

## APPENDIX A

### Proposed LCO Recommendations to Amend Bill 142

1. Bill 142 should include more explicit recognition of online contracting and establish an explicit authority to prescribe regulations governing online consumer contracts.

#	LCO Recommendation	Discussion & Proposed Legislative Language
1.1	<b>Bill 142 should include more explicit recognition of online contracting and establish an explicit authority to prescribe regulations governing online consumer contracts.</b>	<p>Online consumer contracts are the most significant new form of contracting for Ontario's consumers since the CPA was passed more than 20 years ago. The legislation needs to establish a modern and flexible legal framework to ensure Ontario's consumers can be protected from new risks and business practices. This framework will benefit Ontario's online businesses as well.</p> <p>The proposed amendment would ensure "online contracts" have the same legislative and legal footing as other forms of consumer contract.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s.16(1) to read:</b></p> <p>"16(1) para 2: A consumer contract that is entered into when the consumer and supplier are not present together, including a contract entered into online when the consumer and supplier are not present together, and such other online contracts as may be prescribed."</p> <p><b>And add new regulatory authority to s.107:</b></p> <p>"107(1) para [#TBD]: defining, for the purposes of section 16(1) paragraph 2 online contracts, and governing any related matters, including:</p> <ol style="list-style-type: none"><li>i. prescribing the disclosure of information,</li><li>ii. prescribing the form and content of such contracts,</li><li>iii. prescribing the making, amending or continuation of such contracts,</li><li>iv. prescribing exemptions or one or more amounts for the purposes of subsection 16(5) [monetary threshold], and</li><li>v. prescribing unfair practices for the purposes of Part 2."</li></ol>

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#### 2. Bill 142 should eliminate the CPA's monetary threshold unless explicitly exempt by regulation.

#	LCO Recommendation	Discussion & Proposed Legislative Language
2.1	<b>Bill 142 should eliminate the CPA's monetary threshold unless explicitly exempt by regulation.</b>	<p>LCO consultations broadly supported elimination of CPA minimum monetary thresholds. British Columbia and other jurisdictions do not have a monetary threshold, ensuring all digital consumers are protected. This is an important reform because:</p> <ul style="list-style-type: none"><li>• Many of the largest platforms and most common services used by Ontarians are provided on a low- or no-cost basis. These are some of the biggest services used by consumers and should not be exempt from consumer protections.</li><li>• Ontarians may be required to use online products for work, school, or to access government services with no option to accept or reject the terms of service.</li><li>• Many Ontarians also rely on online products in which small “microtransactions” fall short of minimum monetary thresholds but have significant value over time.</li></ul> <p>Experience in jurisdictions with no minimum threshold – such as British Columbia and elsewhere – demonstrates the risks to businesses of this change are minimal and that trivial complaints go through Ministry complaints process or courts, both of which dissuade vexatious complaints.</p> <p>For clarity and certainty, the LCO recommends that the CPA 2023 specify there is no minimum transaction threshold unless the threshold is otherwise exempt by regulation.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s.16 (5) to read:</b></p> <p>“16(5) This Part applies to a consumer contract referred to in subsection (1) only if the consumer’s total potential payment obligation under the contract exceeds such amount as may be prescribed, in respect of that contract, for the purposes of this subsection.”</p> <p><b>Add new regulatory authority to s. 107(1):</b></p> <p>“107(1) para 5. exempting or prescribing one or more amounts for the purposes of subsection 16 (5) or 55 (1), including providing that exemptions or different amounts apply in respect of different classes of consumer contracts.”</p>

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#### 3. Bill 142 should improve consumer protections against unilateral contract changes.

#	LCO Recommendation	Discussion & Proposed Legislative Language
3.1	<p><b>Bill 142 should improve consumer protections against unilateral contract changes:</b></p> <p><b>Good faith requirement.</b></p>	<p>Section 19 should establish a “duty of good faith” in relation to unilateral contract changes to balance consumer interests with routine business practices within reasonable standards of fair dealing. The LCO recommends the approach endorsed by the American Law Institute (ALI) (<i>5<sup>th</sup> Restatement on Consumer Contracts</i>, 2022 at chapter 3). The ALI sets out four requirements allowing unilateral changes to a consumer contract:</p> <ul style="list-style-type: none"> <li>• Notice of the unilateral changes</li> <li>• A chance for the consumer to exit the contract</li> <li>• A requirement for affirmative consent to the modified services / product; or</li> <li>• Minor amendments can be made in “good faith.”</li> </ul> <p>This amendment improves consumer protection while allowing suppliers to make minor amendments that would otherwise “spam” consumers with inconsequential or routine changes.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Add new provision to s.19 to read:</b></p> <p>“19(4) Despite subsection (2) and (3), a supplier may amend or continue or purport to amend or continue a consumer contract if the modification is proposed in good faith and does not have the effect of undermining any term, affirmation or promise made by the supplier in the original consumer contract and is made in accordance with the regulations.”</p>
3.2	<p><b>Bill 142 should improve consumer protections against unilateral contract changes:</b></p> <p><b>Regulatory powers.</b></p>	<p>Sections 41/42 of O. Reg. 17/05 allow “internet agreements” to be changed under prescribed conditions and where there is affirmative notice and consent provided. CPA 2023 s. 107(1) should insert a new paragraph that legislatively enshrines and encourages regulatory authority along the same lines.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Add new regulatory authority to s. 107(1):</b></p> <p>“107(1) para [#TBD]: “governing the making, amending or continuation of contracts for the purposes of section 19, and governing any related matters, including:</p> <ul style="list-style-type: none"> <li>i. prescribing the disclosure of information,</li> <li>ii. prescribing the form and content of such disclosure,</li> <li>iii. prescribing the disclosure, form and content of key information related to the amendment or continuation,</li> </ul>

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		<ul style="list-style-type: none"> <li>iv. prescribing any requirement for affirmative consent to the modified services or product,</li> <li>v. prescribing the ability of consumers to exit the contract, and</li> <li>vi. prescribing the reasonable standards of fair dealing for amendments made in good faith.”</li> </ul>
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#### 4. Bill 142 should improve notice and disclosure for online consumers.

#	LCO Recommendation	Discussion & Proposed Legislative Language
4.1	<p><b>Bill 142 should improve notice and disclosure for online consumers:</b></p> <p><b>Regulatory powers to prescribe “key information” and “disclosure boxes” for online consumers.</b></p>	<p>The LCO recommends two important strategies to improve notice to consumers in online contracts: 1) specifying “key information” that must be disclosed in online contracts and 2) requiring a “prominent disclosure box.”</p> <p>“Key information” would relay the practical risks and consequences of an online contract to consumers in plain language and do so prominently. This is the original bargain at the heart of standard form contracts. It puts risks and consequences to consumers upfront in a simple bullet list, rather than buried in the confusing language of contract drafting.</p> <p>“Key information” disclosure is also crucial for other consumers: youth, the elderly, and other vulnerable groups need to understand what they are agreeing to. Key information is particularly supportive of parents, relatives, or friends to better assist vulnerable consumers.</p> <p>“Key information” will help ameliorate the use of buried, implied, and vague terms typical in most online consumer contracts. It will also encourage a marketplace where suppliers compete on terms and to the benefit of consumers.</p> <p>Consistent with s.17 (1) and (2) “key information” would be made available before entering a consumer contract and with the express option to decline it. These rights should be precedent to any consumer disclosure of personal details, contact information, credit card information, and the like.</p> <p>Key information and prominent disclosure boxes have proven to a very effective consumer protection. Current examples include banking disclosure requirements mandated in Canada, and the “Schumer Box” that summarizes credit card terms in the United States. In consultations LCO heard from several businesses who use prominent disclosure boxes voluntarily and find them effective for both parties.</p>

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#	LCO Recommendation	Discussion & Proposed Legislative Language
		<p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 17 to read:</b></p> <p>“17(1) Before a consumer enters into a consumer contract, the supplier shall disclose such key information in a prominent disclosure box and other information as may be prescribed in respect of the contract and shall do so in accordance with such requirements as may be prescribed.”</p> <p><b>And add new regulatory authority to s. 107(1):</b></p> <p>“107(1) para [#TBD]: prescribing and governing matters relating to section 17, including:</p> <ul style="list-style-type: none"> <li>i. Prescribing key information, and</li> <li>ii. Prescribing the form and content of a prominent disclosure box for disclosing key information.”</li> </ul>
4.2	<p><b>Bill 142 should improve notice and disclosure for online consumers:</b></p> <p><b>Misleading practices.</b></p>	<p>Section 8(2) para 17 makes it an “unfair practice for a person to make a false, misleading, or deceptive 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.”</p> <p>The need to ensure clear, comprehensible, and prominent disclosure” is acute in online consumer contracts. Accordingly, s. 4(1) should be amended, or regulations prescribed, to require disclosure in online consumer contracts to be “clear, comprehensible, prominent and not misleading.”</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 4 to read:</b></p> <p>“4(1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible, prominent and not misleading.”</p> <p><b>Or add new regulatory authority to s. 107(1):</b></p> <p>“107(1) para [#TBD]: prescribing and governing matters relating to section 4(1), including:</p> <ul style="list-style-type: none"> <li>i. Prescribing that online contracts be clear, comprehensible, prominent and not misleading.”</li> </ul>
4.3	<p><b>Bill 142 should improve notice and disclosure for online consumers:</b></p> <p><b>Accessibility.</b></p>	<p>Section 9(2) para 1 makes it an “unconscionable act” to “take advantage of a consumer as a result of the consumer’s inability to protect their interests because of disability, ignorance, illiteracy, inability to understand the language of a consumer contract or similar factors.”</p>

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#	LCO Recommendation	Discussion & Proposed Legislative Language
		<p>The need to protect vulnerable consumers is acute in online consumer contracts. Accessibility should be a “core protection” in online contracts, consistent with the <i>Ontario Human Rights Code</i> and <i>Accessibility for Ontarians with Disabilities Act</i>. Whereas “accommodation” is typically made individually and on request, “accessibility” confirms the duty to create an inclusive environment for all.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 4 to read:</b></p> <p>“4(1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible, prominent and accessible.”</p> <p><b>Or add new regulatory authority to s. 107(1):</b></p> <p>“107(1) para [#TBD]: prescribing and governing matters relating to section 4(1), including:</p> <ul style="list-style-type: none"> <li>i. Prescribing that online contracts be clear, comprehensible, prominent and accessible.”</li> </ul>
4.4	<p><b>Bill 142 should improve notice and disclosure for online consumers:</b></p> <p><b>Plain language requirement.</b></p>	<p>Plain language requirements are understood as being more than “clear and comprehensible.” Plain language requirements connote action. In contracts, it could help consumers find what they need; understand what they find the first time they read it; and use what they find to meet their needs.</p> <p>This would concisely communicate to consumers the risks and consequences if they enter into a contract. It reduces the need for consumers to complain or litigate when terms are later discovered.</p> <p>Business would also benefit. A plain language requirement would protect business from void terms and contracts under s. 5 (where contractual “ambiguities [are] to the benefit of the consumer”).</p> <p>Plain language requirements are increasingly legislated in the United States, such as the federal <i>Plain Writing Act of 2010</i>.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 4 to read:</b></p> <p>“4(1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible, prominent and in plain language.”</p> <p><b>Or add new regulatory authority to s. 107(1):</b></p>

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#	LCO Recommendation	Discussion & Proposed Legislative Language
		<p>“107(1) para [TBD]: prescribing and governing matters relating to section 4(1), including:</p> <ul style="list-style-type: none"> <li>i. Prescribing the form and content of plain language standards.”</li> </ul>

#### 5. Bill 142 should prohibit the use of “dark pattern” practices designed to deceive Ontario’s consumers.

#	LCO Recommendation	Discussion & Proposed Legislative Language
5.1	<b>Bill 142 should prohibit the use of “dark pattern” practices designed to deceive Ontario’s consumers.</b>	<p>Digital consumer “dark patterns” have been widely researched and criticized as deceptive, unfair, and undermining consumer confidence in online transactions. These are defined by the OECD as “deceptive contracting, software, and user interface design practices to attempt or actually steer, deceive, coerce, or manipulate consumers into making choices.”</p> <p>The OECD identifies over two dozen well defined “dark pattern” techniques used in the digital marketplace. Widely experienced examples include: prominent “accept” buttons and obscured “reject” buttons; colored toggles that don’t clearly denote acceptance or rejection; or obscuring “cancel” buttons several menus deep.</p> <p>Dark patterns are increasingly subject to consumer protection regulation, most extensively in the EU. The US FTC has also issued a comprehensive report and guidance against dark pattern practices. The FTC guidance is comprehensive and provides helpful distinctions between allowable and deceptive marketing practices.</p> <p>The LCO can provide extensive examples of dark patterns and potential regulatory provisions.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 9 to read:</b></p> <p>“9(2) Without limiting the generality of what constitutes an unconscionable act, the following are included as unconscionable acts: para [#TBD]: Using deceptive contracting, software, and user interface design practices to attempt or actually steer, deceive, coerce, or manipulate consumers into making choices.”</p> <p><b>And add new regulatory authority to s. 107(1):</b></p>

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		<p>“107(1) para [#TBD]: prescribing and governing matters relating to section 9(2), including:</p> <p>i. Prescribing and governing different types of deceptive contracting, software, and user interface design practices related to subsection (2) para [#TBD].”</p>
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### 6. Bill 142 should include stronger protections against unfair and unconscionable online practices, and for vulnerable consumers.

#	LCO Recommendation	Discussion & Proposed Legislative Language
6.1	<p><b>Bill 142 should Including stronger protections against unfair or unconscionable online practices:</b></p> <p><b>Examples.</b></p>	<p>Online consumer contracts are widely criticized for their opacity, complexity, and unfairness. There is a need for more standard terms.</p> <p>Section 9(2) includes a list of examples of “unconscionable representations or unconscionable acts” in consumer transactions. The list is effectively a set of standard terms governing all consumer contracts.</p> <p>Section 9(2) does not include examples “unconscionable representations or unconscionable acts” which occur in the digital marketplace and online contracts.</p> <p>The EU and other jurisdictions enumerate such practices, including the EU’s 2021 <i>Unfair Commercial Practices Directive</i>, and the 2022 <i>Digital Services Act</i> and <i>Digital Marketplaces Act</i>.</p> <p>LCO stakeholders widely believed that examples of online practices that are unfair and unconscionable should be included in legislation. These examples would both help consumers and protect/promote honest businesses.</p> <p>Examples include:</p> <ul style="list-style-type: none"> <li>• Hidden marketing practices.</li> <li>• Failure to identify commercial intent, especially in low-cost or no-cost services and products.</li> <li>• Free trials and subscription traps.</li> <li>• Products designed to target vulnerable youth.</li> <li>• Contractual language that facilitates reprisal against consumer complaints, such as disabling devices, services and accounts.</li> </ul> <p><b><u>LCO Legislative Recommendations:</u></b></p>



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#	LCO Recommendation	Discussion & Proposed Legislative Language
		The LCO can provide extensive examples of unfair and unconscionable practices in online contracting that could be included in section 9 as legislative examples. See also the examples in Chapter 10 of the LCO's <i>Consumer Protection Consultation Paper</i> (June 2023).
6.2	<p><b>Bill 142 should Including stronger protections against unfair or unconscionable online practices:</b></p> <p><b>Accommodation.</b></p>	<p>Section 9(2) para 1 make it an unfair practice to “take advantage” of a vulnerable consumer “because of disability, ignorance, illiteracy, inability to understand the language of a consumer contract or similar factors.”</p> <p>Disability advocates strongly recommend that the CPA additionally reflect language of <i>Ontario Human Rights Code</i> that would make it a violation of consumer rights to fail to accommodate consumers throughout the contracting process. It was emphasized the CPA could provide more immediate, practical and appropriate remedies for vulnerable consumers than litigating through Ontario's Human Rights Tribunal.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 9 to read:</b></p> <p>“9(2) Without limiting the generality of what constitutes an unconscionable act, the following are included as unconscionable acts: para [#TBD]: Failing to accommodate a consumer.”</p> <p><b>And add new regulatory authority to s. 107(1)</b></p> <p>“107(1) para [#TBD]: prescribing and governing matters relating to section 9(2), including:</p> <ol style="list-style-type: none"> <li>Prescribing and governing different accommodation practices related to subsection (2) para [#TBD].”</li> </ol>
6.3	<p><b>Stronger protections against unfair or unconscionable online practices.</b></p> <p><b>Additional Recommendations:</b></p> <ul style="list-style-type: none"> <li><b>Age Appropriate Design Code.</b></li> <li><b>Consumer Privacy Act</b></li> </ul>	<p>In addition to legislative recommendations, the LCO makes the following policy recommendations to promote consumer protections against unfair or unconscionable online practices:</p> <p><b><u>Age Appropriate Design Codes</u></b></p> <p>Both <a href="#">California</a> and the <a href="#">United Kingdom</a> have introduced or enacted legislation to compel online platforms to proactively assess the privacy and protection of children in the design of any digital product or service that they offer. The legislation aims to protect children under the age of 18. The legislation imposes obligations on a range of businesses and contains stiff penalties for noncompliance. This is generally seen as building on the US <i>Children's Online Privacy and Protection of 1998</i> (COPPA).</p>

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		<p>The LCO heard that children under Ontario's CPA are only protected as consumers through the vicarious consent of their parents or the ability of parents to rescind contracts where notice was not accepted or consent provided by an adult on behalf of the child.</p> <p>The LCO heard that neither option protects the interests of children. Instead, the LCO was told that privacy and consumer protection for children must by design and baked into products and services targeting children. At the same time, the complex mix of consumer and privacy law suggests the need for study outside the limits of the LCO's immediate project.</p> <p><b><u>Consumer Privacy Act</u></b></p> <p>LCO consultations heard that consumer rights and privacy rights are to be read together. However, specific practices in online contracting may include notice or consent to an array of data gathering, user profiling, content shaping, targeted marketing, and other practices which may not be best governed by contracting alone.</p> <p>At the same time, Ontario has no provincial private sector privacy legislation.</p> <p>Study of a consumer-focused provincial privacy act could greatly assist in clarifying the relationship between consumer rights and privacy rights and better balance consumer rights and business interests alike.</p>

### 7. Bill 142 should include stronger enforcement by government and remedies for consumers.

#	LCO Recommendation	Discussion & Proposed Legislative Language
7.1	<p><b>Bill 142 should include stronger enforcement by government:</b></p> <p><b>Fines.</b></p>	<p>CPA 2023 proposes to implement two new forms of penalties (fines) and one form of increased compensation for consumers in specific circumstances (refunds).</p> <p>Under s. 108(1)(b), the Minister may make regulations "(b) specifying different administrative penalties for the contravention of different prescribed provisions of this Act or the regulations, different portions of those prescribed provisions or different prescribed requirements in those prescribed provisions."</p> <p>Fines are important under the CPA because consumers are generally limited to recovering only their losses, which are generally small amounts, or punitive damages, which have a high legal and evidentiary threshold and require a court order. Many</p>

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		<p>online transactions involve small amounts that the CPA does not protect, and those it does have remedies that are not worth the time and money for individual consumers to pursue. At the same time, small losses by many individual consumers can add up to substantial profits for a supplier.</p> <p>For many businesses, the “risk calculation” of non-compliance with the CPA amounts to a “cost of doing business” with apparently low risk of enforcement or penalty.</p> <p>Australia recently addressed this gap head on. In 2022, Australia legislated a sliding scale of administrative fines and gave firms one year to change their terms of service to comply with the legislation. This included fines up to a maximum of \$50M. This revised “risk calculation” has encouraged “compliance by design” with online and other consumer contracts being updated and proactively brought into compliance with all aspects of consumer protection legislation. Australian legislation also protects small businesses from unfair fines by classifying them as consumers, extending consumer protections to “mom and pop shops” to level the competitive playing field.</p> <p>Similarly, the EU’s <i>Digital Services Act</i> and <i>Digital Marketplaces Act</i> have a variety of mechanisms for fines, including respectively fines of up to 6% of the global turnover of a large online service provider (under the DSA), and, and fines of not less than 4% and not exceeding 20% of a platforms total worldwide turnover in the preceding financial year (under the DMA).</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 102(5) to read:</b></p> <p>“102(5) A corporation that is convicted of an offence mentioned in subsection (1) is liable to a fine of not more than [AMOUNT TBD] and in accordance with other such requirements as may be prescribed.”</p> <p><b>Amend s.108 to read:</b></p> <p>“108(1)(b): specifying different administrative penalties for the contravention of different prescribed provisions of this Act or the regulations, specifying minimum administrative penalties, different portions of those prescribed provisions or different prescribed requirements in those prescribed provisions.”</p>
7.2	<b>Stronger enforcement by government and remedies for consumers.</b>	<p>In addition to legislative recommendations, the LCO recommends the following policy recommendations to promote stronger enforcement of consumer protections:</p>

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#	LCO Recommendation	Discussion & Proposed Legislative Language
	<p><b>Additional recommendations:</b></p> <ul style="list-style-type: none"> <li>• <b>Study development of consumer protection agency.</b></li> <li>• <b>More use of current enforcement powers.</b></li> <li>• <b>Consider Establishing Terms of Service Registry</b></li> </ul>	<p><b><u>Consumer Protection Agency</u></b></p> <p>LCO heard support for the many advantages to establishing an independent consumer watchdog, such as Quebec’s Option Consommateurs organization. Option Consommateurs has a sophisticated mandate and capacity to protect Quebec’s consumers, including the ability to represent individual complainants and bring representative issues forward.</p> <p><b><u>More Use of Current Enforcement Powers</u></b></p> <p>Several experts suggest that measures could be taken within existing legislation and additional powers introduced in CPA 2023.</p> <p>Several participants noted that the Ministry has authority to issue stop orders and inspection powers but there are few of these, and they aren’t transparently reported on or effectively used to provide consumers and businesses with guidance on legislative interpretation. Ministry initiatives could include:</p> <ul style="list-style-type: none"> <li>• Systematically reviewing ToS and ongoing practices and publicly issue interpretive guidance and standard term language.</li> <li>• Resolving disputes and investigations through Compliance Agreements with Fine Settlements (determined under s. 108(1)(b)).</li> <li>• More regular disclosure and transparency about consumer complaints, actions taken, and results achieved.</li> <li>• Regulating a “good faith” requirement among suppliers to resolve consumer complaints.</li> <li>• Using the Ministry complaint process to facilitate a requirement that consumer complainants have a right to have their claim reviewed by a person.</li> <li>• Adopting a complaints resolution process like the BC Civil Resolution Tribunal</li> </ul> <p><b><u>Terms of Service Registry</u></b></p> <p>Various registries are used elsewhere in Canadian consumer protection law. For instance, some provinces register itinerant sales operations. In the United States, a federal “terms of service” registry exists for certain types of standard form loans.</p> <p>A terms of service registry could promote:</p> <ul style="list-style-type: none"> <li>• Greater certainty about CPA jurisdiction over suppliers</li> <li>• Best practices to improve consumer protection and understanding, transparency, investigations, and enforcement, including readily understood systems of certification or “trustmarking.”</li> </ul>

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		<ul style="list-style-type: none"> <li>• Development of standard terms and interpretation guidance to the benefit of all businesses and consumers</li> <li>• Improved accessibility and accommodation for both consumers and business.</li> <li>• A more robust marketplace that competes on terms.</li> </ul>
7.3	<p><b>Bill 142 should include stronger remedies for consumers:</b></p> <p><b>Damages for Disgorgement.</b></p>	<p>CPA 2023 s. 69(2-3) specifies that a consumer who successfully brings an action under the Act may seek: court order to recover “full payment” to which they are entitled; “three times the amount of a refund;” and/or “the court may order exemplary or punitive damages or such other relief as the court considers proper.”</p> <p>The LCO heard that damages available to consumers are generally for low amounts while punitive damages set a high legal and evidentiary bar for consumers to meet (such as having to show clear intent and gross negligence) and are only available by court order. Consumers consequently have little incentive to act on their rights in most transactions. In fact, for many consumers and transactions, it would be a disproportionate personal expense to enforce their rights. In addition, these types of damages may not address practices in online contracting that impact consumer interests but which do not cause direct losses.</p> <p>Disgorgement is a type of damages based on ill-gotten gains rather than causing a measurable harm. Claimants can seek damages not just for how much they’ve been harmed, but also in some proportion to how much the offending party gained or profited from the infringement.</p> <p>US states that have disgorgement damages see it as an effective way to systemically discourage unfair practices that may not result in loss or costs to an individual consumer. In the digital marketplace, for instance, a disgorgement remedy might be available where a platform profits from deceptive software or contract design practices resulting in unwanted purchases. Another example might be a platform that uses a consumer’s likeness in advertisements targeted at their friends. A legislative amendment would help clarify competing case law.</p> <p>To be clear, damages for disgorgement would be court ordered.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend s. 69(3) to read:</b></p> <p>“69(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages, disgorgement damages, or such other relief as the court considers proper.”</p>

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7.4	<p><b>Bill 142 should include stronger remedies for consumers:</b></p> <p><b>Statutory Damages.</b></p>	<p>LCO consultations demonstrate support for adopting a model of statutory damages into CPA 2023.</p> <p>Statutory damages would allow a consumer to opt for damages defined in legislation/regulation as an alternative to court ordered damages. This makes enforcement faster and more predictable and clarifies non-compliance risks to businesses. The LCO also heard that existing damages for consumers – including exemplary and punitive – set a high legal and evidentiary bar and are often of such a low amount that the consumer has little incentive to act on their rights. A scheme for statutory damages could also mirror regulations governing fines and penalties issued by the Minister (as prescribed under s. 108) and better ensure the ability of consumers to pursue rights where the Minister may not have the capacity or desire to investigate and issue orders.</p> <p>The best-known statutory damages scheme in Canada is the <i>Copyright Act</i> s. 38.1, which has been in operation for over two decades.</p> <p>The LCO’s recommendation proposes to establish a statutory right to damages in legislation while leaving prescribed amounts to regulation.</p> <p><b><u>LCO Legislative Recommendations:</u></b></p> <p><b>Amend the CPA 2023 to include a new section:</b></p> <p>“<b>Statutory Damages</b>” s. [#TBD]: (1) Subject to this section, a consumer may elect, at any time before final judgment is rendered, to recover, instead of damages referred to s. 69, an award of statutory damages for which any supplier is liable under this act, in such amounts as may be prescribed.”</p> <p><b>And add new regulatory authority to s. 107(1)</b></p> <p>“107(1) para [#TBD]: prescribing and governing matters relating to section [#TBD “statutory damages”].”</p>