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LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

BACKGROUND #1 – PROJECT OVERVIEW

What is the project about?

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

The LCO's [Consumer Protection in the Digital Marketplace Project](#) considers updates to Ontario's *Consumer Protection Act* to improve notice, consent, terms of service, and access to justice in light of rapid changes in technology and the digital marketplace in Ontario.

The LCO's detailed project [Consultation Paper](#) was released on June 22, 2023. The consultation period for this project will run June 22 – August 31, 2023. This background is one of a [series of consultation documents](#) the LCO has developed for this project.

What is the catalyst for law reform?

The project responds to the growing sense that the “fine print” in today's digital marketplace may not be working as well as it could.

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. Yet consumers, businesses, and government alike express increasing concern that this framework no longer meets contemporary needs.

- For consumers, these contracts are often difficult to understand, are almost too numerous to reasonably read, frequently change without notice, and may trigger big consequences from comparatively minor transactions.
- For businesses, there is a risk of regulatory compliance, a risk to reputation, and uncertainty over terms and practices that may be deemed deceptive or unfair.
- For governments, there is an interest in maintaining consumer confidence in a robust digital marketplace, ensuring a fair playing field for businesses, and fostering laws which are in tune with the times.

Ontario's *Consumer Protection Act* was enacted in 2002 and has not been substantially amended in 17 years. Significantly, the Government of Ontario appears committed to consumer protection reform. The [provincial government acknowledges](#) that there is need to “strengthen protection for consumers, adapt to changing technology and marketplace innovations” and that

more must be done to “to ensure that the laws governing the marketplace are in tune with our times.”

Quick Facts about Digital Marketplace Contracts

- The average consumer would need over 250 hours to read through all the “terms of service” contracts they agree to in a year
- 97% of consumers accept terms of service without reading them
- ToS have become so sophisticated that an average consumer requires a minimum of 14 years of education to comprehend them

Source: [LCO Consultation Paper](#) at 11.

What are the consultation issues?

The Consultation Paper was prepared by the LCO following considerable research and informal consultations with our project Advisory Committee and many other individuals and groups representing a broad cross-section of perspectives.

Broadly speaking, the Consultation Paper asks two sets of questions.

The first set of questions consider if or how Ontario’s *Consumer Protection Act* should be updated to better protect consumers considering the new, complex, and expansive range of consumer risks in the digital marketplace. This considers how “classic” or “traditional” consumer protection principles should be applied and adapted to the digital marketplace, including:

- **Notice and disclosure:** is consequential and key information prominently communicated and easily understood by consumers?
- **Deception and unfair practices** (known as “**unconscionability**”): are consumers being tricked by vague contract language, hidden costs, buried terms, or lopsided deals?
- **Unilateral changes:** is the digital contract frequently changed, or changed without notice of important terms?
- **Contracting with youth and vulnerable groups:** are youth, the elderly, and linguistic and cultural minorities being coerced into contracts with unclear terms and consequences?
- **Access to justice, dispute resolution, and oversight:** what can consumers practically do to enforce their rights, and it is easy, accessible, and fast to do?

The second set of questions consider the impact of new technological and business practices that may be unfamiliar to many consumers in the digital marketplace, and how these should be disclosed to consumers or otherwise regulated. This includes:

- **User monetization practices:** this can include indefinite subscriptions, micro-transactions, or free services the profit off consumer content and profiles.
- **Deceptive “dark pattern” practices:** certain software and contract design practices may frustrate consumer rights, such as requiring lots of steps to cancel a subscription or using a smooth “sign-up” routine that doesn’t communicate risks and consequences.
- **Network effects and platform lock-in:** consumers may be obligated to consent to use software at work or at school, or get locked-in to unfavorable terms due to proprietary formats.
- **Content shaping:** consumers may consent to content shaping but be unaware that it is taking place and with no ability to control selective content filtering.

These developments challenge many traditional principles of consumer protection law, often with inconsistent and unpredictable results. 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.

What is the consultation process?

The LCO wants to consult with a broad array of stakeholders, including legal and consumer rights experts, government and justice system leaders, industry representatives, and individual Ontarians interested in consumer protection issues.

The consultation period for this project runs **June 22 – August 31, 2023**.

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.

How can I participate?

The LCO will be organizing several consultation processes over the summer of 2023:

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 **August 31st, 2023**. The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO will 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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Tel: (416) 650-8406
Toll-free: 1 (866) 950-8406



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CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

BACKGROUND #2 – CONSUMER PROTECTION LAW IN ONTARIO

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What does consumer protection law do?

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 unequal negotiating position between a supplier and consumer
- 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 concerns and promote a trustworthy marketplace for consumers and fair competition among businesses. Over time, consumer protection law developed a series of long-standing principles and objectives, including that:

- 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.

What about consumer protection in the digital marketplace?

These principles and objectives apply to consumer transactions in the digital marketplace, where Terms of Service (ToS) or “click consent” contracts govern most activities.

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 sheer number, length, complexity, and use of terms which may be confusing, deceptive, misleading, or unfair.

Frequent and routine transactions in the digital marketplace are also governed by new technology, contracting arrangements, and business practices which have been shown to undermine traditional consumer protections.

The LCO’s project considers if or how Ontario’s *Consumer Protection Act* – which was last significantly updated in 2002 – could better protect consumers in the digital marketplace. 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.

What consumer protection legislation exists in Ontario?

The *Consumer Protection Act* (CPA) is Ontario’s central piece of consumer contracting legislation.

The CPA asserts a very broad jurisdiction over consumer activities. It protects any individual entering contracts for personal, family or household purposes (as distinct from any “business purposes”). 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.”

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

- Prohibiting unfair practices like deception and unconscionable terms. This can occur where the contract is excessively one-sided against the consumer, the consumer is tricked to agree, or the consumer is pressured into the contract.

- Establishing forms of notice and disclosure to consumers, including which contracts must be in writing and what information must be provided.
- 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.”
- 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.
- Prohibiting terms that would waive consumer rights, such as mandatory arbitration of disputes or the ability to join a class action.

Part 2 and Part 3 of the CPA establish rules governing consumer agreements in general, including limitations or prohibitions against:

- False, misleading, or deceptive representation, such as product or service endorsements, performance characteristics, benefits, or necessity (such as a repair)
- 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
- Renegotiation of price or the terms of service through coercion, such as withholding goods
- The right to rescind an agreement due to unfair practices of the kind described above.

Parts 4 through 8 of the CPA protect consumers in specific situations. These include provisions regulating:

- Direct sales contracts (such as door-to-door sales)
- Remote sales contracts (such as by mail or telephone)
- Internet sales contracts (formed by text-based internet agreement)
- Credit agreements and protections
- Time share agreements
- Reward points
- Motor vehicle dealers and repairs
- Vehicle towing and storage.

What kinds of questions is the LCO asking?

LCO research identifies several ways in which ToS contracts in the digital marketplace undermine traditional consumer protections and the CPA. The LCO’s Consultation Paper explores these in detail, including how:

- 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 and 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 rights and enforcement tool.

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

What is the consultation process?

The LCO wants to consult with a broad array of stakeholders, including legal and consumer rights experts, government and justice system leaders, industry representatives, and individual Ontarians interested in consumer protection issues.

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How can I participate?

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2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street Toronto, Ontario, Canada
M3J 1P3

Email: LawCommission@lco-cdo.org
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Tel: (416) 650-8406
Toll-free: 1 (866) 950-8406



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BACKGROUND #3 – ONLINE CONTRACTING PRACTICES

What is the project about?

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What protects consumers in online contracting?

Consumers now conduct most transactions online, and most of these are governed by a terms of service (ToS) contract. Even in-person shopping might use a mobile app (to obtain deals or rewards, verify a purchase for pickup, or to complete a transaction). Or the consumer may give contact information at the point of sale (governed by terms or a policy). This mix of contexts may trigger legal uncertainty about how the *Consumer Protection Act* covers contracting practices online.

The CPA was last significantly updated in 2002. As a response to early forms of digital e-commerce, the CPA added regulations for several new kinds of consumer contracts: these included “internet”, “remote” and “future performance” contracts. This approach distinguishes contracts based on where they are formed (such as in person, on a phone or by mail, or online). The goal, as stated by the legislature of the time, was to ensure “equivalent protection for consumers who shop for goods and services on the Internet to those going to their local corner store.”

A challenge with this approach is that different kinds of regulated contracts may offer different consumer protections and rights. It can be confusing to determine which type of contract is in play. The example above suggests that a mix of overlapping types of contract may be the source of legal confusion, undermine various consumer protections, and contribute to regulatory evasion. This means the goal of equivalent consumer protection anywhere in the marketplace may not be achieved in today's digital marketplace.

At the same time, consumers face new and unique contracting practices which *are* specific to conducting business online. For instance:

- A new app might give notice of a terms of service (ToS) without telling the consumer up-front about key information, risks or consequences.
- Many online services are provided for free while some CPA rights, protections and disclosures are only required for transactions over \$50
- Free online services may not be up-front about costs that can later accumulate, such as subscription fees that kick in at a later time, micro-transactions to purchase additional content, or costs to obtain random rewards from a game.
- A digital ToS may change unilaterally without the consumer knowing or understanding if or how any changes impact them and their interests.

Are there options to address these gaps?

A 2023 consultation by the government of Ontario recognizes the potential for confusion. They propose to eliminate legal distinctions in the CPA between “remote,” “internet,” “future consideration” and other contracts and replace it with a single set of “core rules” that would apply to most consumer contracts, “including a contract entered into online.”

LCO research suggests some potential challenges with this approach:

- The provincial government’s proposals do not define “online” contracts or practices. This means it is unclear what kinds of rights and protections may be included (or omitted) in a unified definition, or what counts as “online.”
- A generic approach may also inadvertently mislead consumers into a false sense of reliance on incomplete terms.
- Certain types of internet platforms – such as those supplying short-term accommodation, public auctions, or food delivery – have exemptions from the CPA, further confusing consumers about their rights.

In contrast, other 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 dedicated definitions addressing “online” practices and the “digital marketplace.” This approach may:

- have the advantage of greater certainty and uniformity to consumer contracts
- make compliance easier for businesses
- address some of the challenges noted above, such as monetary thresholds, unilateral changes to ToS, and up-front disclosure of “key information,” and

- respond to new issues consumers uniquely face in the digital marketplace (such as deceptive software design).

What kinds of questions is the LCO asking?

The LCO is seeking public comment on a range of issues and proposals outlined in our Consultation Paper. In summary we are interested in your views on the following:

- What factor or factors distinguish “online” practices from other forms of contract identified in the CPA?
- 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?
- 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?
- 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 up-front disclosure of key information or a duty of good faith on behalf of suppliers?

What is the consultation process?

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4700 Keele Street Toronto, Ontario, Canada
M3J 1P3

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CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

BACKGROUNDER #4 – NOTICE, DECEPTION AND UNCONSCIONABILITY

What is the project about?

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What are the consumer principles of notice, deception, and unconscionability?

The LCO's project is focused on reforms that would update Ontario's *Consumer Protection Act* for the digital marketplace. As such, it addresses what might be considered classic or traditional consumer protection issues in digital "terms of service" (ToS) contracts. This includes three central, long-standing legal principles of consumer protection: notice and disclosure; deception; and unconscionability.

Notice and disclosure: Consumers are entitled to notice that a ToS governs their transaction. The CPA establishes various forms of mandatory notice, including: how clear, comprehensible and prominent the notice must be; and which contracts must be in writing. The CPA may also require different kinds of disclosure, including things like the name of the supplier, the address of their business, how to contact them, the cost of the good or service, and so forth.

The LCO's project considers if "more disclosures and more information in disclosures" is still an effective approach given the sheer number and complexity of ToS consumers see in the digital marketplace. The LCO asks if consumers instead need notice of "key information" that could disclose up-front risks and consequences to them. This could also include notice of "market contexts" such as how free or low-cost services make money off the consumer.

Deception: Consumer contracts can not use deception to fool a consumer into accepting the deal. The CPA lists and prohibits various kinds of false, misleading, or deceptive representation. Examples of false, misleading and deceptive practices listed in the CPA include product or service endorsements, performance characteristics, benefits of the product, and necessity or the product or service (such as an engine repair or part replacement).

The LCO's project considers if the CPA needs updating to cover more kinds of deception in the digital marketplace, such as fake reviews, misleading pricing, and disclosing cumulative or total costs over time. The LCO also considers a new kind of deception specific to the digital marketplace are known as "dark patterns." "Dark patterns" refer to subtle or invisible ("dark") contracting, software, and user interface design practices that "pattern" or "steer" consumers into making choices that often are not in their best interests." Examples are things like buttons set to "opt-in" to share data, sign-up processes that don't disclose risks and consequences, coerced consent through frequent annoying and harassing pop-ups, and burying cancellation and other settings deep in the software where they are hard to find.

Unconscionability: Where terms of a contract are fundamentally unequal or one-sided, vague, unenforceable, or unfair they may be deemed to be "unconscionable." The CPA lists and prohibits several kinds of unconscionable terms. This includes practices 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.

The LCO's project considers various new kinds of unconscionable practices in the digital marketplace, and whether consumers would be better protected by also listing these in the CPA. This includes, for instance: misleading omissions (such as use of the claim that a service is "free" or that digital content you "buy" is not "owned"); unclear or vague disclosure of material information; free trials and subscription traps; invisible algorithmic content selection and shaping; and consumer lock-in to proprietary platforms and formats.

What kinds of questions is the LCO asking?

The LCO is interested in hearing how classic consumer protection principles are experienced in the digital marketplace, and what new kinds of deception, unfairness, and notice and disclosure consumers may consider helpful. For instance:

- Is the approach of "more notices and more detailed disclosures" effective at balancing and governing the digital marketplace? Would consumers be better served by alternatives like standard legislated terms and practices, or the use of recognizable trustmarks (such as certifications and standard symbols that could be understood at a glance)?
- Would consumers benefit from notice of "key information" that could disclose up-front risks and consequences to them, or notice of "market contexts" such as how free services make money off the consumer? Would this better help consumers decide if the ToS is a fair deal or not? What kinds of "key information" and "market contexts" are important to consumers? Should any of these be listed in the CPA to ensure they are disclosed?

- What new kinds of deceptive and unconscionable practices concern consumers in the digital marketplace? Should some of these practices be listed in an updated CPA so consumers and businesses know the practices are prohibited?
- Should “dark patterns” be regulated so consumers are less likely to be tricked into agreeing to certain practices (such as data collection and sharing) and find it easier to protect themselves with clearer settings and easier cancellation options?

What is the consultation process?

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Toll-free: 1 (866) 950-8406



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CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

BACKGROUNDER #5 – CONTRACTING WITH VULNERABLE CONSUMERS

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Who are vulnerable consumers?

Research demonstrates that all consumers face practical challenges in understanding terms of service (ToS) contracts in the digital marketplace. The length, complexity, and sheer number of contracts mean most consumers do not read or understand what a ToS contains.

“Vulnerable consumers” face these same challenges. But they may be further disadvantaged – and more prone to deceptive or unfair practices – due to personal characteristics. This may be due to age (young or old), race, language or literacy, culture, physical or mental disabilities, low income, and other factors.

Consumers may also be made more vulnerable in specific markets and contexts. For instance, youth may choose to ignore the ToS where there is peer pressure to use social media platforms or play the newest popular game. Older people might worry about raising concerns with people or services they depend on. Some cultures may feel it is disrespectful or unnecessary to question the fine print. Students or workers may be coerced into using the platforms preferred by their school or employer.

The LCO is interested in hearing the experiences, needs, and suggestions of consumers in all their diversity. In our Consultation Paper we focus on how ToS impact youth and the elderly.

How are vulnerable consumers protected under the Consumer Protection Act? And what are the limitations?

Ontario's *Consumer Protection Act* (CPA) aims to protect vulnerable consumer in two ways.

First, it clarifies that any disclosures that are mandatory under the CPA must be “clear, comprehensible and prominent.”

Second, the CPA states the someone selling a good or service (a “supplier”) will act in an unfair way (an “unconscionable representation”) where a consumer “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.”

Despite the clear intentions of the CPA, the LCO has heard it may provide limited practical protection to vulnerable groups. For example:

- The CPA isn't clear about what “clear, comprehensible and prominent” means. For example, there is no certainty about what formats, languages, or features would fulfill the “comprehensibility” requirement. Nor is it clear what “prominent” might mean, or when in a sign-up process “prominent disclosure” should occur.
- The CPA does not specifically protect for many vulnerable characteristics, such as youth or advanced age, culture, or income.
- The CPA does not identify or protect vulnerable people from “market contexts” that can be coercive. For instance, many services get people hooked with “free services” then use small, occasional or indeterminant subscription fees that can really add up. Or consumers may not get a choice when coerced to use a product for school or work.
- The CPA does not specify what obligations suppliers must assume to systematically anticipate the needs of vulnerable groups to get a fair deal.
- Vulnerable consumers still need to take extra steps to protect their rights by complaining to the Ministry of Public and Business Service Delivery or going to court if the supplier isn't responsive. The LCO has heard this is difficult, time consuming, and impractical for most consumers. It is especially hard for vulnerable consumers and for consumers dealing with routine transactions. This suggests that access to justice could be improved.

What kinds of questions is the LCO asking?

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

- How the rights of youth and the interests of parents might be better incorporated into a better-defined consent regime for youth
- Whether upfront disclosure and standard terms should be adopted in the CPA to account for “market contexts” like “free services” that often have cumulative fees

- If there should be expanded limitation periods so vulnerable consumers have more time to cancel a contract or get their money back once they discover something they didn't really agree to
- Whether there should be an improved, systematic approach to better protecting vulnerable groups, such as a “duty of care” to such users
- Whether incremental and cumulative costs

How can I get involved?

The consultation period for this project runs **June 22 – August 31, 2023**.

The LCO will be organizing several consultation processes over the summer of 2023:

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 **August 31st, 2023**. The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO will 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.

Meetings/Forums/Workshops/Partnerships: The LCO expects to organize a wide range of meetings, forums, or workshops on consumer protection issues over the next couple of 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.

Who can I contact about this project?

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

The LCO can also be contacted at:

Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street Toronto, Ontario, Canada
M3J 1P3

Email: LawCommission@lco-cdo.org
Web: <https://www.lco-cdo.org>
Twitter: [@LCO_CDO](https://twitter.com/LCO_CDO)
YouTube: [@lawcommissionofontario8724](https://www.youtube.com/channel/UC8724lawcommissionofontario)
Tel: (416) 650-8406
Toll-free: 1 (866) 950-8406



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

BACKGROUND #6 – IMPROVING CONSUMER ACCESS TO JUSTICE

What is the project about?

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

The LCO's [Consumer Protection in the Digital Marketplace Project](#) considers updates to Ontario's *Consumer Protection Act* to improve notice, consent, terms of service, and access to justice in light of rapid changes in technology and the digital marketplace in Ontario.

The LCO's detailed project [Consultation Paper](#) was released on June 22, 2023. The consultation period for this project will run June 22 – August 31, 2023. This backgrounder is one of a [series of consultation documents](#) the LCO has developed for this project.

What is happening with consumer disputes in the digital marketplace?

Consumer complaints and dispute resolution has become big business in the digital marketplace. Large online platforms report millions of disputes each year. Many have created their own complaints and dispute resolution systems to respond. Some estimate that these are among the busiest dispute resolution systems in the world today.

Terms of service (ToS) contracts therefore play a key role in shaping consumer rights, recourse options, and remedies. The LCO's project considers whether consumers enjoy effective access to justice in today's digital marketplace.

What options do consumers have to resolve disputes through the Consumer Protection Act?

Access to justice is facilitated in Ontario's *Consumer Protection Act* (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).

What kinds of concerns do consumers have with the dispute resolution system in the digital marketplace?

Consumer experience and LCO research suggests there are several shortcomings to ensuring effective, meaningful, and efficient access to justice for consumers in the digital marketplace. 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. For example:

- Many consumer disputes concern low value products and transactions. Consumers often have little financial incentive to take the time to complain or litigate even the most legitimate disputes.
- The CPA offers little compensation for consumers. The CPA is 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 for most consumers.
- ToS may compel dispute resolution processes that are weighed in favor of the supplier and provide little public transparency or oversight. This individualizes complaints and avoids systemic improvements or remedies.
- Consumers may face reprisal for raising concerns. In some cases consumers' accounts and access has been suspended and content stranded or deleted; smart devices have been remotely disabled; and access to workplace tools or social media has been revoked. This can have a devastating effect on the consumer.
- ToS are likely to be long, opaque, and complex legal documents that even the most sophisticated and well-resourced consumers would find difficult to challenge.
- 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.
- Consumers face considerable challenges with jurisdiction and ensuring compliance with Ontario's CPA. In the offline context, businesses 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.
- Consumers find litigation in court expensive, complex, risky. Court cases often lag years behind constantly evolving business practices, and the specific issue under consideration can be of limited use as a broad precedent.

What kinds of questions is the LCO asking?

In light of these and several other concerns, the LCO's Consultation Paper considers a range of options to improve access to justice for consumers in Ontario. Importantly, many of these options are already found in other jurisdictions. This suggests an opportunity for Ontario to align with the new consumer rights movement responsive to practices in the digital marketplace. The LCO would like to hear from consumers about any of the following:

- Most consumer complaints are individual, making it difficult to change or challenges systemic problems. At the same time there is no readily accessible consumer advocacy organization in Ontario. Do consumers need help to address both individual and systemic complaints? What options would best support consumers across Ontario?
- Should consumers have access to new and more systemic forms of redress? What options are preferable? This could include for instance: an ability (and the resourced needed) to trigger more proactive and systemic investigations by the Ministry of Public and Business Service Delivery; an administrative "collective redress" process less onerous than class actions; or a "super complaints" system that could be triggered by designated consumer protection organizations.
- Should there be stronger protections against digital reprisal for consumers who raise complaints? The CPA protects consumers from reprisal by prohibiting, for example, the withholding of goods while renegotiating the price or the ToS. But today consumers may have their account access suspended, content stranded or deleted, and workplace tools or social media lost. Do consumers need protections from these kinds of actions by a supplier?
- What options would improve transparency of consumer complaints? Other jurisdictions, for instance, are developing publicly accessible ToS Registries. This approach is associated with several benefits: they are "machine readable" making it easy to detect common trends and problems which could suggest more responsive systemic challenges or legislative changes; they can better ensure jurisdictional compliance; and they can provide notice to consumers of contractual changes.
- Should consumers have greater rights to compensation for breaches of a ToS? For instance, some suggest "disgorgement damages" could compensate consumers where free or low-cost services unfairly profit off consumers through business practices the consumer may not have been aware of.
- What measures can the government and courts take so they are better equipped to respond to consumer concerns? If Ontario adopted standard guidance on prohibited

practices, legal requirements, and relevant consumer protection principles in the digital marketplace, might it help government investigations and court cases proceed more quickly, effectively, and consistently?

What is the consultation process?

The LCO wants to consult with a broad array of stakeholders, including legal and consumer rights experts, government and justice system leaders, industry representatives, and individual Ontarians interested in consumer protection issues.

The consultation period for this project runs **June 22 – August 31, 2023**.

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.

How can I participate?

The LCO will be organizing several consultation processes over the summer of 2023:

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Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University

Email: LawCommission@lco-cdo.org
Web: <https://www.lco-cdo.org>
Twitter: [@LCO_CDO](https://twitter.com/LCO_CDO)

4700 Keele Street Toronto, Ontario, Canada
M3J 1P3

YouTube: [@lawcommissionofontario8724](#)
Tel: (416) 650-8406
Toll-free: 1 (866) 950-8406