



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

**November 20, 2023**

Goldie Ghamari, MPP, Chair  
Standing Committee on Justice Policy  
c/o Thushitha Kobikrishna, Clerk  
[scjp@ola.org](mailto:scjp@ola.org)

Dear Standing Committee,

**Re: Bill 142 Better for Consumers, Better for Businesses Act, 2023**

On behalf of the Law Commission of Ontario (LCO), I am writing to provide submissions on *Bill 142, the Better for Consumers, Better for Businesses Act (Consumer Protection Act), 2023* (CPA 2023).

As you may know, the LCO is Ontario's leading law reform agency.<sup>1</sup> 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 is undertaking a major law reform project about how to improve consumer protection in the digital marketplace. As a result, we can make independent and thoughtful recommendations about Bill 142 and consumer protection for online contracts.

The LCO's key recommendation is that Bill 142 be amended to establish a modern and flexible legal framework protect Ontario's consumers from the well-documented risks and business practices in online consumer contracting. 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. Bill 142 gives the provincial government the singular opportunity to modernize Ontario's consumer protection legislation to address these risks.

Fortunately, the reforms and measures needed to address many of these risks have been researched and tested in many other jurisdictions. As a result, the LCO is recommending several practical, targeted, and proven amendments to the current Bill.

The balance of this letter discusses:

- The LCO Consumer Protection Project
- The Risks of Online Consumer Contracting
- Emerging Strategies to Improve Consumer Protection in the Digital Marketplace
- LCO Recommendations to Improve Bill 142

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<sup>1</sup> More information about the LCO is available at [www.lco-cdo.org](http://www.lco-cdo.org).

- Other Recommendations and Next Steps

## 1. The LCO's Consumer Protection Project

The LCO began our digital consumer protection project in 2021. Since then, we have conducted extensive research; released a comprehensive consultation paper; and consulted consumers. LCO consultations met with advocates for vulnerable groups (including persons with disabilities, youth, older Ontarians, and racialized and linguistic communities), businesses, academics, practicing lawyers, and government officials.<sup>2</sup>

The LCO's final report will be completed in early 2024. Nevertheless, we are able to make detailed recommendations on key provisions of Bill 142.

## 2. The Risks of Online Consumer Contracting

Ontario's Consumer Protection Act (CPA) was enacted in 2002 and has not been substantially amended in almost 20 years.

A substantial portion of consumer transactions in Ontario now occur online. Many of these transactions are governed by new forms of contracting, technology, business models, and marketplace practices that were neither foreseen nor addressed in the current CPA. Most obviously, many online consumer contracts include lengthy and complex terms of services that most Ontarians neither read nor understand. These contracts affect all Ontarians, but can be particularly unfair for seniors, youth, and other vulnerable Ontarians.

The LCO's research and consultations confirm online consumer contracting raises several risks for Ontario's consumers and online business:

- **Online Consumer Consent May Be Illusory**

Academic research and practical experience prove that "terms of service" (ToS) contracts are often long, unread, and not understood by many consumers. As a result, consumer consent to digital ToS is often illusory.

- **Digital Notice and Disclosure May Not Protect Consumer Interests**

Many traditional consumer protection strategies – such as consumer notice and disclosure – do not effectively protect Ontarian's interests in the digital marketplace. ToS contracts often change frequently and unilaterally, further limiting meaningful notice to consumers. Ontarians may face hundreds of changes across dozens of ToS for products and services each year.

- **Online Consumers Often Have Few Options and Cannot Negotiate**

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<sup>2</sup> More information about the LCO's Consumer Protection in the Digital Marketplace project, including our comprehensive public *Consultation Paper* (June 2023), is available online: <https://www.lco-cdo.org/digitalmarketplace>.

ToS contracts are often presented to Ontarians as “take it or leave it” propositions, with few realistic options. Proprietary digital formats and apparently “free” online services and platforms can “lock-in” Ontarians to specific products and services. Ontarians often lack effective means to review or negotiate contractual terms and conditions and may have few incentives to file consumer complaints.

- **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.”<sup>3</sup> “Dark patterns” 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.<sup>4</sup>

- **Consumers in Ontario 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. Ontarians may not be protected in these transactions because the CPA’s \$50 monetary threshold is not met.<sup>5</sup>

- **ToS May Restrict Legal Remedies and Access to Justice**

Notwithstanding consumer protection legislation, ToS terms may aim 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.

- **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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>3</sup> Organization for Economic Cooperation and Development (OECD), *Dark Commercial Patterns* (October 2022), at 7, online: <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm> (OECD Dark Patterns).

<sup>4</sup> The OECD identifies 24 distinct forms of “dark pattern” design techniques. See OECD, *Dark Commercial Patterns* (October 2022), at 53, online: <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm>.

<sup>5</sup> See for example CPA s. 13, 14.

<sup>6</sup> Ministry of Government and Consumer Services, *Improving Ontario’s Consumer Protection Act: Strengthening Consumer Protection in Ontario* (December 2020), at 12, online:

<https://www.ontariocanada.com/registry/view.do?language=en&postingId=35387>; and Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023), at 3, online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.

<sup>7</sup> *Improving Ontario’s Consumer Protection Act: Strengthening Consumer Protection in Ontario* at 2.

regulatory compliance in the digital marketplace.<sup>8</sup> Many businesses are also concerned about unfair competition if regulatory obligations are not enforced on less scrupulous suppliers.<sup>9</sup>

### 3. Emerging Strategies to Improve Consumer Protection in the Digital Marketplace

Many consumers and businesses around the world are facing the same consumer issues as Ontarians. The LCO has learned there is an emerging consensus around updated principles and proposals to improve consumer protection 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 United Kingdom.<sup>10</sup>

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 exploit consumers.
- Improve oversight, accountability, and access to justice, including more proactive and systemic enforcement of consumer protection legislation.

### 4. LCO Recommendations to Improve Bill 142

The LCO commends the province for adopting several recommendations the LCO identified in its Consultation Paper and submission to Ministry of Public and Business Service Delivery, including:

- Expanding the right to cancel contracts if notice/disclosure do not comply with the CPA.
- Adding a “discoverability doctrine” for unfair terms and practices.
- Limiting business’ ability to unilaterally amend, extend or renew contracts without express consumer consent.
- Prohibiting contractual terms or punitive actions that limit online reviews.
- Expanding some forms of consumer remedies.
- Enacting more penalties and fines, including new administrative fines court-ordered penalties.

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<sup>8</sup> Business surveys demonstrate “risk to regulatory compliance” as a leading concern among digital platforms. See Bain & Company, “Top 5 Business Challenges: For the First Time Regulatory Compliance Becomes a Top 5 Concern for US Companies” (February 2018), online: <https://twitter.com/bainalerts/status/961214714939363328>. In the Canadian context see Toronto Star, “This is how Canada should deal with Big Tech” (October 13, 2020), online: <https://www.thestar.com/opinion/contributors/2020/10/13/this-is-how-canada-should-deal-with-big-tech.html>.

<sup>9</sup> 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.

<sup>10</sup> See generally, European Commission, *The New Consumer Agenda* (2020), online: [https://commission.europa.eu/strategy-and-policy/policies/consumers/consumer-protection-policy/consumer-strategy\\_en](https://commission.europa.eu/strategy-and-policy/policies/consumers/consumer-protection-policy/consumer-strategy_en).

These provisions will improve consumer protection in Ontario, improve clarity and compliance for business, and ensure greater accountability and transparency for consumer rights in Ontario.

The LCO also agrees that *Bill 142* establishes a framework that, as Minister McCarthy suggests, “can better adapt to today’s evolving marketplace” and “make it easier for businesses to comply with consumer protection rules in our increasingly digital-first marketplace.”<sup>11</sup>

Notwithstanding these reforms, the LCO believes Bill 142 does not go far enough to protect Ontario’s online consumers and businesses. As a result, we recommend several practical, targeted, and proven amendments to the current Bill:

- Including more explicit recognition of online contracting and establish an explicit authority to prescribe regulations governing online consumer contracts.
- Eliminating the CPA’s monetary threshold unless explicitly exempt by regulation.
- Improving consumer protections against unilateral contract changes.
- Improving notice and disclosure for online consumers.
- Prohibiting the use of “dark pattern” practices designed to deceive Ontario’s consumers.
- Including stronger protections against unfair or unconscionable online practices.
- Including stronger enforcement by government and remedies for consumers.

The LCO believes many of these reforms could be achieved through legislative or regulatory measures. An Appendix to this letter includes specific legislative recommendations in each of these areas.

## 5. Other Recommendations and Next Steps

The LCO recognizes that effective consumer protection reform depends not just on legislative amendments but regulatory guidance and other initiatives.

The LCO understands there is likely to be an opportunity in 2024 to comment on potential regulatory reforms and other initiatives. The LCO’s final Consumer Protection report will address these issues.

## 6. Conclusion

The LCO thanks the Standing Committee for the opportunity to comment on this important and timely legislation. The LCO welcomes the opportunity to further discuss our recommendations with provincial government representatives should they wish to do so.

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<sup>11</sup> Government of Ontario, “Ontario Strengthening Protections for Consumers” (October 23, 2023), online: <https://news.ontario.ca/en/release/1003687/ontario-strengthening-protections-for-consumers>.

Sincerely,

Raj Anand

Chair, Law Commission of Ontario

CC      LCO Board of Governors  
          LCO Consumer Protection in the Digital Marketplace Advisory Group