LGBTQ youth), and stifle childhood development.[302]

Significantly, some Canadian regulators and organizations have begun to develop guidelines for youth consent and content. At present, however, these are voluntary standards.[303]

9.2 Elderly and ToS

In their response submitted to the 2020 Ontario CPA Consultation Paper, Ontario's Advocacy Centre for the Elderly (ACE) – a specialized legal aid clinic – note how "ACE receives more than 3,000 client intake inquiries a year… [and] Older adults regularly seek our advice respecting their rights under the CPA."[304]

The bulk of consumer-related complaints relate to unfair contracting practices that exploit the vulnerability of elderly consumers. ACE specifically highlights that where they see "many instances where companies use deceptive techniques on a highly vulnerable population, it is often years later that the consumer learns that they were deceived,"[305] and typically only after discovery by a family member, social worker, or other support person.

ACE highlights three sets of recommendations which impact on the consumer protection needs of the elderly in the digital marketplace.

First, older consumers are often unclear about the total costs of a product or service. ACE's experience is that consumers are not aware they have entered into contracts with price escalation clauses, the terms of which are "often buried in the contract in miniscule font."[306] Consequently it is "often difficult to figure out the final lifetime cost to the consumer."[307] ACE proposes that there should be a proactive, mandated disclosure where consumers are shown the full lifetime cost of the product or service.

Second, ACE proposes that the list of what constitutes a false, misleading or unconscionable representation should be expanded. Given the vulnerability of elder consumers, and the difficulty in accessing justice, more

needs to be done proactively to unambiguously protect vulnerable groups and ensure an easier, penalty-free ability to break unfair contracts (for more on deception and unconscionable terms see our discussion in section 10).

Third, ACE advocates for improved access to justice under the CPA. ACE specifically notes how consumer rights "are meaningless without strong and effective remedies and enforcement… [but] Unfortunately, in ACE's experience, consumer face an uphill battle in exercising their rights under the CPA."[308]

Specific access to justice issues cited by ACE include:

- The need for greater Ministry investigation, enforcement, and charges for violations of the CPA. ACE suggests this is needed in part because so few businesses respond to or consent to resolve disputes through mediation. ACE further reports that the Ministry frequently responds to complaints by noting that charges against a business could not be pursued due to a lack of resources. ACE notes that despite 29,000 complaints made to the Ministry for unfair business practices during COVID-19, only one business was charged.[309] ACE strongly supports the use of administrative penalties and resources should be available for the Ministry to pursue all potential charges.[310]
- The need to expand the opportunity to challenge unfair practices. ACE recommends that the limitation period on raising unfair practices should be subject to the principle of discoverability (i.e., when the consumer becomes aware of the unfair practice). This should also be aligned with ss. 4-5 of the Limitations Act, that being 2 years after the practice was discovered, and the clock should be frozen during any period when the vulnerable person lacks legal capacity to act.
- The observation that many low-income, highly vulnerable clients do not find Small Claims a viable form of access to justice, and that ACE frequently declines representation due to limited litigation resources. More legal resources are needed for consumers to meaningfully enforce their rights under the CPA.

9.3 Law Reform Options

These approaches suggest several potential law reform options for Ontario to consider in relation to protecting vulnerable groups in the digital marketplace, including:

- A defined regime for parental or substitute consent with "best interests" fiduciary duties that takes into account childhood development goals, freedom of expression, and vulnerable groups
- Development of standard terms or procurement rules for institutions like government services, schools, or long-term care homes requiring specific platforms or products where consumers have little choice but to agree
- Improved, mandatory, upfront forms of notice and disclosure when youth or parental consent is required. This could include newly mandated disclosure and notice provisions requiring full-cost yearly or lifetime projections of an average users costs, as well as other identifiable piece of "key information" and "market contexts" such as health risks or the addictiveness of a product or platform
- Expanded limitation periods to raise unfair practices and subject to the principle of discovery
- Expanded access of consumer to legal and legal aid services to assist with consumer protection issues under the CPA
- A statutory duty for online suppliers to protect youth
- An expanded list of what constitutes a false, misleading or unconscionable representation to include practices and issues of particular concern to vulnerable groups.

Consultation Questions: Protecting Youth, Elderly, and other Vulnerable Consumers

Question 12:

Do CPA sections 5 and s.15(2) provide sufficient consumer protections to youth, elderly and other vulnerable communities against consumer risks in the digital marketplace? Are additional or more specific consumer protections necessary? If so, could this be achieved by:

- *Creating regulations or best practices guidelines to clarify CPA s. 5's "comprehensibility" requirement?*
- *A defined regime for parental or substitute consent with "best interests" fiduciary duties that takes into account childhood development goals, freedom of expression, and vulnerable groups*
- *Development of standard terms or procurement rules for institutions like government services, schools, or long-term care homes requiring specific platforms or products where consumers have little choice but to agree*
- *Improved, mandatory, upfront forms of notice and disclosure when youth or parental consent is required. This could include newly mandated disclosure and notice provisions requiring lifetime or yearly projections of an average users costs, as well as other identifiable piece of "key information" and "market contexts" such as health risks or the addictiveness of a product or platform*
- *Expanded limitation periods to raise unfair practices and subject to the principle of discovery*
- *Expanded access of consumer to legal and legal aid services to assist with consumer protection issues under the CPA*
- *A statutory duty for online suppliers to protect youth*
- *An expanded list of what constitutes a false, misleading or unconscionable representation to include practices and issues of particular concern to vulnerable groups*
- *Additional measures to protect persons with disabilities, address language barriers, literacy levels, income, class, cultural norms, or age-related and age vulnerabilities (including the elderly and youth)?*

10. Reducing Deception and Unconscionability in the Digital Marketplace

Preventing deception and unfair practices is a long-standing priority for consumer protection.

Deception occurs where contract terms conflict with the affirmations, promises and suggestions made to the consumer, including overall cost or overall detriment to the consumer.[311] Deception undermines the premise that the contract term was agreed to and promotes the interests of all contracting parties.[312] The American Law Institute (ALI) *Restatement on Consumer Contract Law* (2022) specifies that deception should be understood broadly to encompass not only outright fraud, but any act or practice that is likely to mislead the "reasonable consumer." The emphasis is on the consumer's false perception, not on the business's intent to deceive.[313]

Unconscionability addresses contractual terms that are excessively one-sided and unfair, or which diverge from a consumer's reasonable expectations.[314] Unconscionability includes procedural unconscionability (such as unfair surprises, lack of consumer awareness of "market context") or through manipulative techniques that prioritize or minimize certain information.[315]

Protections against deception and unconscionability are arguably the most important cornerstones of consumer protection law given the inherent limitations of notice and disclosure.Accordingly, the ALI has concluded that: "… the prudent approach—reflected in this Restatement and in case law—is to protect consumers against terms that either overreach or undermine express promises made by the business."[316]

The question addressed in this project is how to ensure consumer protection principles of deception and unconscionability are responsive to the consumer risks in the digital marketplace.

The following subsections explore these issues by:

- Outlining current deception and unconscionability provisions under the CPA
- Reviewing reforms proposed by the Government of Ontario
- Highlighting contemporary digital marketplace practices noted as potentially deceptive and unconscionable
- Overviewing judicial consideration of these practices and how they've been litigated, and
- Introducing law reform options that would update the CPA with a modern, non-exhaustive list of unconscionable practices in the online or digital marketplace.

10.1 The CPA and Proposed Amendments

The CPA includes several provisions protecting consumers from deceptive and unfair practices and terms. CPA section 14 states that it is "an unfair practice for a person to make a false, misleading or deceptive representation." Section 14(2) includes 17 enumerated examples of "false, misleading or deceptive representation," including:

- Representations about product or service endorsements
- Representations about product performance, characteristics or uses
- Representations about the benefits of a product, and
- Representations about the necessity of a product or service (such as a repair).[317]

CPA section 15 also prohibits "unconscionable representation" and lists examples, including:

- Exploiting consumer vulnerabilities related to disability, ignorance, illiteracy and language barriers
- Excessively one-sided terms in favor of the seller
- Grossly inflated pricing
- Misleading statements or terms to the detriment of the consumer, and
- Undue pressure to enter into the transaction, such as withholding goods.[318]

Importantly, the CPA states that the listed examples of deception and unconscionability are not exhaustive and do not "[limit] the generality of what constitutes a false, misleading or deceptive representation."[319]

The CPA includes several additional protections against consumer deception. For example, section 17(1) specifies that "No person shall engage in an unfair practice"[320] while section 18(1) empowers consumers to vacate:

> *Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.*[321]

Finally, the CPA specifies that a court may award exemplary or punitive damages in addition to any other remedy in an action commenced under section 17.[322]

Notably, CPA section 14(2) does not include specific examples of "false, misleading or deceptive representation" in the digital marketplace. The most relevant examples are in paragraphs 13 and 14:

> *13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.*
>
> *14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.*

The 2020 and 2023 CPA amendments proposed by the provincial government have the stated aim to:

> *…better protect consumers, in particular vulnerable consumers, from unscrupulous behaviour by being clearer and more prescriptive as to what constitutes unconscionable conduct and by providing additional examples of unfair practices.*[323]

The 2023 Consultation Paper proposes several specific CPA reforms to address unfair consumer practices, including:

- Explicitly prohibiting businesses from including terms in a contract that appear to waive express consumer rights in the CPA to file a complaint with the Ministry, join a class action, or commence an action in court.
- Prohibiting terms that infringe on consumers' rights to make fair public reviews of a business or service.
- Specifying that it would be unfair practice to provide contract-breaking services to a consumer without first disclosing the consumers' rights and cost of the service, and only getting paid if successful.These proposals are evidently aimed at further preventing deception and unfair practices, which is a long-standing priority for consumer protection. That said, the proposals may be too narrow to meet the Ministry's objective to "better protect consumers" in the digital marketplace. For instance, the provincial government's proposals include only one new provision to address deception and unconscionability in predatory contract-breaking services.[324]

Other proposed changes to unconscionable terms in the 2023 Consultation Paper are either minor variations or verbatim examples of unconscionability already defined in CPA s. 15.

10.2 Deception and Unconscionability in the Digital Marketplace

Research and experience demonstrate that business and contracting practices in the digital marketplace engage new and complex forms of deception and unconscionability. This section summarizes several well-known examples. The ALI identifies the following practices as potentially deceptive and unconscionable practices.[325]

Use of Vague and Misleading Language

ToS may include plain-language terms and provisions that mislead the consumer as to their true effect. For example, platforms may obscure user data monetization practices under the guise of "improving your experience."[326] In one notable example, the popular family safety app Life360 was revealed to be selling precise location on its 33 million users including children to more than a dozen data brokers.[327]

Unenforceable Terms

ToS may include contractual terms that are legally not enforceable. For example, ToS may require dispute resolution by arbitration or in a certain jurisdiction, contrary to protections long established in the CPA.[328] Or a ToS may misstate the law on an important consumer protection. In *Douez,* discussed above, the consumer was mistakenly led to believe that privacy protections in British Columbia were of no force or effect.[329] Unscrupulous (or unknowing) suppliers may also "hope to deter attempts to exercise legal rights when a recipient does read the terms but doesn't realize that they are unenforceable."[330]

Misrepresentation and Breaches of Trust

Intentional acts to mislead consumers can amount to misrepresentation and breaches of trust.

The online streaming and communication tool Zoom recently attracted significant fines in the United States because their ToS and marketing assured users that their sessions were protected by "end-to-end encryption" (when they were not) and that their user profiling data was private (when it was actually sent to Facebook and Google).[331]

Dark Patterns and Network Effects

This paper has already discussed several proposals to address "dark patterns" that mislead or confuse consumers into consenting to ToS without understanding what they are consenting to. Dark patterns can thus contribute to unconscionable or deceptive practices.

"Network effects" are provisions in a ToS, business practices, or technology that effectively bind consumers to a specific digital marketplace service or platform through a variety of practices that amount to "sunk costs" or "irreversible investment." These impair the consumer's ability to switch to a competing platform or service provider and, by extension, limit consumer rights to cancel a contract and choose a different supplier as both a form of access to justice and market discipline.

Network effects include practices like proprietary technology; platform lock-in; exclusive intellectual property; lack of data portability; and incentive programs like points, rewards, contests, and discounts. These techniques make it less likely that consumers will exercise their option to leave a digital marketplace platform or service.

Legislative proposals in the United States take aim at "network effects" as a matter of consumer coercion, deception, and unconscionability.[332]

Data Anonymization and De-identification

A particularly controversial issue related to deception are representations that privacy is protected though measures like data anonymization and de-identification.

Many academics and data scientists argue these claims are misleading. There are many studies demonstrating the relative ease of re-identification even on country-scale location datasets.[333] For example, one set of researchers demonstrated an ability to "uniquely identify 95% of individuals in a dataset of 1.5 million people using four location points with timestamps."[334]

Regulators outside of Canada are increasingly assertive in condemning these practices. For instance, US Federal Trade Commission has begun to crackdown on websites that claim data is anonymized when it is not, noting how:

> *Smartphones, connected cars, wearable fitness trackers, "smart home" products, and even the browser you're reading this on are capable of directly observing or deriving sensitive information about users. Standing alone, these data points may pose an incalculable risk to personal privacy. Now consider the unprecedented intrusion when these connected devices and technology companies collect that data, combine it, and sell or monetize it. This isn't the stuff of dystopian fiction. It's a question consumers are asking right now.*[335]

The Government of Canada's recently introduced Bill C-27 aims to address some of these issues and has important implications for ToS in the digital marketplace.[336] Bill C-27 has been criticized, however, as legislative exceptions may continue to leave consumers exposed to deceptive and unconscionable practices.[337]

10.3 Judicial Consideration

Courts and regulators in Canada and the US have actively addressed deception and unconscionability in the digital marketplace.

The first Canadian court case addressingdeception and unconscionability in the context of a class action brought on behalf of Uber drivers in 2017.[338] Mr. Heller, an Uber driver, sought to have drivers recognized as employees protected under the *Employment Standard Act.*[339] Uber disagreed, relying on the ToS drivers sign mandating all disputes be resolved in Netherlands using arbitration, under the laws of Netherlands.[340] The Supreme Court of Canada referred to the agreement "as a classic case of unconscionability" and allowed the class action to certify.[341]

The court found that Uber's unconscionability was based on two factors:

- here was unequal bargaining powers between the parties. The court held that drivers could not negotiate terms, were much less sophisticated than Uber, were not informed of the high arbitration costs in the Netherlands and could not have understood the consequences of the ToS.[342]
- Uber's ToS were deceptive for two reasons: First, because the high arbitration costs specified in the ToS could not have been reasonably expected by Uber drivers. Second, because the high costs effectively nullified the substantive rights of the drivers to access dispute resolution.[343]

A second Canadian case on deception and unconscionability is *Douez v Facebook*. In this case, the Court determined that an otherwise valid and enforceable forum selection clause, which required disputes be resolved in California, was unenforceable because Ms. Douez had a strong argument against its enforcement[344], including "unequal bargaining power", the BC courts' interest in deciding quasi-constitutional privacy and jurisdictional rights in dispute, the BC courts' better ability to interpret local laws and public policy, and the relative convenience of proceedings in British Columbia.[345]

For deception and unconscionability purposes, the significance of *Douez* is its consideration of the online "market context" of a Facebook customer, including network effects, the limited practicality of "consumer choice" to regulate Facebook's behaviour, and unenforceable terms.[346]

American regulators have gone much further. As discussed earlier, the FTC recently ordered Epic, developer of the game Fortnite), to pay fines of $275 million and $245 million respectively for ToS and dark pattern and "unconscionable" practices.[347] More specifically, the FTC investigation criticized the intentional use of:

- Counterintuitive, inconsistent, and confusing button configuration that led players to incur unwanted charges.
- Making it easy for children to make purchases without requiring any parental consent.
- Blocking or deleting the accounts of customers who disputed unauthorized charges with their credit card companies.
- Blocked access to other purchased content.
- Failing to notify parents or to obtain consent for practices that could harm children. [348]

10.4 Law Reform Options: Prohibit Deceptive and Unconscionable Practices in the Digital Marketplace

Given the range, pace, and ingenuity of potentially deception and unconscionability practices, it is tempting to simply rely on the existing principled provisions in the CPA to govern these practices, relying on litigants to challenge disputed practices on a case-by-case basis.

The LCO agrees that the CPA's general provisions prohibiting deception and unconscionability practices are important consumer protections. That said, there are many reasons to believe that the CPA existing provisions are unlikely to be effective in the digital marketplace. Most obviously, "regulation by litigation" of complex technology and deceptive online business practices creates many access to justice challenges. Regulation by litigation can also be costly, slow, and result in inconsistent and piecemeal interpretation of inappropriate business practices. Finally, "regulation by litigation" will likely result in legal uncertainty for consumers and business, uneven consumer protections, and an uneven playing field for Ontario's businesses.

A better approach may be for the provincial government to explicitly identify and prohibit a range of unfair and deceptive practices that have been identified in the digital marketplace. This approach could provide both more clarity for consumers/businesses and establish baseline standards for fair competition among businesses.

The 2023 Ontario CPA Consultation Paper acknowledges the need to update the CPA's deception and unconscionability provisions. The paper proposes to

> *[set] out a list of examples of prohibited unconscionable conduct, which would update and replace the current list of examples of unconscionable representations… [and] better address practices that have emerged since the CPA came into effect.*[349]

The proposed "illustrative legislation language", however, simply reiterates existing unconscionable examples in the CPA, while adding the one new term to address potentially predatory"contract-breaking services."[350]

An alternative approach would be for the CPA to enumerate a range of deceptive and unconscionable practices that have emerged in the digital marketplace. This approach would be consistent with emerging international practices and reforms. For example, the EU have adopted many reforms that specifically enumerate deceptive and unconscionable practices. Most notably, the EU's 2021 Unfair Commercial Practices Directive (UCPD) defines an array of practices related to

- Misleading information and misleading omissions
- Hidden marketing / failure to identify commercial intent
- Material information provided in an unclear manner
- Use of the claim 'free'
- Free trials and subscription traps
- Influencer marketing transparency
- User reviews
- Data-driven and algorithmic personalisation of content
- Dark pattern design of user interfaces
- Consumer lock-in to proprietary platforms and formats
- Gaming practices including sale of virtual items, in-game marketing, and digital currencies.[351]

In this manner, the EU's UCPD effectively creates new "standard terms" that better protect consumers, clarify business obligations, and improve access to justice.

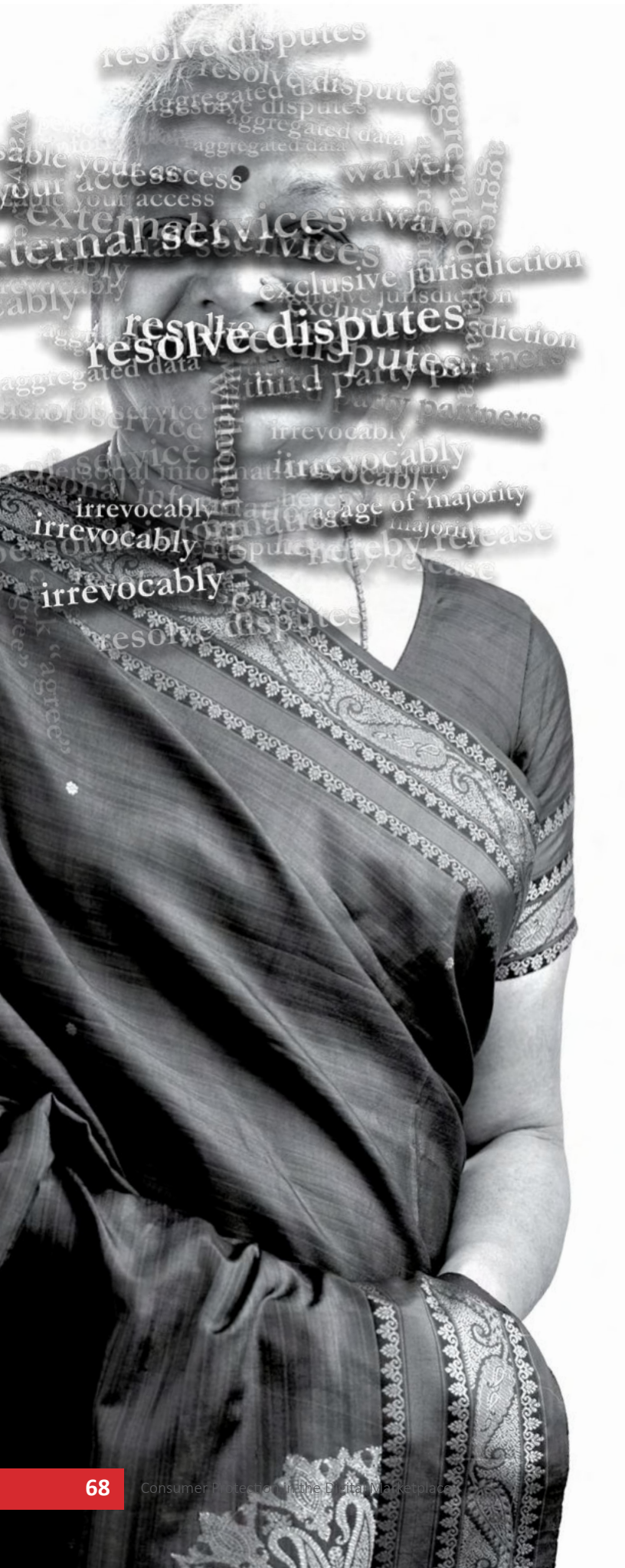
A similar reform in Ontario would update the CPA to include a modern, non-exhaustive list of unconscionable practices in the online or digital marketplace.

Consultation Questions to Modernize Deception and Unconscionability in the Digital Marketplace

Question 13:
Should the CPA be amended to provide more consumer protections against deceptive and unconscionable practices in the digital marketplace? If so, how would these practices be defined in the CPA?

Question 14:
In addition to a statutory definition, should the CPA be amended to include a list of online deceptive and unconscionable practices that should be prohibited or proscribed? If so, which practices should be identified?

Question 15:
Regulation of deceptive practices in the digital marketplace potentially affects jurisdiction within Canada and internationally. Should these rules be harmonized? If so, what does or doesn't need harmonization?



11. Improving Access to Justice: Dispute Resolution, Remedies, Oversight, and Enforcement

Access to justice is a longstanding concern for the LCO. As a result, we have placed particular emphasis on whether, or how, Ontario's consumers have meaningful access to dispute resolution procedures / remedies and whether consumer oversight and enforcement processes are adequate to the particular problems consumers face in the digital marketplace.

The challenge is that many consumers use digital marketplace services for minor or routine transactions, or for small amounts. These activities are often disproportionate with the considerable difficulty and potential expense of pursuing access to justice through existing mechanisms.

The net effect is to undermine the fundamental accountability mechanism of consumer protection law: effective consumer redress. Leading Canadian contracts scholar Margaret Jane Radin has written that the success of consumer contract law depends on "a visible avenue for redress of grievances in cases where the bargain fails, otherwise the trust that the ideal of contract imagines would be weakened and perhaps collapse."[352]

The OECD has similarly noted that:

> …the availability of effective dispute resolution and redress mechanisms can increase consumer confidence and trust in the online and offline marketplace, encourage fair business practices, and promote cross-border commerce, including electronic and mobile commerce.[353]

Redress is crucial because contract law is a form of private governance. Where disputes arise, or where negotiating positions are unbalanced and prone to exploitation, efficient and accessible forms of redress are needed to keep consumer transactions from becoming so one-sided they are neither fair to the consumer nor are they in the public interest of a balanced and trustworthy marketplace.

The access to justice needs of consumers in the digital marketplace have become critical. Consumer complaints routinely top Canadian surveys of legal needs. For instance, the 2014 Canadian Forum on Civil Justice (CFCJ) survey identified consumer issues as the most common type of legal problem Canadians experience, outpacing all other categories including family law, housing, police action, and criminal law.[354]

The CFCJ study is consistent with legal needs surveys in other jurisdictions. For example, in 2021 the OECD surveyed 28 countries and 15 leading companies about consumer complaints in the digital marketplace. The leading issues were strongly related to ToS practices, including "unfair terms and conditions," "dispute resolution or lack thereof," and "misleading marketing practices."[356]

The CFCJ and OECD studies and others suggest several reasons why access to justice is difficult and often impractical in the digital marketplace.

First, disputes "involving consumers acting individually often concern low value products and transactions, which may discourage consumers from seeking redress."[357] In other words, consumers often have little financial incentive to complain or litigate even the most legitimate disputes. These negative incentives are exacerbated in the digital marketplace given the prevalence of complex ToS, dark patterns, and unclear dispute resolution procedures.

Second, ToS contracts are private regulatory instruments. ToS can be opaque; they are unlikely to be neutral; there may be little public oversight; and they may compel dispute resolution processes that are weighed in favor of the supplier.

Profile of Consumer Access to Justice Needs

- Most Canadians who experience a consumer problem take one or more steps to try and resolve them (96.5%) and contact the other party to do so (83%), whereas very few contact a lawyer (7.9%).
- Only 47.5% of Canadian with a resolved consumer problem evaluate the resolution of that problem as being fair
- Some 29.3% of Canadian report difficulty carrying on with normal life after experiencing a consumer problem
- Very few individuals access the formal legal system to resolve their issues even though their problems were considered "legal" and the largest single legal problem Canadians face.[355]

Third, ToS are likely to be long and complex legal documents that even the most sophisticated and well-resourced consumers would find difficult to challenge.

Fourth, online or technological deception and unconscionability practices (such as dark patterns) are likely to be very difficult to litigate, relying on complex and expensive evidential and legal analysis.

Finally, there is the challenge of jurisdiction. In the offline context, businesses will have a physical presence within the borders of a defined geographic region. With an online service, however, a company may be legally registered in one country, be located in another, and provide services to consumers in a third.

The effect of these factors is that Ontario consumers are likely to find it very difficult to challenge digital ToS or otherwise enforce their CPA rights in the digital marketplace.

The following subsections discuss a series of proposals that may improve access to justice for transactions in the digital marketplace. These include:

- Outlining current and proposed access to justice and dispute resolution mechanisms under the CPA
- Measures to ensure courts and government are equipped to resolve consumer disputes in the digital marketplace
- Clarifying jurisdiction over transactions in Ontario
- Stronger protections against reprisal
- Establishing minimum standards for ministry complaints and informal dispute resolution
- Improving consumer rights advocacy and litigation assistance
- Building more proactive means for systemic investigation, redress, and legislative enforcement
- Facilitating better consumer enforcement and policy-making through improved data collection and a machine readable ToS registry
- Considering consumer damages for disgorgement.

11.1 The CPA and Proposed Amendments

Access to justice is facilitated in the CPA through two main mechanisms: 1) consumers can file complaints to the Ministry of Public and Business Service Delivery, or 2) consumers can enforce rights through the Ontario Superior Court of Justice or Small Claims Court.

Complaints to the Ministry can result in an escalating series of actions, including:

- The Ministry declining to review the complaint
- Informal resolution of the complaint, with or without Ministry involvement
- Adding the business to the Ministry's "consumer beware list"
- Mediation, with or without the involvement of the Ministry
- Ministry efforts to educate the business and consumer
- Administrative actions by the Ministry including written warnings, imposing terms and conditions on business licenses and registrations, and suspending or revoking licenses or registrations
- Ministry issued compliance order (potentially triggering a hearing before the License Appeal Tribunal)
- Investigation and prosecution by the Ministry, including examining documentation and accessing electronic records, and potentially resulting in fines of up to $50,000 for individuals and $250,000 for corporations (if found guilty) .[358]

Consumers relying on this process are limited to refunds of monies already paid or the cancellation of an agreement unless suppliers voluntarily offer compensation. Enforcement of other rights and damages (including exemplary and punitive damages) requires an application to court – a complex, expensive and potentially risky exercise. A search of caselaw suggests these actions are rare, with only a few dozen cases reported in the last three years.[359]

The 2023 Ontario CPA Consultation includes three provisions addressing access to justice issues, including proposals. These would:

1. Clarify that consumers have one year to rescind a contract after an unfair practice takes place (as opposed to the existing right to rescind within one year of commencing the contract). [360]
2. Explicitly prohibit businesses from including terms in a contract that appear to waive express CPA rights and adding a new provision prohibiting terms that infringe on consumers' rights to make fair public reviews of a business or service.[361]
3. Extend the power of the Minister to issue compliance orders under the CPA to cover any business that facilitates another business' contravention (covering intermediaries such as online platforms and billing services). [362]

The LCO commends these proposals, especially the proposal that expands the authority of the Minister to issue orders for business intermediaries. As expanded below, there is evidence that more could be done to ensure consumer redress is effective in the digital marketplace.

11.2 Law Reform Options

LCO research reveals a range of potential new tools that could improve meaningful, expeditious, and efficient access to justice for consumers in the digital marketplace. This section discusses a range of options, including:

- Measures to ensure courts and government are equipped to resolve consumer disputes in the digital marketplace
- Clarifying jurisdiction over transactions in Ontario
- Stronger protections against reprisal
- Establishing minimum standards for ministry complaints and informal dispute resolution
- Improving consumer rights advocacy and litigation assistance
- Building more proactive means for systemic investigation, redress, and legislative enforcement
- Facilitating better consumer enforcement and policy-making through improved data collection and a machine readable ToS registry
- Considering consumer damages for disgorgement.

11.2.1 Measures to Ensure Courts and Government are Equipped to Resolve Consumer Disputes in the Digital Marketplace

At present, most consumer rights disputes rely on either complaints to the Ministry or courts to resolve matters of contractual interpretation.

Canadian contract scholars write how resort to the courts is uniquely ineffective for most consumers. Professor Radin finds that:

> *One simple conclusion to be drawn from the overview of how traditional judicial oversight doctrines are faring with boilerplate rights deletion schemes is that current doctrines are not formulated so as to address the mass-market nature of the issues raised by boilerplate, nor do they address the need for consistency in how these schemes are treated in the courts.*[363]

Radin's concern is multifold.

First, she writes that courts will have difficulty applying doctrines of unconscionability, deception, notice, and consumer "expectation" vs consumer "exploitation."[364] What Radin is referring to is the difficulty in adapting common law principles on a case by case basis to the wide array of new practices in the digital marketplace.

Second, while common law courts have a broad power to find that certain kinds of unconscionable terms violate a public interest policy issue, Radin asserts that most courts today are conservative in using that power.[365]

LCO research suggests that the systemic failure to address the mass-market nature of the issues raised by boilerplate and improve judicial consistency is to provide courts and administrative decision-makers with clearer guidance on prohibited practices, legal requirements, and relevant consumer protection principles as they operate in the digital marketplace.

Many of the proposals discussed in this paper so far would provide such guidance. For example, our proposed requirements for the "key information" that could be disclosed and potentially prohibited deception and unconscionability practices would go a long way to establishing a transparent and consistent legal governance framework that could be used by courts to resolve consumer protection matters.

11.2.2 Clarify Jurisdiction over Transactions in Ontario

The CPA asserts a very broad jurisdiction over consumer activities.

The CPA states that it governs all consumer transactions "if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place."[366]

Notwithstanding this provision, there are several practical problems that may inhibit access to justiceand compliance with the CPA: First, a digital marketplace entity may use the same ToS in the US, in Canada, and other jurisdictions. In the absence of a consumer

raising a civil claim, suppliers may simply apply the "foreign" ToS to Ontario consumers, irrespective of whether it is consistent with the CPA or Ontario law. Alternately, global or generic ToS contracts may adopt a hybrid approach and include references to, and exceptions for, local laws. These provisions are often generic and may confuse or disarm consumers of their local jurisdictional rights and protections.

The "spillover" of foreign ToS may also give consumers the wrong impression about their rights and opportunities for redress: "[B]y leaving unenforceable terms in its boilerplate, the firm can hope to deter attempts to exercise legal rights when a recipient does read the terms but doesn't realize that they are unenforceable."[367]

For instance, Article 2 of the U.S. Uniform Commercial Code severely limits consumer remedies in many cases. As Radin writes,

> *Section 2-719(1)(a) provides that remedies may be severely limited, without providing that such limitations need to be communicated especially carefully or that separate consent must be obtained. This invitation to shrink remedies is very widely used.* [368]

A second problem is how jurisdiction is asserted. In Canada, the proper assertion of jurisdiction is based on the "real and substantial connection" test.[369] This legal principle governs whether a court has the authority to hear and decide a dispute.[370] In the context of online contracts, the "real and substantial connection" test can present a significant barrier to consumers if they are compelled to litigate jurisdictional issues in addition to their substantive disagreements.

A multi-national OECD survey of jurisdictional issues in consumer contracting notes how:

- Online marketplaces' status as intermediaries was cited as a major challenge for a number of countries due to limitations in their laws on when marketplaces could be liable in a variety of contexts, including actions of third-party sellersIt was not always clear when liability fell on a marketplace and several countries raised concerns that this may affect some online marketplaces' investment in, and prioritisation of, consumer protection compliance generally
- Several countries highlighted difficulties associated with consumers' level of understanding about their rights and the responsibilities of online marketplaces, including consumer confusion in identifying whether they had transacted with the online marketplace or a third-party trader, and consequently whether consumer complaint-handling bodies have jurisdiction
- Particularly in Canada consumer empowerment is a key challenge, noting that consumers were often not aware of their rights and relevant protection measures when shopping in online marketplaces.[371]

This problem extends interprovincially within Canada. In *Douez,* the BC court took the extraordinary step of asserting jurisdiction over an agreement formed in Saskatchewan.[372]

Notably, the proposed federal CPPA and AIDA legislation may bring a modicum of consistency consumer unconscionability and deception issues (see the discussion at section 3.4).

LCO research suggests that jurisdictional fragmentation and confusion is related in part to the very consumer protection concerns this paper has set out to investigate, namely, the need for consumer protection law to catch-up to practices and issues in the digital marketplace. In other words, taking affirmative steps to address gaps between established consumer protection law and newer digital marketplace activities would be an important first step and would in turn establish a set of terms on which greater provincial and federal consistency could be explored.

11.2.3 Stronger Protections Against Reprisal

As discussed above, the CPA protects consumers from reprisal by prohibiting, for example, the withholding of goods while renegotiating the price or the ToS.[373]

Unfortunately, consumers in the digital marketplace are exposed to far more nuanced and intrusive forms of coercion and punishment, including:

- Suspension, closing, and deletion of accounts and content
- Remote disabling of devices, making devices and investments worthless and causing economic loss or replacement
- Stranding of digital assets, including those that may be in proprietary formats
- Loss of access to productivity tools needed for work and income
- Loss of income for content creators
- Loss of access to social engagement and community.

One approach to address these issues would be to modernize the CPA to recognize and prohibit digital reprisal. For instance, the CPA's current definition that prohibits "withholding of goods" could be amended to include "withholding services and access to content." Another approach would be to prohibit terms in a ToS contract that broadly empower the supplier to withdraw the service "for any other reason."

There is precedent for this in other jurisdictions. As mentioned above, the EU UCPD enumerates several prohibitions against consumer reprisals. Other EU legislation ensures users of digital services continue to enjoy access to services even if they optout of supplier monetization practices.[374]

The Particular Impact of ToS Enforcement on Content Creators.

"User Generated Content" (UGC) is the foundation of many major and minor platforms. UGC is any content created by users rather than established corporations, brands, or traditional media producers. UGC content is diverse: it spans live broadcasting, videos, music, reviews, podcasts, comments, and images.[375]

UGC is also lucrative. The more UGC a platform has, the greater their potential user engagement and thus advertising revenue, data collection, and other means of monetizing. Today it is estimated that there are some 29,000 YouTube channels having 1 million or more subscribers.[376] Other UGC platforms like Twitch and TikTok report similarly dramatic numbers: Twitch is estimated to have over 8 million active streamers with over 1 million streaming daily, and TikTok is estimated to have over a billion users of whom 83% have uploaded content.[377]

Platforms use their ToS to create incentive and compensation schemes for UGC content creators. These platforms monetize content and pay their creators based on different metrics, which can include advertising views, view count, watch time, clicks, shop storefront traffic, brand deals, and other means. These ToS also typically impose conditions on content creators, governing issues like offensive content, copyright, advertising standards and guidelines, asserting ownership of UGC content, forbidding or taking a cut of any 3rd party advertising deals, mandating the use of automated dispute resolution mechanisms, and the like. YouTube, for example, requires all users of the platform to agree to a ToS before creating an account for creative or viewing purposes.[378] Additionally, creators must adhere to over 12 different policies regarding their content creation.[379]

UGC content creators have been increasingly open about how sudden, unexpected, and poorly explained ToS enforcement can devastate their content and income. Content creators report enforcement measures in which platforms instantly and unilaterally suspend access to their account, de-monetize their stream, strand content (by making it inaccessible), take-down and even delete content, and fail to respond to requests for dispute resolution.[380]

UGC creators are thus particularly vulnerable to unfair or malicious ToS enforcement by the operator. UGC creators are also caught in a quasi- professional and quasi-consumer relationship with platforms. It isn't always clear what practices may be governed by consumer protection law, employment law, or otherwise.

11.2.4 Establish Minimum Standards for Ministry Complaints and Informal Dispute Resolution

There are good reasons to consider establishing minimum standards for Ministry complaints and informal dispute resolution processes.

First, the CPA requires that consumers raise an issue with the supplier before they may file a complaint to Consumer Protection Ontario for review and potential investigation.[381]

This rule may be problematic because there are no standards for handling consumer complaints, meaning that consumers have no assurance their issue will be addressed.

At the same time, many platforms are creating their own oversight and complaints systems. In 2022, the OECD recently identified a wide range of concerns and risks for consumers who must use these systems. Not surprisingly the OECD's survey confirmed that "Consumer dispute resolution and redress systems varied across participating marketplaces" and that "all participants had systems for consumers to make complaints directly to them" but had considerable variability in issues like:

- Per-page / per-product buttons "to bring potentially unlawful or otherwise problematic listings to their attention"
- Different return policies
- Different guaranteed refund policies
- Different paid "purchase protection" offers
- Inconsistent policies across their own products and platforms
- Different mandatory complaint timelines, and
- Only "around half indicated that they have processes to mediate and resolve disputes if requested by consumers."[382]

The OECD also found variable "systems in place to mediate disputes between consumers and third-party sellers, and that these included automated and manual aspects."[383] Digital platforms were found to have variability where some:

- Provided some mediation services to consumers that used its payment system in relation to non-delivery of goods, non-compliant goods and damaged goods but that dispute resolution was however not automated.Provided a link to the online dispute resolution platform created by government, including the European Commission or Brazil's National Consumer Secretariat
- Demonstrated a range in response time from 1-2 days to several weeks
- Demonstrated variability in having "a dedicated team responsible for processing reports from consumer protection authorities and co-ordinating platform responses"
- Demonstrated variability in operationalizing regulatory tools, like "[enabling] authorities to send messages to sellers and buyers," use of "trusted flaggers" to report and remove problematic listings, and "dedicated reporting tools for regulators and IP rights holders" and the like. [384]

In response to these issues, the CPA could be updated with a set of clear and actionable principles governing informal dispute resolution with consumers. This reform could establish an equal playing field among businesses while normalizing meaningful access to justice for consumers in everyday transactions.

This also reflects the momentum in other jurisdictions. For instance, the EU *Digital Services Act* (2022) aims to:

> "increase online marketplaces' liability in certain contexts by imposing obligations to… establish internal complaint handling systems, engage in alternative dispute resolution to resolve conflicts with consumers, give priority to notifications by users that have been designated as "trusted flaggers" by consumer protection authorities and suspend third-party sellers that repeatedly infringe consumer protection requirements."[385]

Notably, the DSA "includes a granular set of requirements that apply to different sorts of intermediaries of different sizes" to tailor appropriate obligations to businesses that can meet them.[386] The definition of such systems in leading jurisdictions like the EU suggest it may be easier for Ontario to follow.[387]

11.2.5 Improve Consumer Rights Advocacy and Litigation Assistance

Consumers can file complaints with Consumer Protection Ontario, which can provide information, education, and potentially investigate a complaint. However, this process does not amount to advocacy or summary advice for consumers, nor does it ensure or promote impartial consumer advice.

In Ontario the *Legal Aid Services Act* defines coverage for a range of legal needs for eligible applicants but does not include coverage for consumer rights issues.[388] The Act does, however, provide for "poverty law services" defined in a non-exclusive list as "being law in relation to matters that particularly affect low-income individuals, including housing and shelter, income maintenance and social assistance."[389] The 2009 *Civil Legal Needs Report* in fact notes that consumer issues are identified as the second greatest legal need, and second only to family law disputes.[390]

In March 2023 the Ministry hosted a consultation with consumer groups to comment on the CPA review. One key recommendation was to address the need for effective province-wide consumer rights advocacy. Proponents described the need to fill this void with an independent agency dedicated to consumer-oriented advocacy and education, including policy development, litigation, and consumer litigation support.[391] It was particularly noted that such an agency should focus on new issues in the digital marketplace.

There is apparently no organization in Ontario that serves these needs. The LCO welcomes suggestions on how an organization could be established best suited to fulfilling consumer advocacy needs and achieving the envisioned mandate.

Facebook's Dispute Resolution Process.

In 2022 it was disclosed that Facebook's internal appeal mechanism to review content removal and account bans received over a million applications for review from users in it's first 18 months.[392] This surely makes Facebook one of the busiest dispute resolution services on Earth.

On the one hand, this appears to provide an admirable level of service and accessibility, if only demonstrated through the sheer number of applications accepted. On the other hand, Facebook's form of private governance has been strongly criticized as falling far short of consumer expectations of administrative impartiality, fairness and due process, especially as compared to a civil court.[393] Among the concerns are that Facebook's internal policies (on which applications may be decided) are not always clear or published, making it difficult or impossible to mount an effective case (especially for an unrepresented lay person).[394] Facebook's policies are also crafted by a panel of experts appointed and employed by Facebook, and appointed by CEO Mark Zuckerberg. With significant questions about transparency, the system is criticized as being a self-serving 21st century Star Chamber.[395]

11.2.6 Build More Proactive Means for Systemic Investigation, Redress, and Legislative Enforcement

Consumers may also often find it impractical to enforce their rights under the CPA, particularly for the kinds of routine transactions and activities that take place in the digital marketplace. forms of investigation, redress, and legislative enforcement.

Key proposals that the LCO has been made aware of include:

- A need for more resources for the Ministry to investigate and charge businesses for breaches of the CPA
- The need for more systemic investigations, transparent reports and findings, and stronger penalties to set clear standards and encourage general compliance
- Issuing of CPA interpretation and compliance guidance related to, for instance, CPA terms like disclosure, unconscionability, unconscionable presentation, vulnerable groups, key information and market contexts relevant to practices in the digital marketplace
- Issuing of CPA interpretation and compliance guidance related to intersecting areas of law, such as consumer protection with data and privacy governance
- Facilitating closer engagement with businesses and consumers to discuss challenging issues related to digital marketplace practices, such as those outlined in this consultation paper
- Ongoing review of the ToS of major suppliers and businesses to better encourage jurisdictional compliance.

In addition to limited regulatory resources and mandates, a 2022 OECD survey of 28 countries and 15 leading platforms found a need "for better complaint data [given] the lack of accurate data on consumer complaints relating to online marketplaces."[396] Participating countries noted the lack of such data makes it difficult to achieve the "accurate identification of issues affecting consumers in online marketplaces.[397] Without such data, "Most countries reported that their key challenges… [were] persuading marketplaces to take proactive measures to prevent or reduce consumer harm."[398] Accordingly, CPA amendments could be envisioned that would require businesses to record standard information about complaints and establish and ongoing reporting obligation to the Ministry, better ensuring transparency and identifying systemic consumer concerns.

Another promising approach builds on the interest and capacity of individual consumer complaints and consumer advocacy organizations by establishing a right to more flexible forms of "collective redress" similar to that introduced into UK consumer protection and competition law in 2015.[399] These actions allow an individual consumer to file a claim for "collective actions and opt-out collective settlements" related to consumer harms and business competition, a process that is simpler and less financially risky than engaging a class action. The government also has a role in facilitating collective settlements whether a collective proceedings order has been made or is merely under consideration,[400] along with a series of voluntary redress schemes that can offer the benefit of legal certification of settlements voluntarily negotiated and entered into by businesses.[401]

A recent claim filed under this right in the UK, for instance, alleges that Sony has been overcharging PlayStation gamers for six years, abusing its dominance in the British market to impose unfair terms and conditions on the PlayStation Store. Damages for losses sought under the claim would amount to 5 billion pounds.[402]

Consumer collective redress is broadly available in Canada, allowing for compensation in damages for widespread economic or physical injuries caused by defective goods or services, or by unfair business practices.[403] At present, however, this is mostly limited to class action proceedings.[404] Class actions can be effective. But they are also complex, expensive, and slow – features which suggest that class actions may suffer from the same "law lag" that other court proceedings struggle with, and which undermine their role as a responsive and timely check-and-balance on consumer hostile activities in the fast-moving digital marketplace.[405]

Leading Canadian consumer rights organizations suggest that adopting UK-style collective redress mechanisms would be tremendously effective in re-balancing consumer rights in the digital marketplace. For instance, the Consumers Council of Canada (CCC) writes that:

> *Introducing the concept of "super complaints," greater transparency and public exposure to government consumer complaints databases in Canada could prove an efficient, additional compliance tool for regulators, advance consumer interests, and better use valuable resources provided by professional non-profit consumer advocacy groups.*[406]

In 2002, a "super-complaints" system was established in the U.K. government by the Office of Fair Trade (now Competition & Markets Authority). This is different from the UK's 2015 "collective actions" system. The "super complaint" system allows a designated consumer body to submit a complaint that "…any feature, or combination of features, of a market in the U.K. for goods or services is or appears to be significantly harming the interests of consumers."[407]

The process is public. Regulators are required by law to provide a response in a reasonable time period. By most accounts the program has been a success. Several super-complaints have been launched and resolved.

The Consumers Council of Canada supports this approach:

> *A super-complaint could allow a systemic marketplace problem to be pursued on behalf of all consumers while protecting the privacy of individual consumers. A super complaint supports the right of representation, and enables consumers to have a new opportunity to have themselves represented. It supports redress and having a consumer take responsibility to seek redress, not just for themselves but for all unfairly treated consumers.*[408]

11.2.7 Better Consumer Enforcement and Policy-Making Through Improved Data Collection and a Machine Readable ToS Registry

As in many areas of public policy, consumer enforcement and policymaking could be improved through better data collection and dissemination. The Consumers Council of Canada notes that:

> *One of the primary sources of information for regulators to trigger market conduct reviews and enforcement inspections and investigations is consumer complaint data. Regulators, delegated administrative authorities, ombudsman offices, and self-regulatory agencies have long relied upon and actively sought out consumer complaints to identify unfair or unsafe business practices and sector or industry-wide patterns that may raise flags and warrant investigation. Resources at many consumer protection regulatory agencies have dwindled over the years, forcing them to rely more heavily on complaints as a method of observing marketplace conduct within their risk management approach to compliance.*
>
> *Effectively collected, analyzed and publicized consumer complaint data can be a highly useful compliance tool by raising public awareness about high levels of non-compliance, influencing enforcement priorities, instigating product recalls, enhancing intelligence gathering and strategic planning, supporting other evidence, providing disincentives to non-compliant firms, encouraging reticent consumers to complain, and precipitating policy consultations and public hearings.*[409]

A more far-reaching proposal would be to establish a digital ToS registry. The registry could provide a vital and potentially automated form of reviewing practices and trends in ToS agreements. This, in turn, could facilitate much more proactive monitoring, auditing, and investigation of consumer hostile practices than passively anticipating individual consumer complaints.

Just such a registry has been adopted in California with enactment of the *Social Media Accountability and Transparency Act*.[410] The Act would require social media companies to submit reports to the Attorney General with latest versions of their ToS; to detail specific policies in defined areas; and to collect and report on data related to ToS violations. All ToS reports will be made available to the public through a single searchable database.[411]

The Act further establishes and clarifies standard terms and practices for digital platforms, including privacy notices requiring specific disclosures and general information.[412] The Act also defines "terms of service" to mean a policy or set of policies adopted by a "social media company" that specifies user behavior and activities that are permitted and those that would subject the user to consequences.

In addition to the example of California, the United States Federal Consumer Financial Protection Bureau proposes a database of terms of service contracts offered by supervised non-bank financial institutions who incorporate terms that seek to waive or limit consumer legal protections.[413]

The US examples of a centralized, machine-readable ToS registry could improve consumer protection in Ontario's digital marketplace in many ways:

- Online disclosures could be simplified, made more consistent, and categorized
- The effectiveness of online disclosures could be measured and benchmarked, for instance, by tracking how many consumers viewed the notice
- The database could track changes to ToS and provide notifications, which would counter-balance unilateral contract changes and provide a means to alert consumer to "key information" or other high-risk concerns
- It may increase certainty and establish jurisdiction over suppliers conducting transactions in Ontario
- It may make it easier for governments, scholars, courts, litigants, advocates, and industry to engage in comparative research, identify trends and standard terms, and the like
- It may uncover patterns in ToS that could be evidence of an opportunity or need to regulate
- It could gather data about the prevalence of activities of concern to the public interest, such as data brokering
- It could be leveraged to provide vital public education and engage options for collective redress.

Building on this concept, some jurisdictions have proposed legislative amendments requiring businesses to test the effectiveness of disclosures in the respective target market and "to assess how the information is understood and used by consumers, and to take necessary steps to mitigate any problems identified."[414]

The OECD also identifies how such "Technical solutions, including machine-readable disclosures, can provide a possible way forward in certain contexts."[415] For instance this could considerably accelerate the development of "structured forms" of disclosure, such as ToS "nutrition labels" with standard practices and readily comparable audits. This would overcome long-standing limitations with otherwise promising approaches like the use of "trustmarks."[416]

The OECD writes how:

> Standardised, simplified and clearly structured tables, summarising key information could address these concerns. Examples include the Schumer box in the context of credit card agreements, or proposals for standardised short-form privacy notices. As an alternative, researchers have recently proposed the introduction of standardised privacy levels that consumers only need to understand once and then can easily apply across all digital services that collect data from consumers.[417]

Precedence exists for this kind of proactive auditing and trustmarking in Canada, and is a concept that could be applied to ToS. For instance, since 1972, the Canadian Radio-television and Telecommunications Commission (CRTC) has delegated a "preclearance" review of potentially sensitive advertisements to AdStandards Canada. Their "preclearance" program

assesses advertisements related to alcoholic beverages, children's advertising, cosmetics, food and non-alcoholic beverages, and health products to ensure compliance with advertising standards and guidelines.[418] Both industry and consumers benefit from this arrangement as it helps achieve compliance, maintains public interest standards, and reduces complaints.

A system of trustmarking or certification would support "more complex solutions which often rely on other stakeholders, including information intermediaries. In the context of mobile privacy settings, the FTC, for example, highlights a potential role for operating systems (e.g. Android or Apple)."[419]

It would also respond to the acknowledged necessity to "monitor implementation. Several authorities further encourage businesses to test their own disclosures to ensure that they are in line with the guiding principles."[420]

11.2.8 Consumer Damages for Disgorgement

Disgorgement is a form of compensatory damages that may be awarded in circumstances where a plaintiff cannot adequately quantify his or her loss, or has suffered no actual loss as the result of the other party, while the other party has unfairly profited from the allegedly wrongful acts.

In context of consumer contracts in the digital marketplace, disgorgement may foreseeably arise in two scenarios. First, in relation to unfair and deceptive practices, like dark patterns. Second, as a form of restitution where a party to a contract (like a consumer to a ToS agreement) may witness the unjust enrichment of the other party (like monetizing user data and profiles).[421]

In either scenario, the potential for disgorgement damages can act as a check and balance to deter suppliers from imposing terms on consumers that are totally one-sided and unjustly enriching, thus unbalancing the interests in the contract. Disgorgement can also address the problem of post-facto investigations, fines, and other sanctions amounting to little more than "the cost of doing business" for many suppliers, with limited impact on changing behavior systemically and proactively.

The best-known example of disgorgement in the Canadian context occurs in patent law. In this context, a patent holder can sue not just for how much they have been harmed but also for how much the offending party has gained from the ill-gotten profits.[422]

In the United States, disgorgement is well known in the consumer context.[423] Recent actions of the US Federal Trade Commission have sought to expand the ambit of consumer disgorgement as a damage and remedy for the panoply of practices taking place in the digital marketplace.[424] Competing case law, leading up to a decision of he US Supreme Court, suggests the issue is both relevant to new activities in the digital marketplace, and remains a legally live question.[425]

Disgorgement is rather less well known in the Canadian consumer context. It has been suggested to the LCO that disgorgement may be effective as a check-and-balance for consumers in the digital marketplace, particularly since monetization, data, and other commercial practices both contribute to enormous profits off consumers and given the lack of similar damages under privacy law.[426]

The LCO has also heard that disgorgement may merit consideration in legislation as caselaw otherwise continues to evolve, for instance, with the recent Supreme Court of Canada decision in *Atlantic Lottery Corp. Inc. v. Babstock*.[427] Analysis of this decision suggests a number of wide-ranging implications, particularly for the class action bar, including that "while nominal damages are technically available for any breach of contract" disgorgement of profits as a remedy for breach of contract "is limited to exceptional circumstances that will rarely be present in an ordinary commercial or consumer contract."[428] That said, such circumstances include "where the plaintiff has a legitimate interest in preventing the defendant's profit-making activity" and where the claimant's interest "cannot be vindicated by other forms of relief."[429] This could foreseeably engage the kinds of monetization, data brokering, and other practices that may offend consumers who are party to ToS contracts in the digital marketplace.

Consultation Questions:
Improving Access to Justice for Consumers in the Digital Marketplace

Question 16:
Do access to justice, dispute resolution, enforcement and remedies need to be improved for Ontario's consumers in the digital marketplace? If so, could these be achieved by:

- *Providing clearer guidance/directives to Ontario's courts adjudicating online consumer disputes?*
- *Amending the CPA to provide more certainty regarding Ontario's jurisdiction in online consumer disputes?*
- *Amending the CPA to prohibit online supplier reprisals?*
- *Establishing minimum standards for Ministry complaints?*
- *Establishing regulations or best practices governing private or internal consumer dispute resolution mechanisms?*
- *Amending the CPA to create a collective right of redress or "super-complaints" system?*
- *Improved support for consumer advocacy organizations or public education?*
- *Direct to public consumer legal tools?*
- *A ToS registry?*

Question 17:
How should potential reforms to improve consumer's access to justice, dispute resolution, enforcement and remedies be balanced against the legitimate interests of online suppliers?

Question 18:
Should the Ministry of Public and Business Service Delivery be given a stronger mandate to investigate and prosecute consumer complaints in the digital marketplace? If so, what additional powers should be given to the Ministry?

Question 19:
What other initiatives could supplement improved consumer protection laws in Ontario?

12. Conclusion and How to Get Involved

The release of this Consultation Paper is the start of LCO's consultation process.

The LCO wants to hear from a broad range of stakeholders including lawyers and legal organizations, NGOs, industry representatives, academics, government and justice system leaders, and individual Ontarians interested in consumer protection issues.

To this end, the LCO will be organizing several consultation processes over the next several months. The LCO is strongly committed to partnering with interested organizations and stakeholders to develop consultation initiatives. Individuals or organizations interested in working with the LCO are encouraged to contact our Project Lead.

More information about the consultation process and how to get involved is on our website: https://www.lco-cdo.org/digitalmarketplace.

Written Submissions

The LCO encourages written submissions. Written submissions can be sent to the LCO's general email address at LawCommission@lco-cdo.org.

The deadline for written submissions is **September 1, 2023**.

The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO expects to post written submissions on our project webpage, subject to limited exceptions. Individuals or organizations wishing to provide a written submission may want to contact the LCO for further information prior to their submission.

Project Lead and Contacts

The LCO's Project Lead is Ryan Fritsch. Ryan can be contacted at rfritsch@lco-cdo.org.

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Appendix A – Consultation Questions

Online Contracts

Question 1:
What factor or factors distinguish "online" practices from other forms of contract identified in the Consumer Protection Act (CPA)?

Question 2:
Should Ontario create a statutory or regulatory framework to address potential consumer risks and harms in the digital marketplace? If so, should the CPA be amended to add a statutory definition of "online" practices? How should "online" practices be defined?

Monetary Threshold

Question 3:
Should the CPA be amended to eliminate the monetary threshold (currently $50) for consumer protections for "online" contracts? What are the potential benefits and drawbacks of eliminating the monetary threshold?

Unilateral Changes

Question 4:
Should the CPA be amended to reflect to provide more consumer protections against unilateral changes in terms of service (ToS) in the digital marketplace? If so, could this be achieved by:

- *Prohibiting unilateral changes related to "key information" or "market contexts"?*
- *Providing a right to cancel a contract without penalty under proscribed circumstances?*
- *Better ensuring a "duty of good faith" to distinguish routine from consequential unilateral changes?*
- *Creating a ToS registry, consumer welfare agency, or other audit mechanism to review unilateral changes and prepare independent summaries for consumers about potential risks and consequences.*
- *Other potential reforms?*

Question 5:
How should potential reforms to better protect consumers against unilateral changes be balanced against the legitimate interests of online suppliers?

Notice and Disclosure

Question 6:
Should the CPA be amended to require online suppliers to provide more meaningful and effective notice of material terms and online consumer risks? If so,

- *What is the best way to improve online consumer notice while avoiding consumer information overload?*
- *What "key information" should be disclosed to Ontario's online consumers?*
- *Should online "market contexts" and "deceptive practices" be disclosed to Ontario's online consumers? If so, what contexts or practices should be disclosed?*
- *Are reforms enacted or proposed in other jurisdictions (such as the EU and by the American Law Institute) appropriate for Ontario?*

Question 7:
There are many other options to improve notice for online consumers, including standard terms, prohibiting certain practices, trustmarks, etc. Which options should be adopted in Ontario, if any?

Question 8:
How should potential reforms to provide better or more meaningful notice to consumers be balanced against the legitimate interests of online suppliers?

Dark Patterns

Question 9:
Should Ontario's consumers have more protections against "dark patterns" in the digital marketplace? If so, should the CPA be amended to prohibit these practices? How would "dark pattern" practices be defined in the CPA?

Question 10:
In addition to a statutory definition, should the CPA be amended to include a list of "dark pattern" practices that should be prohibited or proscribed? If so, which practices should be identified?

Question 11:
What other reforms or initiatives should be adopted to improve consumer protections in this area?

Protecting Youth, Elderly, and other Vulnerable Consumers

Question 12:
Do CPA sections 5 and s.15(2) provide sufficient consumer protections to youth, elderly and other vulnerable communities against consumer risks in the digital marketplace? Are additional or more specific consumer protections necessary? If so, could this be achieved by:

- *Creating regulations or best practices guidelines to clarify CPA s. 5's "comprehensibility" requirement?*
- *A defined regime for parental or substitute consent with "best interests" fiduciary duties that takes into account childhood development goals, freedom of expression, and vulnerable groups*
- *Development of standard terms or procurement rules for institutions like government services, schools, or long-term care homes requiring specific platforms or products where consumers have little choice but to agree*
- *Improved, mandatory, upfront forms of notice and disclosure when youth or parental consent is required. This could include newly mandated disclosure and notice provisions requiring lifetime or yearly projections of an average users costs, as well as other identifiable piece of "key information" and "market contexts" such as health risks or the addictiveness of a product or platform*
- *Expanded limitation periods to raise unfair practices and subject to the principle of discovery*
- *Expanded access of consumer to legal and legal aid services to assist with consumer protection issues under the CPA*
- *A statutory duty for online suppliers to protect youth*
- *An expanded list of what constitutes a false, misleading or unconscionable representation to include practices and issues of particular concern to vulnerable groups*
- *Additional measures to protect persons with disabilities, address language barriers, literacy levels, income, class, cultural norms, or age-related and age vulnerabilities (including the elderly and youth)?*
- *Additional measures to protect persons with disabilities, address language barriers, literacy levels, income, class, cultural norms, or age-related and age vulnerabilities (including the elderly and youth)?*

Deception and Unconscionability

Question 13:
Should the CPA be amended to provide more consumer protections against deceptive and unconscionable practices in the digital marketplace? If so, how would these practices be defined in the CPA?

Question 14:
In addition to a statutory definition, should the CPA be amended to include a list of online deceptive and unconscionable practices that should be prohibited or proscribed? If so, which practices should be identified?

Question 15:
Regulation of deceptive practices in the digital marketplace potentially affects jurisdiction within Canada and internationally. Should these rules be harmonized? If so, what does or doesn't need harmonization?

Access to Justice

Question 16:
Do access to justice, dispute resolution, enforcement and remedies need to be improved for Ontario's consumers in the digital marketplace? If so, could these be achieved by:

- *Providing clearer guidance/directives to Ontario's courts adjudicating online consumer disputes?*
- *Amending the CPA to provide more certainty regarding Ontario's jurisdiction in online consumer disputes?*
- *Amending the CPA to prohibit online supplier reprisals?*
- *Establishing minimum standards for Ministry complaints?*
- *Establishing regulations or best practices governing private or internal consumer dispute resolution mechanisms?*
- *Amending the CPA to create a collective right of redress or "super-complaints" system?*
- *Improved support for consumer advocacy organizations or public education?*
- *Direct to public consumer legal tools?*
- *A ToS registry?*

Question 17:
How should potential reforms to improve consumer's access to justice, dispute resolution, enforcement and remedies be balanced against the legitimate interests of online suppliers?

Question 18:
Should the Ministry of Public and Business Service Delivery be given a stronger mandate to investigate and prosecute consumer complaints in the digital marketplace? If so, what additional powers should be given to the Ministry?

Question 19:
What other initiatives could supplement improved consumer protection laws in Ontario?

Appendix B – Definitions

Dark Patterns: "Dark patterns" refer to contracting, software, and user interface design practices to "steer, deceive, coerce, or manipulate consumers into making choices that often are not in their best interests."[430] Typical examples include consent boxes checked by default; preference toggles with unclear coloring; obscured "cancel" or "unsubscribe" buttons; the use of tiny text; misleading disclosures; preference or privacy settings buried deep within a multi-layered menu structure or website; requiring consumers to "opt-out" with unnecessarily onerous procedures; or sign-up and onboarding practices that minimize notice of relevant risks and consequences of business practices to the consumer.[431]

Data Brokering: Data brokers are companies "whose primary business is collecting personal information about consumers from a variety of sources and aggregating, analyzing, and sharing that information, or information derived from it, for purposes such as marketing products, verifying an individual's identity, or detecting fraud."[432] More recently, data brokering has been criticized as contributing to socially hostile activities such as platform misogyny, election interference, online content shaping, and to train algorithms and AI products.[433] ToS are often used to facilitate data brokering through vague or misleading terms like "tailoring products" or "sharing information to improve experiences."[434]

Digital Marketplace: The "digital marketplace" is the broad and inclusive term adopted by the LCO for this project. It reflects an emerging international approach on how to reconcile and modernize classic consumer protection concepts in the era of digital transactions.[435] Ontario's *Consumer Protection Act* has a very broad mandate covering most consumer contracts. But most consumers now conduct these transactions in the "digital marketplace," either directly with service and product suppliers or through digital intermediaries, and almost always under contractual terms of use. For the CPA to remain relevant it must continue to effectively provide core consumer rights – for instance against deception or unfair terms, and to accessible dispute resolution – anywhere in the "digital marketplace." This also means addressing new challenges magnified in, and unique to, the digital marketplace – such as platform lock-in, coercive software design, and rapidly escalating concern for platform misogyny – among other issues discussed later in this paper.

There are many potential definitions for "digital marketplace." SAP's Future of Commerce website notes the term "digital marketplace" is inclusive of a variety of business-to-business, business-to-consumer, intermediary, and consumer-to-consumer practices, among many others. As discussed later in this paper, jurisdictions like the European Union have adopted the notion of the "digital marketplace" and "digital services" as appropriate categories and frameworks for modernized consumer protection legislation.

Market context: refers to the wider business models and practices which are often unknown to consumers but may have serious consequences and risks. A classic example in the digital marketplace is a notice that a supplier "may share information about you with our partners to improve your experience." Absent disclosure of market context, a consumer may not know that these provisions have been used to monetize the consumer, shape consumer content or prices, and share consumer profiles with other businesses. Canadian courts have recognized market conditions and market contexts in interpreting the adequacy of notice, disclosure and consent practices. The American Law Institute (ALI) Restatement on Consumer Contract Law highlights how consumer disclosure practices in the digital marketplace often lack "market context" to make the disclosure meaningful.

Network Effects and Platform Lock-in: Consumers are routinely enticed into buying related products from the same supplier due to concerns like interoperable formats, the ease of backup functions, or the inability to easily export portable data. This can result in "platform lock-in" that diminishes the desire for consumers to exercise choice (and increases the time and effort required to do so).

Endnotes

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99 "Consumer agreements" at CPA s. 4; "internet agreements" at CPA s. 37-40; "remote agreements" at CPA s. 44-47.

100 CPA s. 15.

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107 CPA s. 8.

108 CPA s. 9.

109 CPA s. 11.

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113 CPA s. 16.

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115 *Canada Consumer Product Safety Act* (S.C. 2010, c. 21); *Consumer Packaging and Labelling Act* (R.S.C., 1985, c. C-38); see *The Wireless Code* at https://crtc.gc.ca/eng/phone/mobile/codesimpl.htm; and *Financial Consumer Agency of Canada Act* (S.C. 2001, c. 9). For a more complete list see Innovation, Science and Economic Development Canada, "Federal consumer protection legislation in Canada," online: https://ised-isde.canada.ca/site/office-consumer-affairs/en/federal-consumer-protection-legislation-canada.

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121 Depending on which Act is being referenced, some Acts apply to transactions regardless of if there is a consumer involved, and some specifically state "consumer transactions."

122 Since the 1880 Supreme Court of Canada ruling in *Citizens Insurance v Parsons*, the constitutional interpretation of s.91(2) of the *Constitution Act, 1867* is constrained. In s.91(2), Parliament has exclusive jurisdiction to pass laws in relation to "trade and commerce." There is extensive overlap between the provincial jurisdiction of s.92(13). Section 91(2)'s broad, sweeping powers have been replaced with an interpretative approach of "mutual modification" aimed at limiting the degree of overlap between the two sections. This landmark decision meant that provincial bodies have expansive powers under s.92(13) in regard to trade and commerce. The constitutional powers of the federal government were modified as the provincial powers expanded. The federal government's powers under s.91(2) are split into two distinct categories: 1. The power of international and interprovincial trade and commerce. 2.The power over General regulation of trade affecting the whole dominion.

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126 Canada House of Commons, Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts* (introduced June 16, 2022), online: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-27/first-reading. For additional summary of C-27 see: Christopher Ferguson, Heather Whiteside, Iara Griffith, Amirali Alavi, Soleica Monnier, "The Canadian Government Undertakes a Second Effort at Comprehensive Reform to Federal Privacy Law", (June 20, 2022), online: https://www.fasken.com/en/knowledge/2022/06/20-the-canadian-government-undertakes-a-second-effort-at-comprehensive-reform-to-federal-privacy-law; Lyndsay A. Wasser, Kristen Pennington, Robbie Grant, Kristen Shaw, "Privacy Reform is on the Table Once More: Canada Introduces the Digital Charter Implementation Act, 2022" (June 22, 2022), online: https://mcmillan.ca/insights/privacy-reform-is-on-the-table-once-more-canada-introduces-the-digital-charter-implementation-act-2022/.

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173 The Guardian, "France fines Google and Facebook €210m over user tracking: Data privacy watchdog says websites make it difficult for users to refuse cookies" (January 6, 2022), online: https://www.theguardian.com/technology/2022/jan/06/france-fines-google-and-facebook-210m-over-user-tracking-cookies. See also TechCrunch, "Facebook fined again in Italy for misleading users over what it does with their data" (February 17, 2021), online: https://techcrunch.com/2021/02/17/facebook-fined-again-in-italy-for-misleading-users-over-what-it-does-with-their-data/.

174 TechCrunch, "Italy fines Apple and Google for 'aggressive' data practices" https://techcrunch.com/2021/11/26/agcm-fines-apple-google/. The full text of the decisions of the Italian competition and market authority can be found here for Apple and Google. Google is accused of omitting relevant information at the account creation phase and as consumers are using its services — information the regulator says should be providing in order for people to decide whether or not to consent to its use of their data for commercial ends. Apple is accused of failing to immediately provide users with clear information on how it uses their information commercially when they create an Apple ID or access its digital stores, such as the App Store. The Italian regulator further notes that Google pre-sets user acceptance of commercial data processing yet fails to provide a clear way for users to revoke consent for these data transfers later, or otherwise change their choice after the account step has been completed. It also takes the view that Apple's approach denies users the ability to properly exercise choice over its commercial use of their data, with the regulator arguing the iPhone maker's data acquisition practices and architecture essentially "condition" the consumer to accept its commercial terms. With respect to Facebook, the Italian regulator began investigations in 2018 related to the information Facebook provided to users at sign up and the lack of an opt out for advertising, later fining Facebook €10M for two violations of the country's Consumer Code. The regulator subsequently found in 2020 that Facebook was still failing to inform users "with clarity and immediacy" about how it monetizes their data at the point of sign-up. Instead, it found Facebook emphasizes its service's "gratuitousness": "The information provided by Facebook was generic and incomplete and did not provide an adequate distinction between the use of data necessary for the personalization of the service (with the aim of facilitating socialization with other users) and the use of data to carry out targeted advertising campaigns." See TechCrunch, "Facebook fined again in Italy for misleading users over what it does with their data" (February 17, 2021), online: https://techcrunch.com/2021/02/17/facebook-fined-again-in-italy-for-misleading-users-over-what-it-does-with-their-data/.

175 See for instance: Canadian Lawyer Magazine, "Regulators increasingly using privacy law to confront deceptive online design, say lawyers" (March 14, 2023), online: https://www.canadianlawyermag.com/practice-areas/privacy-and-data/regulators-increasingly-using-privacy-law-to-confront-deceptive-online-design-say-lawyers/374401.

176 See for example CPA s. 13, 14.

177 US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making.

178 The Guardian, "Uber broke laws, duped police and secretly lobbied governments, leak reveals" (July 11, 2022), online: https://www.theguardian.com/news/2022/jul/10/uber-files-leak-reveals-global-lobbying-campaign. See also Margaret Jane Radin, "Evaluating Current Judicial Oversight" in *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 123-142.

179 For instance see *Douez v. Facebook, Inc*. (2022 BCSC 914), in which the court notes the practical difficulty in bringing a class action against a digital platform given "the matter is complex: there are 29 affidavits, with exhibits including cross-examination transcripts comprising just under 14,000 pages, and 400 cited authorities, comprising just under 16,000 pages. There are about 540 pages of written submissions, and the summary trial took ten days" (at para 46). For the courts' expression of broader public policy concerns in interpreting online ToS see: *Douez v. Facebook, Inc*. (2017 SCC 33, [2017] 1 SCR 751) at paras 97-99, 111, 116.

180 See *Douez v. Facebook, Inc*. (2022 BCSC 914), which found in part that the court could adjudicate claims under consumer protection and privacy statutes enacted outside British Columbia. See Law360.ca, "Facebook privacy decision highlights need for tech companies to get consent from users, lawyers say" (June 21, 2022), online: https://www.law360.ca/articles/37394/facebook-privacy-decision-highlights-need-for-tech-companies-to-get-consent-from-users-lawyers-say.

181 Law360.ca, "Facebook privacy decision highlights need for tech companies to get consent from users, lawyers say" (June 21, 2022), online: https://www.law360.ca/articles/37394/facebook-privacy-decision-highlights-need-for-tech-companies-to-get-consent-from-users-lawyers-say.

182 See *Douez v. Facebook, Inc.* (2017 SCC 33) which found that the relevance of public policy factors and the consumer context – including unequal bargaining powers – may provide strong reasons not to enforce forum selection clauses that may waive local class action and privacy rights, at paras 97-99, 111, 116.

183 *Douez v. Facebook, Inc*. (2022 BCSC 914), at para 96-97, noting that "The principle governing contract interpretation is to review the contract as a whole to promote the true mutual intent of the parties at the time of contract formation… Factors such as the contract's purpose, the relationship it creates and the environment in which it operates remain considerations in the interpretive exercise, but are not case specific…"

184 See *Uber Technologies Inc. v. Heller* (2020 SCC 16), which found that a mandatory arbitration clause was unconscionable; *Douez v. Facebook, Inc.* (2017 SCC 33) which found that the relevance of public policy factors and the consumer context – including unequal bargaining powers – may provide strong reasons not to enforce forum selection clauses that may waive local class action and privacy rights; *Canadian Union of Postal Workers v Foodora Inc.* (2020 CanLII 16750 (ON LRB)), in which the Ontario Labour Relations Board found that Foodora meal delivery couriers are dependent contractors and eligible to be unionized under Ontario's *Labour Relations Act*.

185 See for instance *Uber Technologies Inc. v. Heller* (2020 SCC 16), which found that a mandatory arbitration clause was unconscionable; *Canadian Union of Postal Workers v Foodora Inc.* (2020 CanLII 16750 (ON LRB)), in which the Ontario Labour Relations Board found that Foodora meal delivery couriers are dependent contractors and eligible to be unionized under Ontario's *Labour Relations Act*; and *WCL Capital Group Inc. v. Google LLC*, 2019 ONSC 947 in which the ToS governing the purchase of online advertising was accepted by a sophisticated commercial private mortgage lending business (as distinct from a consumer) and so did not raise the same public policy concerns.

186 See CBC News, "Quebec class action alleging Fortnite is addictive will go ahead, judge rules" (December 8 2022), online: https://www.cbc.ca/news/canada/montreal/fortnite-class-action-1.6678687.

187 See generally, European Commission, *The New Consumer Agenda*, (2020) at https://commission.europa.eu/strategy-and-policy/policies/consumers/consumer-protection-policy/consumer-strategy_en.

188 "Internet Agreements" (CPA s. 37-40); "Direct Agreements" (CPA s. 41-43.1)"Remote Agreements" (CPA s. 44-47).

189 See for instance Legislature of Ontario, Hansard Transcripts (September 26, 2002), online: https://www.ola.org/en/legislative-business/house-documents/parliament-37/session-3/2002-09-26/hansard#P390_116153. Scholars point out that prior to 2002, the CPA was little changed since it's original introduction in 1966. The core structure largely remains unchanged since then. See John Enman-Beech, *Contract Life: A Rhetoric on Law, Tech and Power in Everyday Work, Consumer and User Agreements* (Doctoral dissertation, University of Toronto, 2023) at 141-142.

190 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 5, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en. These changes are noted in Suhuyini Abudulai, *The Annotated Ontario Consumer Protection Act, 2023 Edition* (LexisNexis, October 2022) at 8.

191 Suhuyini Abudulai, *The Annotated Ontario Consumer Protection Act, 2023 Edition* (LexisNexis, October 2022) Tables 1-12 at 290-298.

192 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 5, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

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194 CPA s. 38(1-3) and s. 40, referring to Ontario Regulation 17/05 s. 32 "disclosure of information."

195 CPA s. 37, referring to Ontario Regulation 17/05 s. 4, 5, 7 and 9.

196 See: EU Digital Markets Act, Article 2, "Definitions" (2022), online: https://eur-lex.europa.eu/eli/reg/2022/1925/oj; EU Digital Services Act, Article 3, "Definitions" (2022), online: http://data.europa.eu/eli/reg/2022/2065/oj; and Directive (EU) 2019/2161, Consumer information, right of withdrawal and other consumer rights (2019), online: https://eur-lex.europa.eu/EN/legal-content/summary/consumer-information-right-of-withdrawal-and-other-consumer-rights.html#keyterm_E0001.

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202 See the Journal of the European Union, "Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01)" (December 12, 2021), online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(05)..

203 *Working for Workers Act, 2022, S.O. 2022, c. 7 - Bill 88*, enacting as schedule 1 the *Digital Platform Workers' Rights Act, 2022*, online: https://www.ontario.ca/laws/statute/s22007. Note that the 2022 bill introduces amendments further to the 2021 legislation of the same name, enacted in December 2021 (DPWRA).

204 DPWRA, s. 1.

205 Specified rights include: A right to information, including the calculation of pay, the collection of tips and gratuities, pay periods, and how algorithmic performance rating and work assignments are conducted; a right to notice of removal from the platform, including reasons for the removal and two weeks written notice if the removal (or temporary removal) is for a period longer than 24 hours; and a right to be free from reprisals. See DPWRA, ss. 7-13.

206 Ministry of Public and Business Service Delivery, "Consultation on Modernizing Consumer Protection in Ontario: Strengthening the Consumer Protection Act" Session 2 Business Leaders (March 8, 2023), notes on file with the LCO.

207 See *O. Reg. 17/05: General* under the *Consumer Protection Act, 2002* (S.O. 2002, c. 30, Sched. A) at ss. 23.1 ("Future Performance Agreements), 27 ("Personal Development Services"), 31 ("Internet Agreements), 34 ("Direct Agreements"), 36 ("Remote Agreements"), and 43.3 ("Consumer Agreements for Reward Points").

208 An exploration of "free services" in the consumer context is in Public Interest Advocacy Centre*, No Such Thing as a Free Lunch: Consumer Contracts and "Free" Services* (November 2014), online: https://www.piac.ca/wp-content/uploads/2014/11/free_services.pdf.

209 Several kinds of micro-transaction and other incremental monetization practices were recently investigated by the US Federal Trade Commission in context of "free to play" games. See both: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making; and US Federal Trade Commission, "Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges" (December 19, 2022), online: https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations

210 Interestingly, the $50 threshold was initially set in the earliest versions of the *Consumer Protection Act* dating to the 1960s. The threshold has persisted since, despite inflation. Indexed to inflation, this threshold would be nearly $500 today (calculated using the Bank of Canada Inflation Calculator: https://www.bankofcanada.ca/rates/related/inflation-calculator/). This suggests a multi-decadal and implicit normalization of consumer protections to cover an ever-wider array of major and minor transactions. As noted elsewhere in this paper, the minimum transactional threshold has been abolished in other Canadian jurisdictions, including British Columbia.

211 Communication to the LCO from leading consumer protection law lawyer (November 21, 2022), on file with the LCO.

212 For instance, see *Graham v. Imperial Parking Canada Corp. (c.o.b. Impark)*, [2010] O.J. No. 3898, 2010 ONSC 4982 (Ont. S.C.J.), leave to appeal refused[2011] O.J. No. 2027. In this case the putative class representative pleaded that the CPA applied to machine generated contract (i.e. the ticket you put on your dash) as contracts that exceed the $50 when you leave your car there for enough time. The court held that that would have been true except that such agreements were not future performance agreements at all under the CPA. Instead, "Relying on common law, the Court revisited the policy rationale that consumers should be provided with prescribed information before entering into certain types of agreements as well as provided with the opportunity to correct errors immediately before entering into such agreements. The intent of the legislature could not have been to impose formalities and stipulations of the Act to all consumer agreements that satisfy the definition of a future performance agreement under the Act" (Suhuyini Abudulai, *The Annotated Ontario Consumer Protection Act, 2023 Edition* (LexisNexis, October 2022) at 89). The result is questionable on its face but what the court is really saying is that having detailed rules and severe consequences of noncompliance is foolish. In this sense, indefinite subscriptions are likely caught. On the other hand, the *Imperial Parking* case might encourage a future court to ignore the rules if they see the result as unfair or otherwise undesirable.

213 Communication to the LCO from leading consumer protection law lawyer (November 21, 2022), on file with the LCO. See also the decision against a strict interpretation of the CPA in *Graham v. Imperial Parking Canada Corp. (c.o.b. Impark)*, [2010] O.J. No. 3898, 2010 ONSC 4982 (Ont. S.C.J.), leave to appeal refused[2011] O.J. No. 2027.

214 See the *Consumer Protection Act* [RSBC 1996] ch. 69 at section 10, online: https://www.bclaws.gov.bc.ca/civix/document/id/rs/rs/96069_01#section010.

215 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 7-8, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

216 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 13, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

217 See American Law Institute, "§ 3. Adoption of a Modification of Standard Contract Terms" in *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 66-82.

218 See for instance US Federal Consumer Financial Protection Bureau, "Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections" (January 11, 2023), online: https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/registry-of-supervised-nonbanks-that-use-form-contracts-to-impose-terms-and-conditions-that-seek-to-waive-or-limit-consumer-legal-protections/. See also State of California Department of Justice, California Consumer Privacy Act (updated May 10, 2023), online: https://www.oag.ca.gov/privacy/ccpa.

219 This can include internet agreements, direct agreements, and remote agreements, as well as in specific transactions like time share properties, loan brokering, or credit repair, among others. See for example CPA "Internet Agreements" (s. 38); "Remote Agreements" (s. 45); "Tow and Storage Services" (65.3); "Credit Agreements" (77-81); and "Leasing" (s. 89).

220 See *Consumer Protection Act*, O. Reg. 17/05: General at s. 32.

221 See for example CPA "Tow and Storage Services" (65.3); "Credit Agreements" (77-81).

222 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 5, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

223 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 6, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

224 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 6, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

225 Ministry of Government and Consumer Services, *Improving Ontario's Consumer Protection Act: Strengthening Consumer Protection in Ontario* (December 2020) at 7, online: https://www.ontariocanada.com/registry/view.do?language=en&postingId=35387.

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227 Ministry of Public and Business Service Delivery, "Consultation on Modernizing Consumer Protection in Ontario: Strengthening the Consumer Protection Act" Session 2 Business Leaders (March 8, 2023), notes on file with the LCO.

228 See Omri Ben-Shahar and Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).

229 Omri Ben-Shahar, Carl E Schneider, "The Failure of Mandated Disclosure" (March 1, 2010), University of Chicago Law & Economics, Olin Working Paper No. 516, online: https://ssrn.com/abstract=1567284.

230 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 12.

231 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 13, online: https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm

232 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3-4.

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234 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 33, online: https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm.

235 See American Law Institute, "§ 5. Unconscionability" in *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 100, "market context."

236 For an overview see European Commission, "Unfair commercial practices directive," online: https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en. Specifically see the Journal of the European Union, "Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01)" (December 12, 2021), online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(05).

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245 *Douez v. Facebook* (2022 BCSC 914) (June 2, 2022), online: https://www.bccourts.ca/jdb-txt/sc/22/09/2022BCSC0914.htm.

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247 *Douez v. Facebook* (2022 BCSC 914) (June 2, 2022), online: https://www.bccourts.ca/jdb-txt/sc/22/09/2022BCSC0914.htm, at para 96-97.

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257 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 91.

258 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 137: a term does not stand as a "final expression of the [consumer] agreement" if the term "contradicts, unreasonably limits of fails to give the reasonable expected effect to a prior affirmation of fact or promise by the business."

259 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 137-138.

260 *Working for Workers Act, 2022, S.O. 2022, c. 7 - Bill 88*, enacting as schedule 1 the *Digital Platform Workers' Rights Act, 2022*, online: https://www.ontario.ca/laws/statute/s22007 at s. 7.

261 *Working for Workers Act, 2022, S.O. 2022, c. 7 - Bill 88*, enacting as schedule 1 the *Digital Platform Workers' Rights Act, 2022*, online: https://www.ontario.ca/laws/statute/s22007 at s. 7.

262 See European Commission, "A Europe fit for the digital age: new online rules for users" https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-users_en.

263 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 6, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

264 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 6, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

265 See section 7.3 "Criticisms of Notice and Disclosure Regimes."

266 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 16, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

267 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 39, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

268 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 30, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

269 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

270 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

271 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm, citing European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report* (Publications Office of the European Union, 2022), online: https://data.europa.eu/doi/10.2838/859030.

272 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

273 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm.

274 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm. Annex F to this document lists several other dark pattern practices and their correspondence to various EU legislation.

275 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm, citing *FTC Act*, 15 U.S.C. § 45.

276 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm

277 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, online: https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm, citing 16 CFR § 238; Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405); and CAN-SPAM Act, 15 U.S.C. § 7704(a).

278 CPRA/ Cal. Civ. Code § 1798.140(l)).

279 A helpful overview of youth consent laws and contracting practices among the top 20 platforms used by adolescents is found in Schneble CO, Favaretto M, Elger BS, Shaw DM, "Social Media Terms and Conditions and Informed Consent From Children: Ethical Analysis" (2021 JMIR Pediatrics and Parenting 4(2)), online https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8103294/.

280 Organization for Economic Cooperation and Development, *Challenges to Consumer Policy in the Digital Age* (September 2019) at 32, online: https://www.oecd.org/digital/challenges-to-consumer-policy-in-the-digital-age.pdf.

281 Organization for Economic Cooperation and Development, *Challenges to Consumer Policy in the Digital Age* (September 2019) at 32, online: https://www.oecd.org/digital/challenges-to-consumer-policy-in-the-digital-age.pdf.

282 See U.S. National Center for Education Statistics, Program for the International Assessment of Adult Competencies, *Highlights of PIAAC 2017 U.S. Results* (2017), online: https://nces.ed.gov/surveys/piaac/national_results.asp#international, as cited in New York Times, "We Read 150 Privacy Policies. They Were an Incomprehensible Disaster" (June 12, 2019), online: https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

283 CPA s. 5.

284 CPA s. 15(2).

285 For instance, the New York Times reports a recent survey "published by the non-profit research organization Common Sense Media, found that overall screen use among teens and tweens increased by 17 percent from 2019 to 2021 — growing more rapidly than in the four years prior. On average, daily screen use went up among tweens (ages 8 to 12) to five hours and 33 minutes from four hours and 44 minutes, and to eight hours and 39 minutes from seven hours and 22 minutes for teens (ages 13 to 18)." See New York Times, "Kids as Young as 8 Are Using Social Media More Than Ever, Study Finds" (March 24, 2022), online: https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html.

286 See for instance the revelations of Facebook whistleblower Frances Haugen in testimony before the US Congress, as reported in The Guardian: "Facebook harms children and is damaging democracy, claims whistleblower" (October 6, 2021), online: https://www.theguardian.com/technology/2021/oct/05/facebook-harms-children-damaging-democracy-claims-whistleblower. A recent coroner's inquest in the United Kingdom determined that the suicide of student Molly Russell was attributable in part to the harmful effects of social media promoting pro-suicide and self-half content on Instagram; see TechCrunch, "UK to change Online Safety Bill limits on 'legal but harmful' content for adults" (September 20, 2022), online: https://techcrunch.com/2022/09/20/uk-online-safety-bill-legal-but-harmful-changes/.

287 See for instance the revelations of Facebook whistleblower Frances Haugen in testimony before the US Congress, as reported in The Guardian: "Facebook harms children and is damaging democracy, claims whistleblower" (October 6, 2021), online: https://www.theguardian.com/technology/2021/oct/05/facebook-harms-children-damaging-democracy-claims-whistleblower. Similar hearings were subsequently convened in the United Kingdom and Canada. Addictive content targeting youth and other vulnerabilities is being addressed in other ways. For instance, certain EU jurisdictions have moved to ban "loot boxes," a video game design technique that effectively introduces random and occasionally valuable gaming content through a lottery system, often accessible only at great expense of time or money invested. See EuroGamer, "18 European countries call for better regulation of loot boxes following new report" (June 1, 2022), online: https://www.eurogamer.net/18-european-countries-call-for-better-regulation-of-loot-boxes-following-new-report, citing the report of the Norwegian Consumer Council, *Insert Coin: How the gaming industry exploits consumers using loot boxes* (May 31, 2022), online: https://fil.forbrukerradet.no/wp-content/uploads/2022/05/2022-05-31-insert-coin-publish.pdf.

288 Standards and approaches vary, resulting in a variety of approaches taken in terms of service contracts. For instance, in context of privacy protections, the discussion about youth consent in the federal Office of the Privacy Commissioner of Canada's *Guidelines for Obtaining Meaningful Consent* (August 13, 2021), online: https://priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/ notes that: "The OPC is of the view that while a child's capacity to consent can vary from individual to individual, there is nonetheless a threshold age below which young children are not likely to fully understand the consequences of their privacy choices, particularly in this age of complex data-flows. On the other hand, the OIPC-AB, OIPC-BC and Quebec CAI do not set a specific age threshold, but rather consider whether the individual understands the nature and consequences of the exercise of the right or power in question. As such, where a child is unable to meaningfully consent to the collection, use and disclosure of personal information (the OPC takes the position that, in all but exceptional circumstances, this means anyone under the age of 13), consent must instead be obtained from their parents or guardians. For minors able to provide meaningful consent, consent can only be considered meaningful if organizations have reasonably taken into account their level of maturity in developing their consent processes and adapted them accordingly."

289 Apple, "Apple Media Services Terms and Conditions" (last updated September 20, 2021), on file with the LCO. The terms of service was subsequently amended to remove this clause and the current version is dated September 12, 2022, online: https://www.apple.com/legal/internet-services/itunes/us/terms.html.

290 Several problematic aspects of relying on substitute parental consent were at the heart of the FTC investigation into Epic Games' game Fortnite. See both: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making; and US Federal Trade Commission, "Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges" (December 19, 2022), online: https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations

291 See New York Times, "Surgeon General Warns That Social Media May Harm Children and Adolescents" (May 23, 2023), online: https://www.nytimes.com/2023/05/23/well/family/social-media-mental-health-surgeon-general.html.

292 See for instance: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making.

293 See for instance: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making.

294 See CBC News, "Quebec class action alleging Fortnite is addictive will go ahead, judge rules" (December 8 2022), online: https://www.cbc.ca/news/canada/montreal/fortnite-class-action-1.6678687.

295 New York Times, "Meta Fined $400 Million for Treatment of Children's Data on Instagram" (September 5, 2022), online: https://www.nytimes.com/2022/09/05/business/meta-children-data-protection-europe.html. See also The Guardian, "Instagram owner Meta fined €405m over handling of teens' data" (September 5, 2022), online: https://www.theguardian.com/technology/2022/sep/05/instagram-owner-meta-fined-405m-over-handling-of-teens-data.

296 Wired, "A Danish City Built Google Into Its Schools—Then Banned It" (September 23, 2022), online: https://www.wired.com/story/denmark-google-schools-data/.

297 See U.K. Department for Science, Innovation and Technology and Department for Digital, Culture, Media & Sport, "Online Safety Bill: supporting documents" (January 18, 2023), online: https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet#how-the-bill-will-protect-your-freedom-of-speech-online.

298 New York Times, "California Governor Signs Sweeping Children's Online Safety Bill" (September 15, 2022), online: https://www.nytimes.com/2022/09/15/business/newsom-california-children-online-safety.html.

299 New York Times, "Sweeping Children's Online Safety Bill Is Passed in California" (August 30, 2022), online: https://www.nytimes.com/2022/08/30/business/california-children-online-safety.html.

300 Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501–6505.

301 In Utah see S.B. 152 Social Media Regulation Amendments; in Arkansas see S.B. 396, To Create the Social Media Safety Act; To Require Age Verification for Use of Social Media; et. al.

302 See Electronic Frontier Foundation, "The Law Should Not Require Parental Consent for All Minors to Access Social Media" (May 12, 2023), online: https://www.eff.org/deeplinks/2023/05/law-should-not-require-parental-consent-all-minors-access-social-media.

303 For instance, in context of privacy protections and the varying approaches and standards across federal and provincial jurisdictions to youth consent see the federal Office of the Privacy Commissioner of Canada's *Guidelines for Obtaining Meaningful Consent* (August 13, 2021), online: https://priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/. Trade associations such as the Canadian Marketing Association establish voluntary standards for marketing to children and youth that, while non-binding, establish a set of minimum expectation and act as *de facto* industry standards. See for example Canadian Marketing Association, "Marketing to Children & Teenagers" (https://thecma.ca/resources/maintaining-standards/marketing-to-children-and-teens) as well as sections K and L of the *Canadian Marketing Code of Ethics and Standards*, online: https://thecma.ca/resources/code-of-ethics-standards.

304 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

305 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

306 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

307 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

308 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

309 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

310 Advocacy Centre for the Elderly, "Letter to Consumer Protection Act Review" (February 2, 2021), on file with the LCO.

311 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 9, 119.

312 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 119.

313 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 127.

314 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3.

315 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 100-102.

316 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3-4.

317 CPA s. 14.

318 CPA s. 15.

319 CPA s. 14(2).

320 CPA s. 17(1).

321 CPA s. 18(1).

322 CPA s. 18(11)).

323 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 9, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

324 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 10-11, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

325 See the discussion in American Law Institute, "§ 5. Unconscionability" and ""§ 6. Deception" in *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022).

326 See this and other examples earlier in this paper at Section 2.3 "Examples of Terms from Existing ToS Contracts in Canada."

327 The Markup, "The Popular Family Safety App Life360 Is Selling Precise Location Data on Its Tens of Millions of Users" (December 6, 2021), online: https://themarkup.org/privacy/2021/12/06/the-popular-family-safety-app-life360-is-selling-precise-location-data-on-its-tens-of-millions-of-user.

328 CPA s. 7(2).

329 *Douez v. Facebook, Inc.* (2017 SCC 33).

330 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 143-153.

331 ArsTechnica, "Zoom to pay $85M for lying about encryption and sending data to Facebook and Google" (August 2, 2021), online: https://arstechnica.com/tech-policy/2021/08/zoom-to-pay-85m-for-lying-about-encryption-and-sending-data-to-facebook-and-google/.

332 See for instance the *American Innovation and Choice Online Act* (S.2992), online: https://www.congress.gov/bill/117th-congress/senate-bill/2992/text. The bill was introduced by Sen. Amy Klobuchar in October 2021 and amended in May 2022. The bill aims at prohibiting large tech companies from self-preferencing their services and requiring them to provide access to proprietary formats and content.

333 See Teresa Scassa, "Anonymization and De-identification in Bill C-27" (July 6, 2022), online: https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=356:anonymization-and-de-identification-in-bill-c-27&Itemid=80; Ali Farzanehfar, Florimond Houssiau, Yves-Alexandre de Montjoye, "The risk of re-identification remains high even in country-scale location datasets" (2 Patterns 3, 2021), online: https://www.sciencedirect.com/science/article/pii/S2666389921000143; Paul Ohm, "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization" (57 UCLA Law Review 1701, 2010), online: https://ssrn.com/abstract=1450006.

334 US Federal Trade Commission, "Location, health, and other sensitive information: FTC committed to fully enforcing the law against illegal use and sharing of highly sensitive data" (July 11, 2022), online: https://www.ftc.gov/business-guidance/blog/2022/07/location-health-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal-use.

335 US Federal Trade Commission, "Location, health, and other sensitive information: FTC committed to fully enforcing the law against illegal use and sharing of highly sensitive data" (July 11, 2022), online: https://www.ftc.gov/business-guidance/blog/2022/07/location-health-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal-use. See also PCMagazine, "FTC to Crack Down on Sites That Claim Your Data Is 'Anonymized' When It's Not" (July 11, 2022), online: https://www.pcmag.com/news/ftc-to-crack-down-on-sites-that-claim-your-data-is-anonymized-when-its?utm_source=substack&utm_medium=email.

336 Canada House of Commons, Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts* (introduced June 16, 2022), online: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-27/first-reading.

337 See Teresa Scassa, "Anonymization and De-identification in Bill C-27" (July 6, 2022), online: http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=356:anonymization-and-de-identification-in-bill-c-27&Itemid=80

338 CBC News, "Ontario court certifies class action against Uber that could see some workers recognized as employees" (August 14, 2021), online: https://www.cbc.ca/news/canada/toronto/uber-class-action-toronto-employees-david-heller-1.6139825.

339 *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do.

340 *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do.

341 *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do.

342 *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do at para 93. In particular The Uber ToS arbitration provision required disputes to be resolved in Amsterdam and stated applicants had to pre-emptively pay $US14,500 in administrative fees to access the arbitration process.

343 *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do. at paras 94-5.

344 *Douez v Facebook*, 2017 SCC 33 at para 50.

345 *Douez v Facebook*, 2017 SCC 33 at paras 52, 58, 72.

346 *Douez v Facebook*, 2017 SCC 33 at paras 56.

347 See both: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making; and US Federal Trade Commission, "Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges" (December 19, 2022), online: https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations.

348 See both: US Federal Trade Commission, "FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay $245 Million for Tricking Users into Making Unwanted Charges" (March 14, 2023), online: https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making; and US Federal Trade Commission, "Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges" (December 19, 2022), online: https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations.

349 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 10, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

350 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 11, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en

351 For an overview see European Commission, "Unfair commercial practices directive," online: https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en. Specifically see the Journal of the European Union, "Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01)" (December 12, 2021), online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(05). Notably, the European Community Directive of 1993 on Unfair Terms in Consumer Contracts provides an Annex of 17 "indicative and non-exhaustive terms which are presumptively unconscionable." This list is similar to Ontario's CPA. In the EU, however, the terms resulted in development of various black, white and grey lists in individual EU countries. Over time, more consistency was achieved between jurisdictions. Ultimately these efforts resulted in development of the EU's 2021 Unfair Commercial Practices Directive. See Official Journal of the European Communities, L 95/29 Council Directive 93/13/EEC "on unfair terms in consumer contracts" (April 5 1993), online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

352 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 4.

353 Organization for Economic Cooperation and Development, Committee on Consumer Policy, *Recommendation on Consumer Dispute Resolution and Redress* (2007), online: https://www.oecd.org/sti/consumer/38960101.pdf.

354 See Les Jacobs, David Kryszajtys & Matthew McManus, *Paths to Justice and the Resolution of Consumer Problems: Findings from the 2014 Everyday Legal Problems and the Costs of Civil Justice in Canada National Survey* (CFCJ 2015), online: http://www.cfcj-fcjc.org/sites/default/files/Paths%20to%20Justice%20and%20the%20Resolution%20of%20Consumer%20Problems.pdf.

355 Les Jacobs, David Kryszajtys & Matthew McManus, *Paths to Justice and the Resolution of Consumer Problems: Findings from the 2014 Everyday Legal Problems and the Costs of Civil Justice in Canada National Survey* (CFCJ 2015), online: http://www.cfcj-fcjc.org/sites/default/files/Paths%20to%20Justice%20and%20the%20Resolution%20of%20Consumer%20Problems.pdf.

356 See Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 6, online: https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm.

357 Organization for Economic Cooperation and Development, *Challenges to Consumer Policy in the Digital Age* (September 2019) at 23, online: https://www.oecd.org/digital/challenges-to-consumer-policy-in-the-digital-age.pdf.

358 A summary of these procedures and powers is available at Ministry of Public and Business Service Delivery, Consumer Protection Ontario, "How we address consumer complaints" (December 2, 2022), online: https://www.ontario.ca/page/how-we-address-consumer-complaints and Ministry of Public and Business Service Delivery, Consumer Protection Ontario, "Consumer complaints and enforcement" (March 21, 2023), online: https://www.ontario.ca/page/consumer-complaints-and-enforcement.

359 A search of cases found through Canlii.org containing "Consumer Protection Act" and reported from the Superior Court of Justice between the dates of Jan 1 2019 and May 17, 2023 yielded 87 results, of which fewer than 75 were unique.

360 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at12, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

361 Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 13-14, online: https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en.

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