

IMPROVING CONSUMER PROTECTION in the DIGITAL MARKETPLACE

Final Report

May 2024



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



About The Law Commission of Ontario

The 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.

LCO reports are a practical and principled long-term resource for policymakers, stakeholders, academics and the general public. LCO's reports have led to legislative amendments and changes in policy and practice. They are also frequently cited in judicial decisions, academic articles, government reports and the media.

A Board of Governors, representing a broad cross-section of leaders within Ontario's justice community, guides the LCO's work.

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The opinions or points of view expressed in the LCO's research, findings and recommendations do not necessarily represent the views of LCO Advisory Committee members, funders (Law Foundation of Ontario, Osgoode Hall Law School, Law Society of Ontario) or supporters (Law Deans of Ontario, York University).

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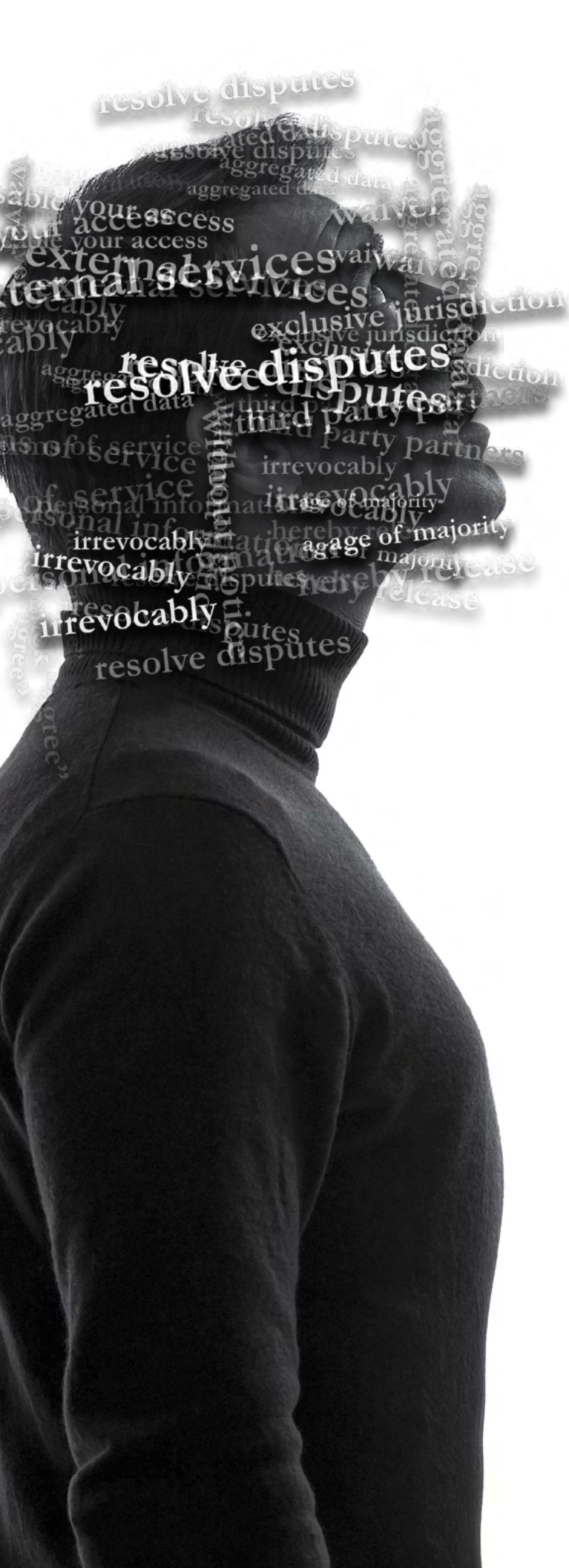


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1. Introduction

1.1 Improving Consumer Protection in Ontario's Digital Marketplace

This is the *Final Report* of the Law Commission of Ontario's (LCO) [Consumer Protection in the Digital Marketplace](#) project.¹ 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, transaction, or service.

ToS contracts have many advantages: they are often fast, consistent, efficient, and transparent. These attributes make ToS 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, unfair, or contrary to Ontario law. 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.

In broad terms, the LCO's project considers if or how Ontario's consumer protection legislation 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.

This project coincides with the most significant consumer protection reforms in Ontario in the last twenty years. In December 2023, the provincial government passed Bill 142, the *Better for Consumers, Better for Businesses Act, 2023* (Bill 142). Bill 142 enacted the *Consumer Protection Act, 2023* (CPA 2023)² which replaced the *Consumer Protection Act, 2002* (CPA 2002).³

The provincial reforms were motivated by many issues above and beyond digital contracting.⁴ One of the province’s key objectives, however, was “to ensure that the laws governing the marketplace are in tune with our times”⁵ and 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*
[Emphasis added.]

“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.*⁷

1.2 Summary of Conclusions and Recommendations

The LCO analyzed Ontario’s consumer protection legislation through the lens of the “new consumer agenda,” an emerging global consensus around key law and policy reform principles which has gained significant momentum in the United States (US), United Kingdom (UK), European Union (EU) and Australia.⁸

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.

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. 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 protect core consumer rights in all contexts.



As currently enacted, the LCO believes CPA 2023 does not provide sufficient protections for Ontario’s online consumers. Most significantly, CPA 2023 does not establish a dedicated regulatory framework to govern online consumer transactions.

The LCO believes that CPA 2023 will fulfill its potential if the provincial government adopts a series of focused law and regulatory reforms. These measures would improve the CPA 2023 for the benefit of all Ontarians.

The LCO has identified several practical, actionable, balanced, and proven recommendations that could be adopted into the new legislation or forthcoming regulations. These recommendations would clearly establish Ontario’s authority to govern online consumer contracting; establish necessary and dedicated rules to protect Ontario’s online consumers; reduce legal uncertainty; establish a level playing field for Ontario’s businesses; and fulfil the provincial government’s commitment “to ensure that the laws governing the marketplace are in tune with our times”⁹

The LCO’s legislative, regulatory, and policy recommendations can be summarized as follows:

- Updating CPA 2023 to better protect consumer contracting rights in the digital marketplace by:
 - Establishing a dedicated legal framework to address practices specific to online consumer contracting.
 - Eliminating the minimum monetary threshold to protect consumers in all transactions.
 - Improving notice and disclosure with simpler and up-front “key information” that is explicit about consumer risks, consequences, and choices.
 - Prohibiting a range of practices in the digital marketplace that have been shown to be contractually deceptive, unfair, or unconscionable.
 - Prohibiting a range of specific online contracting and user interface practices that deceive, coerce or nudge consumers into unwanted choices (so called “dark patterns”).
 - Establishing a “good faith” duty and criteria for unilateral contract amendment in routine circumstances.

- Updating the CPA 2023 to better protect vulnerable consumers by:
 - Establishing a plain language requirement and standard for consumer contracts.
 - Defining the failure to accommodate as an unconscionable contracting practice.
 - Protecting youth online by adopting an age-appropriate design code.
 - Protecting younger and older consumers by making it an unconscionable act to take advantage of a consumer as a result of their age.
- Updating the CPA 2023 to improve enforcement and ensure effective access to justice by:
 - Increasing the use of investigations, systemic investigations, consent agreements (including fines), and interpretive guidance.
 - Establishing minimum standards for investigations of consumer complaints.
 - Establishing adaptable sliding-scale fines and penalties commensurate with the size of the business in breach of the CPA and increasing maximum fines and penalties.
 - Establishing damages for disgorgement and specifying statutory damages.
 - Consider establishing a consumer assistance organization.
 - Consider establishing a terms of service registry.

The great majority of our 32 recommendations are based on existing precedents, practices, and access to justice strategies seen elsewhere in Canada and other jurisdictions.

A complete list of our recommendations is included in **Appendix A**.

1.3 About the LCO

The 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. LCO reports are a practical and principled long-term resource for policymakers, stakeholders, academics, and the general public. LCO’s reports have led to legislative amendments and changes in policy and practice. They are also frequently cited in judicial decisions, academic articles, government reports and the media.

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The LCO is located at Osgoode Hall Law School in Toronto.

More information about the LCO and its projects is available at www.lco-cdo.org.

1.4 Consultations and Research

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

The LCO’s project is focused on potential reforms to Ontario’s *Consumer Protection Act, 2023*. It largely addresses “traditional” consumer protection concepts in digital ToS contracts, including foundational 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.

The background to many of the issues discussed in the Final Report is set out in the LCO’s June 2023 Consumer Protection Consultation Paper. The Consultation Paper discussed a wide range of digital consumer protection issues, including:

- Contracting practices specific to the online digital marketplace.
- The use of minimum monetary thresholds for transactions to trigger consumer protections.
- Unilateral changes to contracts.
- Improving notice and disclosure.
- Dark patterns.
- Better protections for youth and other vulnerable consumers.
- Deception, unfairness, and unconscionability in the digital marketplace.
- Improving access to justice.¹⁰

During our consultations, the LCO directly engaged with dozens of institutions and individuals who reflect a diversity of views. The LCO convened eight in-person and online consultation events and had many more conversations with smaller groups. Overall, the LCO heard from legal experts; businesses; academics; consumers; vulnerable consumers (including youth, older people, and members of different cultural and linguistic communities); consumer advocacy organizations; business organizations; and consumer and corporate litigators.

The LCO’s *Consultation Paper* and *Final Report* were prepared by the LCO following extensive research and consultations with our project Advisory Committee and many other individuals and groups representing a broad cross-section of perspectives.

Discussions about consumer protection in the digital marketplace are often controversial and influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, public interest analysis of consumer protection issues.

1.5 Legislative Reform

The LCO's project largely coincided with the provincial government's consumer protection reform initiative. The LCO began its project in 2021 and published its Consultation Paper in June 2023. Bill 142 was introduced in October 2023, following provincial consultation papers in 2020 and 2023.¹¹ Bill 142 received Royal Assent in December 2023.

The LCO's participated in several Bill 142 consultations, including

- Written submissions to the Ontario Ministry of Public and Business Service Delivery in response to their February 2023 Consultation Paper.¹²
- Written submissions to the Standing Committee on Justice Policy reviewing of Bill 142.¹³
- Testifying before the Standing Committee on Justice Policy.¹⁴

The LCO's submissions were cited extensively at the Standing Committee and Third Reading debate of Bill 142.¹⁵

Notably, CPA 2023 incorporated several issues identified by the LCO in our 2023 *Consultation Paper* and our submissions during the legislative process, including:

- Expanding the right to cancel contracts if notice or disclosure do not comply with the CPA 2023.
- Adding a "discoverability doctrine" to contest unfair terms and practices once they are discovered (as opposed to when the contract is signed).
- Limiting business' ability to unilaterally amend, extend, or renew contracts without express consumer consent.
- Protecting the right of consumers to post online reviews.
- Expanding some forms of consumer remedies.
- Enacting more penalties and fines, including new administrative fines and court-ordered penalties.¹⁶

1.6 Staffing, Support and Funding

The LCO's lead for the Consumer Protection in the Digital Marketplace Project is **Ryan Fritsch**.

The LCO's established an Advisory Committee to assist our work. The Advisory Committee included:

- Dan Edmondstone, McMillan LLP, and Ontario Bar Association Business Law Section
- Jack Enman-Beech, Faculty of Law, University of Toronto
- David Fewer, General Counsel, CIPPIC
- Florencia Marotta-Wurgler, New York University School of Law
- Alexandra Mogyoros, Lincoln Alexander School of Law, Toronto Metropolitan University
- Marina Pavlovic, Faculty of Law, University of Ottawa
- Michael Tamblyn, CEO, Rakuten Kobo

The analysis and recommendations in this report do not necessarily represent the views of the LCO's Advisory Committee, its funders (Law Foundation of Ontario, Law Society of Ontario, Osgoode Hall Law School) or supporters (Law Deans of Ontario, Ministry of the Attorney General).

1.7 Next Steps and How to Get Involved

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario. As a result, the LCO is seeking comments and advice on this report. There are many ways to get involved. Ontarians can:

- Learn about the project and sign up for project updates on our project website.
- Contact us to ask about the project.
- Provide written submissions or comments on the final report.

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2. Catalysts for Reform

Ontario’s CPA was enacted in 2002 and had not been substantially amended in more than 20 years.¹⁷

Since 2002, Ontario’s digital economy has grown substantially. Many consumer transactions are now governed by new forms of contracting, technology, business models, and marketplace practices that were neither addressed nor contemplated in CPA 2002.

This section summarizes the major catalysts driving the LCO’s project and ToS consumer protection reform in Ontario. The section divides these catalysts into three broad categories:

- The risks of online consumer contracting.
- The need for a better environment for Ontario businesses.
- An analysis of the “new consumer agenda” i.e. legislation and strategies to improve consumer protection in the digital marketplace.

This project will consider whether CPA 2023 responds effectively to these catalysts.

An expanded discussion of the issues highlighted below is found in the LCO *Consultation Paper* at section 4, “Catalysts for Reform: Gaps in Consumer Protection in the Digital Marketplace.”

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.”¹⁸

2.1 The Risks of Online Consumer Contracting

The LCO's research and consultations confirm online consumer contracting raises several new risks and challenges for Ontario's consumers. It also appears traditional consumer protection strategies are often inadequate to address these issues.

1. Consumer Consent May Be Illusory

The common law, CPA 2002, and CPA 2023 require adequate disclosure be given to the consumer to read and understand contractual terms and conditions.¹⁹

Notice is a fundamental principle of consumer protection law intended to ensure consumers can read and consent to contractual terms.

Notwithstanding this principle, it is now widely acknowledged that consumer consent in online ToS is often illusory. This is because online ToS are often long, not read, and/or inaccessible:

- **Digital ToS 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.²⁰ In the Canadian context, it has been said that the likelihood consumers actually read ToS in the digital marketplace is "statistically never."²¹ Recent US studies show that 91% of adults and 97% of younger adults (18-34) accept legal terms and services without reading them.²²
- **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 American consumer would require 14 years of education to comprehend the terms.²³ Many ToS are written at a level that exceeds the sophistication of books about theoretical physics and philosophy.²⁴
- **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.

2. Notice and Disclosure May Not Protect Consumer Interests

Many traditional consumer protection strategies – such as consumer notice and disclosure – do not effectively protect consumer's interests in the digital marketplace.

Legal researchers note 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).²⁵

Studies in the digital marketplace have also found that:

- 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."²⁶
- The "limiting factor in becoming informed thus seems not to be the cost of accessing license terms but reading and comprehending them."²⁷

Moreover, ToS contracts often change frequently and unilaterally, significantly limiting meaningful notice to consumers. Ontarians may face hundreds of changes across dozens of ToS for products and services each year. Services like the website *Terms of Service; Didn't Read* show how frequently and consequentially ToS contracts change.²⁸

3. Online Consumers Often Have Few Options and Cannot Negotiate

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

This situation gives businesses “both the ability and incentive to unfairly influence consumers.”²⁹ Studies in the United States demonstrate that the market regulatory power of consumer choice is largely ineffective in ensuring fair and balanced ToS.³⁰

4. 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.”³¹ “Dark patterns” may include “frictionless” sign-up practices that minimize notice of risks to the consumer; consent boxes and user settings checked by default; settings with unclear yes/no status; and settings buried deep within multi-layered menus or websites.³²

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.³³

Research demonstrates that dark patterns are very effective at “subverting or impairing consumer autonomy, decision-making or choice”³⁴ and can undermine consumer protection practices. A recent OECD report identified 24 distinct categories of “dark pattern” design techniques deployed in the digital marketplace (see section 4, below, and the table in that section).³⁵

Ultimately the “purpose of dark patterns is to increase business revenue” through deception.³⁶ 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.”³⁷ Collectively, these practices reflect “mounting concern that dark commercial patterns may cause substantial consumer detriment.”³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹

5. 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.⁴²

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.

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 also avoid consumer regulation.

6. ToS May Restrict Legal Remedies and Access to Justice

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

Notwithstanding consumer protection legislation, ToS contracts may restrict consumer's ability to seek legal remedies. For example, ToS may include terms stating that disputes are governed by foreign laws or must be initiated in a foreign jurisdiction. 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. A recent US Federal Trade Commission (FTC) investigation into online games company Epic 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.⁴³

7. The Limits of Litigation

Litigation is an important strategy to protect and promote consumer rights. That said, there may be important practical limits on litigation that undermine enforcement of consumer rights.

First, litigation often lags business practices. This may undermine the usefulness and applicability of litigation as a precedent or narrow it to specific instances rather than broader application. It has also been demonstrated that less scrupulous businesses may intentionally adopt an aggressive litigation strategy to delay enforcement or regulation, create more time for lobbying, and to normalize public perception of their business model in the interim.⁴⁴

Second, consumer lawsuits are expensive, lengthy, and complex legally. Only the best-resourced litigants may 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 low.

Finally, litigation is often an incomplete tool for regulating any online services, AI, algorithms, and other digital technology. The LCO has written extensively about the "limits of litigation" and corresponding barriers to access to justice in these contexts.⁴⁵

2.2 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.⁴⁶

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.⁴⁷

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.⁴⁸

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.⁴⁹

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."⁵⁰ 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.⁵¹

2.3 The “New Consumer Agenda”

The last and perhaps highest profile catalyst for legislative reforms to better protect Ontario’s digital consumers is the speed and range of digital consumer protection initiatives across the world.

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 internationally and within Canada.⁵²

For instance, the European Union (EU), the United States (US), and Australia recently enacted significant legislation to modernize consumer protection in the digital marketplace.⁵³ The EU legislative model is the most comprehensive to date, and has been embraced by several other countries including Turkey, Brazil, and India.⁵⁴ Closer consumer protection integration between the EU and US is also occurring, with regular meetings of the recently established EU-US Trade and Technology Council taking place since 2021.⁵⁵

European Union

In 2023, the EU enacted the *Digital Services Act* and the *Digital Markets Act*, with various provisions coming into force through 2024.⁵⁶ These complementary pieces of legislation impose regulations on digital platforms of varying sizes, including unfair consumer practices.

United States

American federal and state regulators have been at the forefront of many of “new consumer protection” initiatives. A small sample of these initiatives include:

- The State of California and US federal regulators have proposed a variety of consumer contract registration databases, including for privacy policies and terms that seek to waive or limit consumer legal protections.⁵⁷
- The *California Privacy Rights Act* (CPRA 2020) 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.”⁵⁸

- The 2022 *California Age-Appropriate Design Code Act* is the first child safety legislation in the US to impose a wide-ranging set of safeguards online services that provide products, services, or features for children 17 and under.⁵⁹
- California’s 2022 *Social Media Accountability and Transparency Act*⁶⁰ 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.⁶¹

Australia

In 2022, Australia enacted the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.⁶² In the main, the legislation significantly shifts the risk analysis for businesses using “borderline” unfair terms in standard form consumer contracts by imposing potentially very significant fines for breaches (up to \$AU50M).

Regulators and courts are now empowered to review contracts and impose significant fines for any determined breaches. Businesses were given 12 months to review and update their contracts for compliance, and the law came into force in late 2023.⁶³

Administrative Enforcement and Initiatives

Many jurisdictions have stepped-up administrative enforcement of consumer protection and related provisions. These efforts include a variety of existing tools to discipline online consumer contracting practices, such as:

- High-profile systemic investigations.
- Publicly published consent agreements.
- Significant fines for violations.
- Publication of regulatory interpretation and guidance documents on issues specific to the digital marketplace.

Examples of these efforts are available below in **Case Study 1: The Impact of Dark Patterns on Consumer Protection** and further discussed at length in LCO’s *Consultation Paper* at sections 4.5 “Deceptive “Dark Patterns” May Undermine Consumer Choice,” 7.4 “Government, Judicial and Academic Scrutiny,” and 9.2 “Youth and ToS.”

International digital consumer protection developments have mirrored several important Canadian initiatives, including:

Government of Canada

The Government of Canada has also begun legislating consumer issues governed by ToS contracts in the digital marketplace, including:

- **Online Harms Act (OHA):** On February 26, 2024, the Government of Canada tabled Bill C-63, the *Online Harms Act*. The objective of the Act is to promote online safety. It specifies seven types of conduct: (1) intimate content communicated without consent; (2) content that sexually victimizes a child or revictimizes a survivor; (3) content that induces a child to harm themselves; (4) content used to bully a child; (5) content that foments hatred; (6) content that incites violence; and (7) content that incites violent extremism or terrorism.⁶⁴
- **Consumer Privacy Protection Act (CPPA):** The Government of Canada introduced CPPA in June 2022 as part of Bill C-27, the *Digital Charter Implementation Act, 2022*.⁶⁵ CPPA 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, 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).⁶⁶

- **Artificial Intelligence and Data Act (AIDA):** Bill C-27 also introduced AIDA, establishing prohibitions on the design, development, use or making available of AI systems that use illegally obtained personal information. AIDA also prohibits the making available of AI systems that cause “serious harm” to individuals. AIDA has implications for a variety of consumer protection issues otherwise governed by ToS, such as content shaping, user profiling and targeting, advertising, and other uses.
- **Proposal to use “compliance agreements” with financial penalties to regulate privacy and data governance standards.** The Government of Canada has proposed a series of legislative amendments to Bill C-27 allowing regulators to negotiate “compliance agreements” with corporate entities that include financial penalties.⁶⁷ This would reflect powers used by the US Federal Trade Commission as an effective investigatory and regulatory mechanism over a broad range of privacy, data governance, and related consumer protection issues.

Canadian Privacy Regulators

In 2021, Privacy Commissioners in Canada, Quebec, British Columbia, and Alberta released results of a joint investigation into Tim Horton’s online ToS, app, and contracting practices.⁶⁸ The Commissions determined the widely used Tim Horton’s app – downloaded 8.6 million times and with 1.6 million active users in 2020 – was tracking consumers’ location even when the app was closed, contrary to the notice to consumers. This information was used to infer locations including the consumer’s home, place of work, travel status, and visits to competing stores.⁶⁹

The Commissions found the Tim Horton's ToS included misleading terms; failed to get proper consent; gave misleading explanations; and shared data with third parties with potentially systemic consequences. The Commissions concluded that ToS must be reformed, writing:

Organizations must implement robust contractual safeguards to limit service providers' use and disclosure of their app users' information... 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.⁷⁰

Summary: The New Consumer Agenda

Collectively, the various regulatory activities underway in Canada and elsewhere demonstrate several themes that are coalescing and giving practical effect to the "new consumer agenda":

- Traditional consumer contracting protections – such as notice, deception, unconscionability, and unfairness – can be applied to govern new business practices in the digital marketplace, where appropriate.
- Consumer protection law complements other areas of law, including privacy, data governance, competition, advertising, product liability, algorithmic regulation, and other laws.
- Better enforcement and access to justice is a primary concern.
- There is growing momentum to embrace these developments among leading consumer enforcement agencies, academics, law reform agencies, and courts.⁷¹

CASE STUDY 1:

The Impact of Dark Patterns on Consumer Protection

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."⁷² 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.⁷³ 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.⁷⁴ The amount includes \$US 245 million to refund consumers.⁷⁵





3. Consumer Protection and Ontario's Consumer Protection Act

3.1 Consumer Protection Law and Standard Form Contracts

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.
- Consumer’s potential lack of sophistication.

Consumer protection legislation attempts to address these inequities 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.

An expanded discussion of the rationale, objectives, legal evolution, and various common terms in standard form contracts in Canadian consumer protection law is in the LCO *Consultation Paper* at section 2, “Consumer Protection Law: Background.”

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.⁷⁶

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. Indeed, 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.⁷⁷

“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.⁷⁸ Shrink-wrap licenses are the precursor to click-consent “terms of service” agreements. These became increasingly common as more consumer transactions and services transitioned to the digital marketplace throughout the early 2000s.

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.

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.

3.2 CPA 2002

Given the prevalent role of notice in the digital marketplace, consumers increasingly rely on legislation to govern any imbalance of power with suppliers. At the same time, routine products, services, and transactions have become more sophisticated, interconnected, and complex in the digital marketplace. These new practices may operate outside the scope of existing legislation and have been shown to undermine traditional consumer protections such as effective notice.

Until very recently, Ontario's central piece of consumer contracting legislation was the *Consumer Protection Act, 2002* (CPA 2002).⁷⁹ CPA 2002 was replaced by legislative amendments introduced and passed in the fall of 2023 (CPA 2023).⁸⁰

An expanded discussion of the structure and provisions of Ontario's CPA is found in the LCO *Consultation Paper* at section 3, "Consumer Protection Law in Ontario and Across Canada."

The purpose of the CPA 2002 is unchanged: it aims to support a competitive marketplace while protecting individuals entering contracts for personal, family or household purposes (as distinct from any "business purposes"). The CPA 2002 asserts a very broad jurisdiction over consumer activities. The Act 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."⁸¹

Courts acknowledge the broad jurisdiction and 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.^{82.}

*[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.*⁸³

The CPA 2002 accordingly 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.⁸⁴
- Banning unfair practices like deception and unconscionable terms where "the consumer transaction is excessively one-sided in favor 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."⁸⁵
- 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.⁸⁶
- 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."⁸⁷
- 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.⁸⁸
- Making terms that would require mandatory arbitration of disputes unenforceable against consumers.⁸⁹
- Making terms that would waive the right to commence or become a member in a class action unenforceable against consumers.⁹⁰

To achieve these objectives CPA 2002 adopts a mix of legislative and regulatory provisions.

CPA 2002 Parts 2 and 3 establish a set of universal rules to govern all consumer contracts. These rules enact fundamental requirements for notice and disclosure, as well as defining unconscionable and unfair contracting practices. Importantly, these universal rules protect all consumer transactions, including those provided for free or below a minimum monetary threshold set in the Act.

In addition, CPA 2002 Parts 4 – 8 establish specific rules and regulations governing certain types of commercial activity and transactions, such as “internet” and “remote” agreements, as well as specific industries like tow trucking, gift certificates, and door-to-door sales.⁹¹ 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.”⁹²

Notably, in 2002 provincial legislators explicitly acknowledged the need for 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.”⁹³ However, CPA 2002 limited the reach of these protections by establishing a minimum monetary threshold set in the Act (\$50).⁹⁴

Many consumer protection scholars have noted important limitations of the notice and disclosure model the CPA 2002 and similar legislation is based on. For example, many commentators note this model does not address the problem of consumer “accumulation and overload” that occurs when the number and length of ToS contracts overwhelms a consumer's ability to take notice of, read, or understand contracts. Accumulation and overload lessens consumer's “wish to make choices and impairs the quality of choices they make.”⁹⁵

This analysis is summarized concisely by Margaret Jane Radin, a leading Canadian contracts academic, who stated that consumers:

- Feel they would not understand 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.⁹⁶

Significantly, the CPA is not the only legislation protecting consumers in Ontario. Consumer contracting law is intended to be read as complimentary to other consumer protection laws, and to related protections like privacy law, product safety, and emerging law governing artificial intelligence.

An expanded discussion of how consumer protection law is read alongside privacy law, data protection, and artificial intelligence is found in the LCO *Consultation Paper* at section 3.4, “Federal Legislation: Privacy, Data Protection, and the AIDA.”

3.3 CPA 2023

Both the CPA 2002 and CPA 2023 were introduced at a time of significant technological change. Both governments of the day recognized that consumers need equivalent protection in the digital marketplace.

The CPA 2023 explicitly aims to establish a forward-looking framework for the future of online consumer protection.⁹⁷ The 2023 amendments acknowledge that more must be done “to ensure that the laws governing the marketplace are in tune with our times.”⁹⁸ The stated goal is 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.”⁹⁹

To this end, CPA 2023 incorporates several issues identified as law reform options by the LCO in our 2023 *Consultation Paper* and in an earlier submission to the Ministry of Public and Business Service Delivery. This includes:

- Expanding the right to cancel contracts if notice or disclosure do not comply with the CPA.
- Adding a “discoverability doctrine” to contest unfair terms and practices once they are discovered (as opposed to when the contract is signed).
- Providing for regulations which may limit business’ ability to unilaterally amend, extend, or renew contracts without express consumer consent.
- Protecting the right of consumers to post online reviews.
- Expanding some forms of consumer remedies.
- Increasing the cap on penalties and fines.¹⁰⁰

Notwithstanding these accomplishments, CPA 2023 mostly strips-down CPA 2002 and restates it as “framework” legislation, leaving many specific and challenging issues – including several key issues for the digital marketplace – to regulations which have yet to be developed.¹⁰¹ For instance, CPA 2023 eliminates and replaces an array of consumer protections specific to “internet” and “remote” agreements with a single reference to “a contract entered into online,” a term which is undefined in the legislation and given no specific rights or protection.¹⁰² CPA 2023 also continues certain practices from CPA 2002 that no longer reflect business practices common in today’s digital marketplace. For instance, some of the largest digital marketplace products and services with the most users are provided on a free or low-cost basis that fall below the monetary trigger required to invoke consumer rights under the CPA.¹⁰³ CPA 2023 also does little to address the frequent need of consumers to resolve an increasing number of disputes and unfair practices without the complexity and cost of going to court.

The remainder of this report discusses how CPA 2023 and its accompanying regulations can be adapted to better protect Ontario’s digital consumers. This analysis builds on the issues introduced in the LCO *Consultation Paper*, our ongoing research and consultations, and our detailed analysis of the new legislation.





4. Improving Consumer Contracting in the Digital Marketplace

The LCO has concluded that a targeted set of legislative and regulatory reforms are needed to ensure effective consumer protections in the growing and constantly adapting digital marketplace.

This section discusses several reforms to meet this objective, including:

- Establishing a dedicated legal framework to address practices specific to online consumer contracting.
- Eliminating the minimum monetary threshold to protect consumers in all transactions.
- Improving notice and disclosure with simpler and up-front “key information” that is explicit about consumer risks, consequences, and choices.
- Prohibiting a range of practices in the digital marketplace that have been shown to be contractually deceptive, unfair, or unconscionable.
- Prohibiting a range of specific online contracting and user interface practices that deceive, coerce or nudge consumers into unwanted choices (so called “dark patterns”).
- Establishing a “good faith” duty and criteria for unilateral contract amendment in routine circumstances.

4.1 Dedicated Legal Framework for Online Consumer Contracts

CPA 2023

CPA 2002 identified at least three types of online contracts, including “internet”, “direct” and “remote” contracts.¹⁰⁴ These provisions were added to the CPA in 2002 in response early forms of internet commerce. Legislators at the time 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.”¹⁰⁵

CPA 2002 provided for several important protections for “internet agreements” including:

- 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 in some circumstances.
- The supplier’s 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.¹⁰⁶

CPA 2023 arguably has fewer protections for online consumers than CPA 2002. CPA 2023 includes only one reference to online contracting. Paragraph 2 of s. 16(1) states that Part III of the CPA 2023 (which establishes general rules respecting disclosure, contract amendments, etc.) applies to “a contract entered into online when the consumer and supplier are not present together.” There is no other reference to online contracting in the legislation, nor are there dedicated online contracting regulatory powers created in s. 107, the Act’s regulation-making power section.

It is not immediately clear how CPA 2023, as written, could or will be used to govern online consumer contracting. One possibility is that the Act’s regulation-making powers could be used to establish dedicated rules for online contracting. For example, s.17 (1) of the Act could be used to establish dedicated rules for online disclosure. This section states that

Before a consumer enters into a consumer contract, the supplier shall disclose such information as may be prescribed in respect of the contract and shall do so in accordance with such requirements as may be prescribed.

Similarly, CPA 2023 s. 19(2) could be used to regulate online contract amendments. This section states that

No supplier shall amend or continue to amend or continue a consumer contract except as otherwise prescribed.

There are also general regulatory provisions that could apply. For example, CPA 2023 s. 107(1) 3. gives the Lieutenant Governor in Council the authority to make regulations defining any word or expression that is used in the Act but not defined in the Act. This power could presumably be used to articulate a more robust definition of an “online” contract.

The LCO has two criticisms of the CPA 2023 approach.

First, s. 16(1) establishes authority to govern “a contract entered into online when the consumer and supplier *are not present together.*” [Emphasis added.] In other words, the legislation distinguishes contracts based on *where* they are formed (i.e., in person, on a phone or by mail, or online). In 2024, these distinctions are not always relevant. For instance, a consumer might buy a product in person but confirm the transaction online or through an online third party.

The second criticism is more significant. Online consumer contracts are the most frequent, complex, and significant new form of contracting for Ontario’s consumers since the CPA 2002 was passed more than 20 years ago.

During the development of Bill 142, the LCO argued that dedicated and specific legislative provisions and regulations were needed to ensure consumer protections for online contracts had the same legal footing as other forms of consumer contract. The LCO also argued that a dedicated framework was necessary to address the unique and complex issues of online contracting, including issues relating disclosure, consent, unconscionability, and “dark patterns.” Dedicated provisions would also establish clear authority under the CPA 2023 to update online consumer protections as the digital marketplace evolved technologically.

CPA 2023 did not adopt this recommendation, but rather collapsed statutory distinctions between “remote,” “internet,” “future consideration” and “direct” into a single category of “online” contracts.

CPA 2023 does not define “online” contracts or practices. As a result, it is unclear whether CPA 2002’s protections for internet contracts will continue in whole or in part. For example, CPA 2002 provided 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 supplier’s 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 cancellation, returns, exchanges and refunds.
- Any other restrictions, limitations, and conditions imposed by the supplier unilaterally.¹⁰⁷

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

The LCO is also concerned that the provincial government will replace the CPA 2002’s dedicated sector by sector rules with a generic set of “core rules” applicable to all, or most, consumer transactions. This approach is problematic because online consumer needs and consumer protection issues cannot reasonably be addressed in a single definition of “core rules” that could also apply to timeshare, personal development services, loan brokering, credit repair services or lease agreements.¹⁰⁸ A generic approach may also inadvertently mislead online consumers into a false sense of reliance on incomplete standard terms.

Finally, the LCO notes the legislative gap between the CPA 2023’s treatment of online contracting and other forms of consumer contracting.¹⁰⁹ In 2024, Ontarians still have more detailed and robust consumer protections for car repairs, points cards, timeshares, etc. than for online contracting.



Other Jurisdictions

In contrast to CPA 2023, many jurisdictions have legislated definitions of “online” or “digital” contracts, practices, or services. In many cases, these jurisdictions have defined specific legislative provisions that effectively act as “standard terms” applicable to all digital marketplace ToS. For example, the European Union has adopted several dedicated definitions of “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.”¹¹⁰

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-related contexts 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.¹¹¹
- 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.¹¹²

Similarly, the UK is finalizing the *Online Safety Bill* which introduces new rules for search engines and any platform that hosts user-generated content.¹¹³ These rules effectively set “standard terms” for search engine and platform ToS which consumers can rely on universally.¹¹⁴

Digital Platform Workers’ Rights Act, 2022

Importantly, Ontario has already established an important precedent 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).¹¹⁵ The DPWRA establishes the first stand-alone definition of “digital platform” 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...*¹¹⁶

The legislation makes platforms (and hence their ToS) 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.¹¹⁷

Analysis and Recommendations

The LCO believes CPA 2023 should establish a modern, flexible, and dedicated legal framework to ensure Ontario’s consumers can be protected from new online contracting risks and business practices. To do this, the LCO believes that CPA 2023 should either be amended to include more explicit recognition and protections for online contracting, or the provincial government should use the Act’s existing powers to prescribe detailed regulations governing online consumer contracts.

The LCO believes there are several clear benefits to this approach:

First, our recommendation would clearly establish CPA 2023's authority to establish necessary and dedicated rules to protect Ontario's digital consumers.

Second, our recommendation would ensure consumer protections for online contracting had the same legal footing as other forms of consumer contracts.

Third, this framework would reduce legal uncertainty and establish a clear and level playing field for Ontario's businesses.

Finally, this approach would fulfill the provincial government's commitment to "to ensure that the laws governing the marketplace are in tune with our times"¹¹⁸ and 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.*¹¹⁹

RECOMMENDATIONS

The LCO recommends the provincial government:

- 1. Amend CPA s. 16(1) para 2 to establish legislative authority over "such other online contracts as may be prescribed."**
- 2. Amend CPA s. 107(1) to add authority to make regulations governing online contracts by:**
 - **Prescribing the disclosure of information for online contracts.**
 - **Prescribing the form and content of online contracts.**
 - **Prescribing the making, amending or continuation of online contracts.**
 - **Prescribing exemptions or one or more amounts for the purposes of subsection 16(5) [monetary threshold] and prescribing unfair practices for the purposes of Part 2.**

4.2 Eliminating Monetary Threshold for Online Consumer Contracts

Origin and Rationale of the CPA Monetary Threshold

Under CPA 2002, many consumer protections were subject to contracts meeting a minimum monetary threshold. For example, consumer protections for "internet agreements" only applied when the value of the transaction was \$50 or more.¹²⁰

The CPA 2002's \$50 threshold originated in the 1960s, when the CPA was first introduced. At the time, the \$50 threshold was intended to avoid imposing too many formalities on low value contracts.¹²¹ The \$50 threshold requirement was carried forward to CPA 2002.

There are many reasons to believe that a simple, single monetary threshold is no longer a valid precondition for online consumer protections. Legislators in the 1960s (or 2002, for that matter) could not have foreseen the radical transformation of Ontario's consumer economy due to online contracting. Nor could they have foreseen how consumers in 2024 rely on digital marketplace services and accompanying business models where goods or services are often provided on a free or low-cost basis:

- Many of the largest platforms and most common services used by Ontarians are provided on a low- or no-cost basis. For instance, content sharing on YouTube or Facebook; job hunting on LinkedIn; searching for rental housing on Realtor.ca or Zillow.com; requiring Google productivity software at work or school; ordering goods and customer loyalty programs through apps like Tim Horton's; or navigating using maps from Google or Apple.
- Many Ontarians rely on digital products in which small "microtransactions" fall short of minimum monetary thresholds but have significant cumulative value over time.¹²² For instance, many app stores, games, and productivity apps give away the software then charge small amounts to unlock additional functions and content. The United States recently investigated consumer hostile examples of these practices (see the discussion about online

game Fortnite below at sections 5.3 and 6.4, and Case Study 1 above at section 2.3).

- Many online services rely on non-monetary exchanges of value such as consumer data monetization, reward points, platform tokens or currency, or similar practices typical of the platforms and products described above.

Regulators outside of Ontario have begun to acknowledge the contractual value of free or low-cost digital goods and services. Many regulators have also noted that free or low-cost online contracts can contribute to exploitative, unbalanced, or unconscionable bargains between supplier and consumers.¹²³

CPA 2023

CPA 2023 does not carry over CPA 2002's \$50 minimum threshold. Nor does it specifically address free or low-cost online contracts. As a result, CPA 2023 does not provide dedicated consumer protections in these transactions. Rather, the CPA 2023 addresses consumer protections and monetary thresholds indirectly by establishing the regulatory authority "prescribing one or more amounts" that may limit the applicability of the Act's consumer protections.¹²⁴

It is not yet clear whether, or how, the provincial government will use this authority to limit – or ensure – consumer protections for free or low-cost consumer contracts. Regulations under CPA 2023 have not been developed. However, the LCO is concerned that the provincial government will reinstate the minimum \$50 monetary threshold and thus shelter free and low-cost online contracts from important consumer protections.

Analysis and Recommendations

LCO consultations broadly supported elimination of CPA minimum monetary thresholds for online contracting. Consultees acknowledged the importance of avoiding onerous obligations on low value contracts but were equally worried about wholesale consumer protection exemptions for low- or no-cost online goods and services.

Many jurisdictions have taken positive steps to ensure all digital consumers are protected. For example, British Columbia and the European Union do not have a monetary threshold. Experience in these jurisdictions demonstrates that risks and burdens on businesses are minimal (see sidebar below, **Will Eliminating a Monetary Threshold Invite a Flood of Complaints?**).

In the LCO's view, a modern CPA would eliminate the minimum monetary for online contracts. This would ensure consumers of free, low-cost, or occasional cost online services had important consumer protections respecting notice, disclosure, etc. That said, the LCO acknowledges there may be times or circumstances where a monetary threshold is an appropriate limitation for some forms of online contracting. In our view, the best way to address these circumstances is to develop specific regulations or limitations, rather than simply exempting all free or low-cost online contracts.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 3. Use its authority under s. 107(1) 5. to eliminate monetary thresholds for online contracts, subject to exemptions on a case-by-case basis.**

Will Eliminating a Monetary Threshold Invite a Flood of Complaints?

The experience of jurisdictions with robust and readily accessible consumer dispute resolution mechanisms suggests that consumers are unlikely to flood the system or invite frivolous or vexatious complaints.

The EU is an instructive example. It is a jurisdiction with a large population (approx. 448 million people) and a long-established Online Dispute Resolution (ODR) system created for consumers beginning in 2013.¹²⁵ The system is very effective at educating and informing consumers about their rights: in 2020 it received 3.3 million visits (approx. 275,000 visits a month).¹²⁶ Many of these consumers avail themselves of the “self-test,” functionality which “helps consumers identify a redress solution most appropriate for their specific problem.”¹²⁷ At the end of the process, however, only a small proportion of visitors submitted a finalized complaint (17,461 consumers). Notably, a further 30,319 opted to engage in “direct talks” in which “consumers are given an option to share a draft complaint with a trader before submitting it officially, to try to settle the dispute directly.”¹²⁸ Additionally, few ODR complaints related to the digital marketplace. Most ODR cases related to airlines, vehicles, hotels, and clothing (44%) while complaints categorized as relating to “information and communication technology” were a much smaller fraction (5%).¹²⁹

British Columbia provides another helpful example. BC’s *Business Practices and Consumer Protection Act*¹³⁰ has no minimum monetary threshold determining consumer protection. Consumer complaints can also go to BC’s Civil Resolution Tribunal (CRT), an accessible, online-first approach to resolving disputes.¹³¹ In 2023, the BC CRT accepted 4,733 complaints related to “small claims,” of which only a fraction relate to consumer complaints.¹³² The CRT also reports a significant number resolved expediently: 44% of all “small claims” were resolved by consent or withdrawn; 23% were resolved by default (often indicating the respondent did not reply) and 25% resulted in a final decision involving formal dispute resolution.¹³³ Like the EU, BC’s online dispute resolution acts as an effective triage mechanism, refusing to accept some 3% of complaints that do not meet the threshold for justiciability.¹³⁴

4.3 Improving Notice and Disclosure for Online Consumers

Consumer notice and disclosure is one of the pillars of consumer protection legislation. Notice and disclosure reduce information asymmetries, improve consumer awareness, and facilitate the exercise of consumer choice. There are many notice and disclosure provisions in Ontario’s CPA 2002. The updated CPA 2023 has comparatively fewer, and with less specificity, as it aims to streamline and simplify such provisions.

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 online consumer protection law reform issue.

The CPA 2002’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. In these circumstances, the law reform challenge is how to reconcile the “more disclosures, more notifications” approach inherent in traditional consumer protection approaches with the many small and large transactions consumers routinely conduct in the digital marketplace.

CPA 2002 and CPA 2023

Both CPA 2002 and CPA 2023 reflect the traditional “more disclosures, more notifications” model. For example, both Acts give consumers 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 2002 also included detailed mandatory disclosures for “internet agreements.”¹³⁵ 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.¹³⁶ These provisions are supplemented by a general requirement in both Acts that:

*If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent.*¹³⁷

Notice and Disclosure in the Digital Marketplace

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.”¹³⁸ 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.”¹³⁹ As a result, any updated CPA 2023 requirements that simply *add* additional notice and disclosure provisions could 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 not understand 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.¹⁴⁰

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...¹⁴¹

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.¹⁴²

Concerns about notice and disclosure in the digital marketplace were summarized effectively in a recent OECD study:

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 maximizing their effectiveness in informing consumer decisions.¹⁴³

*...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.*¹⁴⁴

Notice and disclosure requirements are typically framed as an important protection for consumers, but there are important implications for businesses as well. During our consultations, the LCO heard business representatives state that:

- Consumers *and* businesses can be overwhelmed by voluminous or unexplained notice and disclosure requirements.
- Some businesses may not understand the consequences of many digital terms of service they sign on to, and in turn, subject their customers to.
- 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.¹⁴⁵

Simply adding disclosure requirements may also 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.¹⁴⁶

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 an 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. There are many different terms regularly deployed in consumer contracts that may carry these kinds of risks and consequences, but which are not obvious or transparent to consumers.¹⁴⁷

Limits of Disclosure for Online Terms of Service

Studies in the digital marketplace have found that:

- The degree of disclosure has almost no impact on the rate at which consumers read license agreements.¹⁴⁸
- Consumers who do read ToS are equally likely to purchase a product regardless of the one-sidedness of the contract.¹⁴⁹
- 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.”¹⁵⁰
- The “limiting factor in becoming informed thus seems not to be the cost of accessing license terms but reading and comprehending them.”¹⁵¹
- 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.”¹⁵²

Other Jurisdictions

There have been many attempts to update notice and disclosure provisions to improve consumer protection. For instance, recent 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).¹⁵³

In the EU, “key information” disclosures are widely mandated. For instance, EU ToS notices for platforms and apps replace vague disclosure language (“sharing information with partners to improve your experience”) with explicit details (a list of partners, foreseeable impacts are likely for the consumer) that allow consumers to make more informed decisions about whether to accept an online consumer contract. See below **Case Study 2: Consumer Notice to Services in the EU** for an example of this in action.

The “key information” approach is also reflected in recent California consumer privacy legislation. The *California Privacy Rights Act* (2018, and as amended in 2020) establishes privacy rights for California consumers in the digital marketplace. The Act requires disclosure of details of what personal information is collected, how it is used and shared, and information about the consumer’s practical choices and potential actions.¹⁵⁴

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.”¹⁵⁵ 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.¹⁵⁶ 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 valuable to data brokers and more valuable advertising targets, resulting in “ads that enriched Twitter by the multi-millions.”¹⁵⁷

Examples of Key Information and Market Contexts

In 2021 the EU adopted an Unfair Commercial Practices Directive (UCPD).¹⁵⁸ 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 personalization 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.¹⁵⁹

Regulators and Courts

Many foreign regulators and courts have increased the pace of investigations into notice and disclosure practices in the digital marketplace. For example,

- 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.¹⁶⁰ 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...”¹⁶¹
- 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.¹⁶²
- 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%).¹⁶³

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)¹⁶⁴ addressed the relationship between ToS, consent, and notice provided during the user registration process. 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.¹⁶⁵ 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.¹⁶⁶

Key Information and the CPA 2023

The 2023 Government of Ontario CPA Consultation Paper included three important proposals to update CPA 2002 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.”¹⁶⁷
- 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.¹⁶⁸
- Requiring disclosure of “key information in the contract.”¹⁶⁹

The third proposal was potentially the most far-reaching. A requirement to disclose “key information” in an online contract could materially advance consumer protection in this area if it was used to prominently identify the legal and practical risks and choices facing consumers faced when considering an online contract.

The definition of “key information” was not provided in the 2023 Consultation Paper, nor is the concept of “key information” included in CPA 2023 or its accompanying regulatory powers. The government’s 2023 Consultation Paper did, however, commit the government to “consult during regulatory development on the appropriate information to be required for disclosure purposes and whether some contract categories would require additional rules.”¹⁷⁰

Analysis and Recommendations

The LCO supports the requirement that consumers receive mandatory notice and disclosure of “key information” prior to consenting to an online contract and important amendments to that contract.

Adopting key information requirements in the CPA 2023 would be an important step towards protecting Ontarians from the risks of online contracting. Adopting key information requirements would also restore the long-standing balance between consumer protection and expediency that is at the heart of many standard form contracts.

Key information requirements would benefit Ontario’s consumers and businesses:

- Consumers would benefit because they would become more aware of contractual terms and consequences that are important to them.
- Businesses would benefit because their consumer protection disclosure obligations would be certain, transparent, consistent and easier to understand.

In the long run, key information requirements could be used to create standard contractual terms or disclosure notices for online consumer transactions equivalent to mandated “prominent information boxes” to protect consumers in Canada’s banking industry,¹⁷¹ the “Schumer Box” that summarizes credit card terms in the United States,¹⁷² or similar “trustmarking” regimes.¹⁷³

Key information requirements could also be used creatively to develop specific disclosures or practices to protect vulnerable consumers, including the elderly, children and youth, and persons who do not read or speak English. Key information is particularly supportive of parents, relatives, or friends to better assist vulnerable consumers.

Finally, adopting key information requirements into CPA 2023 would build on an existing provincial precedent. 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.¹⁷⁴ The law also establishes important disclosure requirements addressing how work is assigned and platform’s use of performance rating systems.¹⁷⁵ 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.

In light of this analysis, the LCO believes that CPA 2023 should either be amended to include key information requirements, or the provincial government should use the Act’s existing powers to proscribe detailed regulations specifying the form and content of key information disclosure.

As a general matter, the LCO believes “key information” for digital consumer transactions should include information regarding consent, deception, unconscionability, notice and disclosure, risks to consumers, and market contexts. These topics are generally consistent with key information requirements that have been established in other jurisdictions.

The LCO acknowledges that recommending key information requirements be adopted into the CPA 2023 is easy; defining the content of those requirements will be difficult and dependent upon extensive stakeholder consultations. Accordingly, the provincial government should use its upcoming CPA 2023 regulatory consultations or separate process for this purpose.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 4. Amend CPA 2023 s. 17(1) to state that “the supplier shall disclose such key information as may be prescribed...”**
- 5. Use its authority under CPA 2023 s. 107(1) 3. and 4. to define and prescribe the form and content of key information that must be disclosed in an online contract once those consultations have been completed.**
- 6. Consult with a broad range of stakeholders on the form and content of key information disclosures for online contracts in Ontario.**

CASE STUDY 2:

Consumer Notice to Services in the EU.

Consumer protection practices in Ontario demonstrate a widening gap with other jurisdictions that are empowering consumers through key information.

For instance, the ToS for a widely used sports news and sports fantasy app in Canada only uses a single “I agree” blanket notification to use the app. Consumers are not specifically or prominently notified of practices like “affiliate advertising programs,” a term disclosed in a single sentence in a ToS agreement that is approximately 11,000 words long.

In contrast, the EU version of the app brings key information to the attention of the consumers. The EU version of the app specifically lists what “affiliate advertising” really means: the app discloses each of the 201 data brokering and advertising companies the app sends user information to (of which 135 are identified as EU TCF-registered companies and 65 are advertisers). As a result, the app user can decide if they wish to allow all, some, or none of these uses of their information. Canadian users would have to read through 11,000 words to find about the option to opt-out, as well as the onerous written procedures and links for doing so. Also of note: because the EU approach makes key information like this a standard term with an easy and immediate opt-out option, users may reject it all and continue using the app. This eliminates “consent by coercion” approach Ontario consumers experience.¹⁷⁶

4.4 Prohibiting Deceptive, Unfair or Unconscionable Online Practices

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. Deception undermines the premise that the contract term was agreed to and thus triggers the interests of all contracting parties. The American Law Institute (ALI) *Restatement on Consumer Contract Law (2022)* (“ALI Restatement”) 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.”¹⁷⁷ The emphasis is on the consumer’s false perception, not on the business’s intent to deceive.¹⁷⁸

Unconscionability addresses contractual terms that are excessively one-sided and unfair, or which diverge from a consumer’s reasonable expectations.¹⁷⁹ Unconscionability includes procedural unconscionability (such as unfair surprises or lack of consumer awareness of “market context”) and manipulative techniques that prioritize or minimize certain information.¹⁸⁰

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.”¹⁸¹

CPA 2002 and CPA 2023

Both CPA 2002 and CPA 2023 state that it is “an unfair practice for a person to make a false, misleading or deceptive representation.”¹⁸² Both statutes also state that “it is an unfair practice to make an unconscionable representation or to engage in an unconscionable act.”¹⁸³ Finally, both statutes regulate practices related to deception, unfairness, and unconscionability by enumerating detailed lists of deceptive and unconscionable terms.¹⁸⁴

CPA 2023 s. 8(2) includes 21 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.
- Representations about the necessity of a product or service (such as a repair).¹⁸⁵

CPA 2023 s. 9(2) similarly includes nine examples “unconscionable acts”, 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.
- Undue pressure to enter into the transaction, such as withholding goods.¹⁸⁶

Legally, the enumerated lists in the CPA function as a set of standard terms or consumer protections in all applicable ToS consumer contracts in Ontario.

Importantly, both statutes state 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.”¹⁸⁷

Finally, both statutes include several additional protections against consumer deception. For example, CPA 2023 s. 10(1) specifies that “No person shall engage in an unfair practice”¹⁸⁸ while section 49(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.*¹⁸⁹

Analysis and Recommendations

The CPA 2002’s and CPA 2023’s prohibition against false, misleading, deceptive, or unconscionable practices and list of enumerated examples reflects a long-standing legislative model in consumer protection legislation. This model provides a strong foundation for standard form contracts because it promotes contractual certainty/clarity for consumers, contractual expediency for suppliers, and legislative support for honest businesses.

This model is particularly well-suited to governing ToS contracts in the digital marketplace. Online consumer contracts are widely criticized for their length, opacity, and complexity. Both consumers and businesses could benefit from standardization of contractual terms and clearer articulation of prohibited digital marketplace practices.

Unfortunately, neither CPA 2002 nor the updated CPA 2023 include specific examples of false, misleading, or deceptive representations or unconscionable acts in the digital marketplace. Rather, the changes to the lists of deceptive representations or unconscionable act in CPA 2023 are either minor variations or verbatim reintroduction of the enumerated lists in CPA 2002.¹⁹⁰ Only one new rule is included in CPA 2023 that addresses some aspect of the digital marketplace: CPA 2023 s. 14(1)(f) details an “other rule” that prohibits terms that infringe on consumers’ right to post online reviews.¹⁹¹

The omission of a wider range of deceptive and unconscionable acts is surprising, given that the 2023 Ontario CPA Consultation Paper acknowledged the need to update the CPA 2002’s deception and unconscionability provisions, and proposed 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. [Emphasis added.]*¹⁹²

Other Jurisdictions

The approach taken in Ontario contrasts with consumer protection modernization initiatives elsewhere. For example, the EU's 2021 *Unfair Commercial Practices Directive* (UCPD), 2022 *Digital Services Act* (DSA), and *Digital Marketplaces Act* (DMA) specifically identify forms of deception and unconscionability in the digital marketplace.¹⁹³ The UCPD lists many examples of such practices and includes:

- 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.
- Users' rights to post reviews.
- Data-driven and algorithmic shaping 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.¹⁹⁴

In this manner, the UCPD effectively modernizes ToS in consumer contracts to better protect online consumers, provide certainty to suppliers, and support the use of standard form contracts in the digital marketplace.

This approach echoes recent court decisions in Canada. Two cases before the Supreme Court of Canada (SCC), for instance, respectively determined that terms mandating forced arbitration of disputes to the Netherlands were found unconscionable, and that terms selecting California as the applicable law governing the ToS were unconscionable given the coercion and limited choice consumers have in using online services (even those that are free).¹⁹⁵

In the first case, *Uber v Heller* (between the Uber app and drivers) the SCC referred to the agreement "as a classic case of unconscionability" based on two main factors:

- The 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.¹⁹⁶
- The presence of deception. The court found that the high arbitration costs specified in the ToS could not have been reasonably expected by Uber drivers and that those costs effectively nullified driver's right to dispute resolution.¹⁹⁷

In the second case, *Douez v. Facebook*, the SCC 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 enforcement¹⁹⁸ 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.
- The relative convenience of proceedings in British Columbia.¹⁹⁹

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.²⁰⁰

An expanded discussion of these cases is in LCO's *Consultation Paper* at sections 10.2 and 10.3.

During our consultations, LCO stakeholders widely supported adding examples of online practices that are unfair and unconscionable to CPA 2023. These examples would both help consumers and protect/promote honest businesses.

To achieve this goal, the LCO believes that CPA 2023 should either be amended to include key information requirements, or the provincial government should use the Act's existing powers to proscribe detailed regulations specifying the form and content of key information disclosure.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 7. Amend CPA 2023 sections 8(2) and 9(2) to specifically enumerate a range of false, misleading, or deceptive representations and unconscionable acts that take place in the digital marketplace.**
- 8. Use its existing authority under CPA 2023 s. 107(1) 1. and 3. to identify and enumerate false, misleading, or deceptive representations and unconscionable acts that should be prohibited under ss. 8(2) and 9(2).**
- 9. Consult with a broad range of stakeholders to comprehensively identify such representations or acts.**

4.5 Prohibiting “Dark Pattern” Design

What Are “Dark Patterns”?

Digital consumer “dark patterns” have been widely researched and criticized as deceptive, unfair, and undermining consumer confidence in online transactions. These practices 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.”²⁰¹

The OECD has identified over two dozen “dark pattern” techniques used in the digital marketplace. Widely experienced examples include prominent “accept” buttons and obscured “reject” buttons; colored toggles that do not clearly denote acceptance or rejection; or obscuring “cancel” buttons several menus deep.²⁰² (See sidebar below: **Examples of Dark Pattern Practices in the Digital Marketplace**).

Impact on Consumer Protection

Dark pattern practices can subvert consumer protection. 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.”²⁰³ Studies have also found 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.”
- 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.²⁰⁴

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)

Other Jurisdictions

In many jurisdictions, dark patterns are increasingly subject to consumer protection regulation, most extensively in the EU, UK, and United States.

For instance, in the EU and UK:

- EU *Digital Services Act* (DSA) places new obligations on online platforms and intermediaries and define dark patterns as follows: “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 of the DSA 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.”²⁰⁵
- The companion EU *Digital Markets Act* (DMA) 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).²⁰⁶
- A 2022 European Commission study advises that the principle-based prohibitions in the EU *Unfair Commercial Practices Directive* (UCPD) on dark pattern practices that are deemed unfair are interpreted as misleading actions or omissions (Articles 6 and 7) or as aggressive practices (Articles 8 and 9).²⁰⁷
- 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.” 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).²⁰⁸

In the United States:

- Section 5 of the *Federal Trade Commission Act* has been interpreted by the FTC to challenge dark pattern practices. 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.”²⁰⁹
- 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.”²¹⁰
- Other US federal law expressly prohibits dark pattern practices, 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; or making it hard to opt-out of marketers’ emails.²¹¹
- The *California Privacy Rights Act* (CPRA 2020) 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.”²¹²
- 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.”²¹³

Leading American consumer protection and competition law academics in the United States further note how US courts are adapting classic consumer protection principles to commercial and contracting practices typical in today’s digital marketplace. Matt Stoller, Director of Research for the American Economic Liberties Project, writes how the FTC has pursued a series of successful cases, investigations, and consent settlements which firmly connect “deceptive and unfair” consumer contracting law to a wide range of practices in the digital marketplace – such as data gathering and sharing activities – and how courts increasingly see such practices as unfair and unconscionable.²¹⁴ Finally, US regulators other than the FTC are taking complimentary enforcement action in their respective consumer spheres, including the Consumer Financial Protection Bureau, Health and Human Services Department, and the FTC’s own Antitrust Division.²¹⁵

Analysis and Recommendations

Notwithstanding the stated intentions of Ontario’s efforts to modernize the CPA, CPA 2023 is silent on dark pattern practices.

CPA 2023 ss. 8, 9, and 10 contain general consumer protections against misleading or deceptive conduct, unconscionable conduct, and unfair contract terms. CPA 2023 s. 17 also requires mandatory disclosure of certain information. These provisions could potentially be employed against dark patterns in the digital marketplace.

However, it is unlikely that a principles-based approach will provide effective protection for consumers against dark pattern practices because they are intentionally hidden or deceptive to consumers. Nor can consumers be expected to raise individual or systemic concerns with practices which are, by definition, obscured and unknown.

LCO consultations suggested general agreement between consumers and businesses on the need to identify dark pattern practices in legislation or to establish a standard set of terms of consumer ToS contracts. The LCO was told repeatedly that the absence of dark pattern regulation or prohibitions encourage less scrupulous businesses to engage in such practices, undermining honest businesses and promoting a “race to the bottom” in which consumers ultimately pay the price.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 10. Amend CPA 2023 s. 9(2) to specifically identify a range of unfair and unconscionable practices related to deceptive contracting, software, and user interface design practices that attempt to or actually steer, deceive, coerce, or manipulate consumers into making choices.**
- 11. Amend CPA s. 107(1) to add authority to make regulations prescribing and governing different types of deceptive contracting, software, and user interface design practices in online notice and contracts.**
- 12. Consult with a broad range of stakeholders to comprehensively identify such practices.**



CASE STUDY 3:

Design and Consumer Consent: Dark Patterns under the EU Microscope

A recent investigation into dark pattern practices in the EU demonstrates how software and interface design practices can undermine or improve consumer consent in the digital marketplace.

The European Commission has opened non-compliance investigations under the *Digital Markets Act* (DMA) into Alphabet's rules on steering in Google Play and self-preferencing on Google Search, Apple's rules on steering in the App Store and the choice screen for Safari and Meta's "pay or consent model."²¹⁶ For example, the Commission is concerned that Apple fails to "prompt users with choice screens which must effectively and easily allow them to select an alternative default service, such as a browser or search engine on their iPhones."²¹⁷ The investigation was launched after a group of software engineers with Open Web Advocacy:

*accused Apple of "maliciously" intending "to undermine user choice" with "an astonishingly brazen dark pattern" where "Apple engineers added code to the Safari's settings page to hide the option to change the default browser if Safari was the default but then to prominently show it if another browser was the default."*²¹⁸

Data from the EU also demonstrates how prohibitions on dark patterns can quickly change consumer behaviour. Since the DMA came into force in March 2024, a study commenced by Reuters based on:

*data [collected] from six companies, confirm[s] that, when presented with a choice screen, many EU users will swap out default browsers like Chrome or Safari for more privacy-focused options... In the month since the DMA took effect on March 7, the Cyprus-based Aloha Browser told Reuters that its total users in the EU spiked by 250 percent in March. In Belgium, Aloha users increased three-fold, Aloha said in a press release.*²¹⁹

4.6 Establishing "Good Faith" Unilateral Contract Amendments

CPA 2002 and CPA 2023

Under CPA 2002, regulations allowed "internet agreements" to be unilaterally changed under prescribed conditions and where there is affirmative notice and consent provided.²²⁰

These regulations are not present under CPA 2023.

CPA 2023 instead incorporates simpler, blanket language prohibiting any supplier from "amending or... purporting to amend... a consumer contract except as otherwise provided for in the regulations."²²¹

CPA 2023 goes on to establish regulatory authority to prescribe measures "governing the making, amending or continuation of such contracts."²²² The Act further states that amendments to contract that do not comply with the Act are deemed to be "void if it is not made in accordance with the regulations."²²³

The 2023 government consultation paper suggests what regulations might look like. The paper proposed two exceptions that would waive the need for consent to many unilateral changes, including:

- 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.²²⁴

These proposals recognized 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.

Analysis and Recommendations

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 amend 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 believes there is a better way to balance the needs of businesses and consumers in these situations.

First, the LCO recommends the approach endorsed by the American Law Institute (ALI) in the *5th Restatement on Consumer Contracts, 2022*.

The ALI identifies two alternate processes for making unilateral changes to contracts.

The first process requires a series of procedural and substantive safeguards, including:

- Reasonable notice to the consumer of the unilateral changes and a reasonable opportunity to review it, along with
- A reasonable chance for the consumer to reject the proposed term and continue the contract under the existing term, or to terminate the transaction without unreasonable cost, loss of value, or personal burden, and
- A requirement for affirmative consent to the modified services / product, or continuing to take the benefit of the contractual relationship.²²⁵

The second process allows for minor amendments to be made in "good faith." The ALI writes that:

*The duty of good faith is intended to capture and weed out various forms of opportunistic behavior — including unfair and inequitable advantage-taking, hold-up, manipulation, and dishonesty — that undermine the reasonable expectations of the parties, reduce the value of contracting, and require costly precautions. Good-faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the reasonable expectations of the other party.*²²⁶

Many modifications may be justified by changes in the economic or legal environment, by revisions in the service itself, or by the realization of other unexpected contingencies. There is a concern, however, that businesses will initiate self-serving, opportunistic modifications in standard contract terms once consumers are already locked into the service.

*A modification by the business of a standard contract term in a consumer contract is adopted only if the modification is proposed in good faith, if it is fair and equitable, and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer... [and with the] three necessary safeguards, procedural and substantive.*²²⁷

A “good faith minor amendment” provision in the CPA would balance consumer interests with routine business practices within reasonable standards of fair dealing. Notably, a “good faith minor amendment” model would cover many ToS amendments, including amendments to website addresses, contact information, and other administrative activities that are of little consequence to the consumer. In so doing, this model would both improve consumer protection (by eliminating a frequent source of “consent spam” notices) and allow suppliers to make minor amendments with fewer compliance obligations for notice and distribution.

Accordingly, the LCO recommends s. 19 of CPA 2023 be amended to establish a “duty of good faith” in relation to unilateral contract changes.

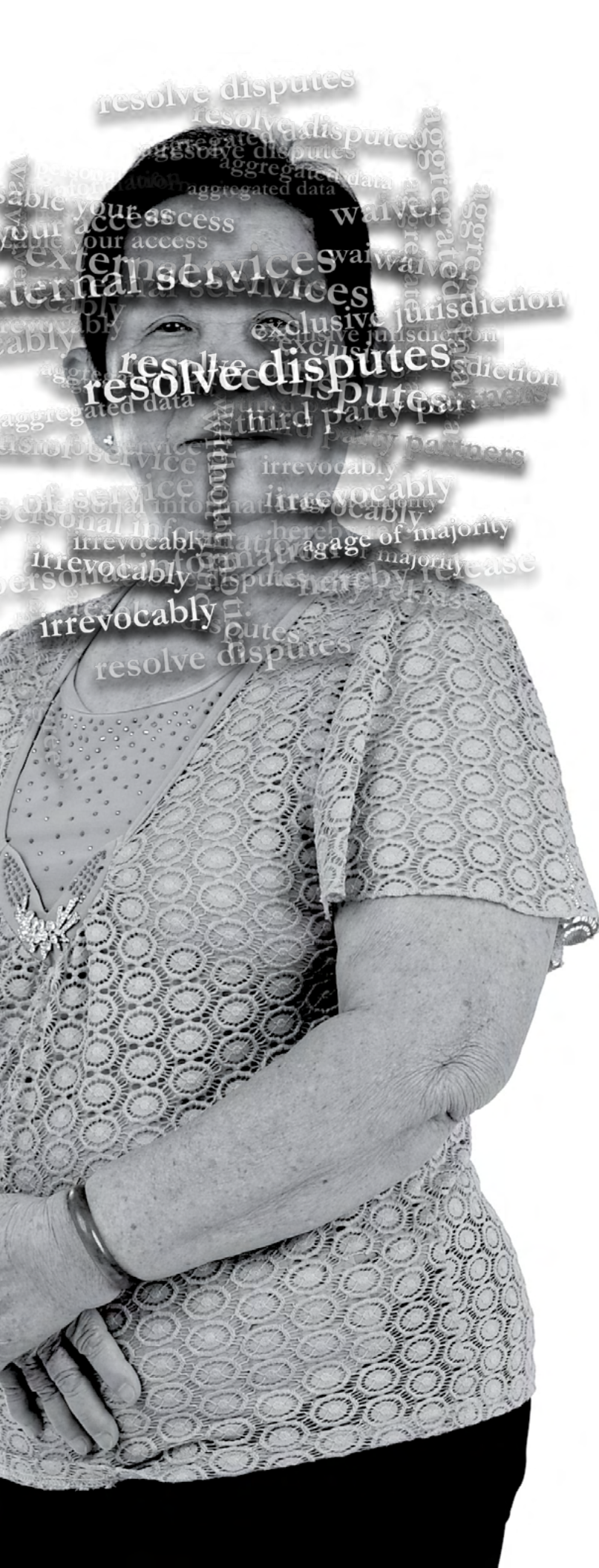
Second, CPA 2023’s existing regulatory authority should be used to provide greater specificity as to the factors or circumstances allowing unilateral amendments. For instance, regulations could clarify criteria under which a “good faith” amendment could be made. This would align with the intent expressed in the government’s 2023 consultation paper to allow unilateral amendment “[w]here the changes do not reduce the obligations of the supplier or increase the obligations of the consumer.” This regulation is consistent with the LCO’s previous recommendations.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 13. Amend CPA 2023 s. 19 to allow a supplier to amend or purport to amend a consumer contract if the modification is proposed in good faith and does not have the effect of undermining any term, affirmation, promise or performance requirement made by the supplier in the original consumer contract and is made in accordance with the regulations.**
- 14. Use its regulatory authority under CPA 2023 s. 107(1) para. 6 to clarify and define circumstances under which unilateral amendments are permissible, including:**
 - Prescribing disclosure of appropriate information.
 - Prescribing the form and content of such disclosure.
 - Prescribing the disclosure, form and content of key information related to the amendment or continuation.
 - Prescribing any requirement for affirmative consent to the modified services or product.
 - Prescribing the ability of consumers to exit the contract.
 - Prescribing reasonable standards of fair dealing for amendments made in good faith.
- 15. Consult with a broad range of stakeholders to comprehensively identify such practices.**





5. Protecting 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.²²⁸ 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.*²²⁹

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.*²³⁰

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.²³¹

CPA 2023

CPA 2023 addresses vulnerable consumers in two sections.

Section 4(1) states that where a supplier is required to disclose information, the disclosure must be “clear, comprehensible and prominent.”²³²

Section 9(2) para. 1 states it is 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.”²³³

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

- Neither the Act, regulations, policy guidance, nor case law identify what formats, languages, or features would fulfill CPA 2023’s s. 4’s “comprehensibility” requirement.
- There is no case law or legal/policy guidance interpreting CPA s.9(2).
- A consumer’s youth or age is not listed as a vulnerable factor in s. 9(2).

LCO consultations focused on the vulnerability of youth, older persons, and people with disabilities. However, the recommendations that follow will be of benefit to all consumers in Ontario.

An expanded discussion of the issues highlighted below is found in the LCO *Consultation Paper* at section 9, “Better Consumer Protections for Youth and Vulnerable Consumers.”



5.1 Plain Language Consumer Contracts

As outlined earlier, ToS contracts are notoriously dense and complex documents known to discourage consumers from reading or understanding them (see above sections 2.1, “The Risks of Online Consumer Contracting” and 4.3, “Improving Notice and Disclosure for Online Consumers”). ToS contracts also make it difficult for consumers to understand what risks and consequences they may face, and the practical choices available to them (see above section 4.3, “Improving Notice and Disclosure for Online Consumers”).

Plain language (also called plain writing or plain English) is communication which an “audience can understand the first time they read or hear it.”²³⁴ Material is in plain language if an audience can:

- Find what they need.
- Understand what they find the first time they read or hear it.
- Use what they find to meet their needs.²³⁵

Plain language adopts several techniques to achieve its goal, including:

- Reader-centered organization.
- “You” and other pronouns.
- Active voice, not passive.
- Short sentences and paragraphs.
- Common, everyday words.
- Easy-to-follow design features such as lists, headers, and tables).²³⁶

Plain language is increasingly understood as crucial to public accessibility, participation, and engagement. It is also a practical and achievable goal. For instance, the US federal government legislated the *Plain Writing Act of 2010* with clear definitions and universal plain language guidelines.²³⁷ In Canada, a federal tribunal has been recognized for successfully adopting a plain language standard and producing written decisions that are clear and accessible.²³⁸

The LCO heard about the acute need to better protect consumers and ensure that notices, disclosures, and contracts are accessible to all. Accessibility should be a “core protection” in online contracts, consistent with the *Ontario Human Rights Code* and *Accessibility for Ontarians with Disabilities Act*. This is an important distinction. Whereas “accommodation” is typically made individually and on request, “accessibility” confirms the duty to create an inclusive environment for all.

This extends to how notices and contracts are communicated to consumers.

Amending CPA 2023 to require a plain language standard would apply universal accessibility design principles to the ToS notices and contracts communicated to consumers. This would go beyond the current standard in CPA 2023 to be “clear and comprehensible.” A plain language standard would instead help consumers find what they need; understand what they find the first time they read it; and use what they find to make informed choices and take other actions.

For instance, a plain language notice or contract would concisely communicate risks and consequences to the consumer. The benefits are to both the consumer and the business. Plainly communicated terms reduces the likelihood of consumer complaints or litigation when objectionable terms are later discovered.

A plain language requirement would also help achieve other recommendations the LCO heard are essential to improving consumer protection, including the disclosure of “key information” to consumers in an effective way (see above section 4.3, “Improving Notice and Disclosure for Online Consumers”).

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”).

RECOMMENDATIONS

The LCO recommends the provincial government:

- 16. Amend CPA s. 4(1) to clarify that where a supplier is required to disclose information it must be clear, comprehensible, prominent, and accessible.**
- 17. Use existing regulatory power under CPA s. 107(1) to prescribe and govern matters relating to s. 4(1) including related to accessibility, or otherwise amend CPA s. 107(1) to establish this regulatory power.**

5.2 Failure to Accommodate as an Unconscionable Practice

As noted elsewhere, CPA 2023 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.”²³⁹

The CPA 2023 includes several additional protections against such unconscionable acts. For example, section 10(1) specifies that “No person shall engage in an unfair practice”²⁴⁰ while section 49(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.*²⁴¹

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 10.²⁴²

Ontario’s *Human Rights Code* makes it clear that the provision of “goods and services” must ensure every person has a right to equal treatment “without discrimination because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.”²⁴³

Furthermore, requirements under the *Convention on the Rights of Persons with Disabilities* provide that “States Parties, including Canada, must take steps to make sure that people with disabilities are provided with accommodation.”²⁴⁴

How accommodation must be provided is explained by the Ontario Human Rights Commission:

The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided).

[...]

*In Ontario, it is clear that a failure in the procedural duty to accommodate can lead to a finding of a breach of the Code even if there was no substantive accommodation that could have been provided short of undue hardship. Failure to perform either component of the duty is a failure to carry out the duty to accommodate.*²⁴⁵

CPA 2023 presently deems it an unconscionable contracting practice to disadvantage a consumer due to their disability, illiteracy, and other characteristics – many of which can be accommodated. However, the CPA is silent on the need to accommodate, and how to accommodate. For instance, it is unclear what an “undue hardship” might be in context of a consumer contract in the digital marketplace.

The LCO heard that the failure to provide accommodation under the CPA creates further barriers to vulnerable consumers. For instance, there are almost no cases reported by Ontario’s Human Rights Tribunal in which accommodation under the CPA has been reviewed despite the CPA being in its more modern form for nearly 23 years.²⁴⁶ Similarly, it is unknown how many (if any) consumer complaints the Ministry of Public and Business Service Delivery may have mediated or resolved related to accommodation in contracting practices.

The LCO believes that legislative clarity improves awareness of rights, increases access to justice, and sets a clear standard for compliance. Accordingly,

the CPA 2023 should be clearer that the failure to accommodate a consumer in contracting is an unconscionable practice. This would set a standard definition of disability and other grounds for accommodation within the CPA consistent with Ontario’s Human Rights Code; facilitate faster and informal resolution of consumer accommodation requests; encourage proactive compliance; and clarify the mandate and analytical framework for the Ministry of Public and Business Service Delivery to investigate and resolve consumer complaints related to accommodation. This may also relieve consumers (and businesses) of more complex litigation procedures before the Human Rights Tribunal or Superior Court.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 18. Amend CPA 2023 s. 9(2) para 1 by adding the failure to accommodate consumers as an unconscionable act.**
- 19. Amend CPA s. 107(1) to prescribe and govern matters relating to s. 9(2) including prescribing the form and content of accommodation which should be provided.**
- 20. Consult with a broad range of stakeholders to comprehensively identify such practices.**

5.3 Age-Appropriate Design Code

Children and minors are among the heaviest users of digital marketplace products and services.²⁴⁷ At present, it appears many ToS agreements do not effectively address the vulnerabilities of youth.²⁴⁸ Some commentators believe certain businesses actually go further, and may violate commitments made in their own ToS, or intentionally target children by making their products more addictive.²⁴⁹

These are live concerns for consumers in Ontario. Earlier this year, lawyers representing the four largest school boards in Ontario commenced lawsuits against TikTok, Snapchat, and Instagram, alleging these social media companies have imposed on teachers disruptive and unsafe changes in student behaviour through the

design of their addictive and mental-health-damaging products. These potential harms are not disclosed through the notice process during signup. Efforts in Ontario echo those of a coalition of 32 state attorneys general in the US filed a federal lawsuit against Meta, arguing the social media company is contributing to a youth mental health crisis.²⁵⁰

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.²⁵¹ 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.”²⁵² These provisions are problematic because many ToS contracts are 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 may be compelled for institutional, economic, or social reasons to use certain platforms.²⁵³

Children and parents are also often caught unaware by consequential terms that may not be obvious or disclosed in the first instance. For example, children's games and software may use in-game currencies, reward points, loot boxes, and other incremental mechanisms to entice small but cumulative discretionary purchases.²⁵⁴

Other Jurisdictions

Many regulators and courts in other jurisdictions 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.²⁵⁵ The amount includes \$US245M to refund consumers.²⁵⁶ An array of similar practices by Epic is now subject to a class action in Canada, which was certified to proceed in late 2022.²⁵⁷
- In 2022, regulators in Ireland issued a fine of approximately \$US400M 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.²⁵⁸
- 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.²⁵⁹
- The United Kingdom recently introduced the *Online Safety Bill*.²⁶⁰ 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.²⁶¹ The law regulates online services that provide products, services, or features for children. It also 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.²⁶²
- The United States *Children's Online Privacy Protection Act* (COPPA) 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 13.²⁶³

Analysis and Recommendations

The LCO heard that online child consumers in Ontario are protected through either the vicarious consent of their parents or if their parents resind a contract where notice was not accepted. The LCO also heard that neither option effectively protects children's interests.

In these circumstances, it may be tempting to require explicit parental consent for many or all online activities for children or youth. This may not be an appropriate response. The Electronic Frontier Foundation, for example, is concerned that strict 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.²⁶⁴

The LCO was advised that a better approach is to embed privacy and consumer protection principles into the design of digital services sold to children. The California Age-Appropriate Design Code suggests how this might be achieved. The table below sets out the Code's prohibited activities and recommendations for how companies design their products.²⁶⁵

The California Age-Appropriate Design Code (and similar initiatives elsewhere) is a proactive, thoughtful framework governing consumer rights, privacy, and data governance in the digital marketplace. Perhaps most significantly, these initiatives replace (or update) traditional conceptions of consumer consent in order to respond effectively to contemporary needs.

The benefits of an age-appropriate design code are obvious for parents, children, and youth consumers. Less obviously, there are important benefits for online businesses as well. An age-appropriate design code would clarify business' legal obligations; promote fair, transparent, and consistent rules between competitors; and reduce litigation and reputational risks.

Developing a made-in-Ontario (or Canada) age-appropriate design code is a complex undertaking that must engage a broad range of stakeholders.

Companies Must Stop:	Companies Must:
Selling kids personal information.	Set all default settings to the most private.
Profiling kids unless profiling can be shown to be in their best interests.	Design age-appropriate experiences for kids' based on set age ranges.
Collecting personal information about kids that they don't need to deliver the service.	Make it easy for kids to report privacy concerns.
Designing features that are detrimental to kids' well-being.	Determine whether kids are reasonably likely to access their online product, service, or feature.
Tracking kids' location unless doing so is essential for the service.	Let kids know when they are being monitored or tracked.
Using kids' data in ways for which they have not obtained explicit permission.	Provide privacy notices in clear language that young users can understand.
Using manipulative design to get kids to sign away their information.	Conduct a risk assessment of how they use kids' data.

Study of a consumer-focused provincial privacy act could also greatly assist in clarifying the relationship between consumer rights and privacy rights and better balance consumer rights and business interests alike.

RECOMMENDATIONS

The LCO recommends the provincial government:

- 21. Consult with appropriate stakeholders to establish an Age-Appropriate Design Code for online services in Ontario that target youth.**
- 22. Study the creation of a Consumer Privacy Act for Ontario that would clarify how commercial collection, use, analysis, and disclosure of information is best protected on behalf of vulnerable youth.**

5.4 Protecting Older Online Consumers

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.”²⁶⁶

ACE states the bulk of consumer-related complaints relate to unfair contracting practices that exploit the vulnerability of elderly consumers. ACE highlights that 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,”²⁶⁷ and typically only after discovery by a family member, social worker, or other support person.

ACE highlights three recommendations to better protect older Ontarians 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 contracts with price escalation clauses, the terms of which are “often buried in the contract in miniscule font.”²⁶⁸ Consequently it is “often difficult to figure out the final lifetime cost to the consumer.”²⁶⁹ 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. Expanding this list has practical consequences: the prohibited practices are grounds that establish an easy, penalty-free right to rescind unfair contracts, and without any need for the consumer to engage in belaboured complaints, investigation, or judicial procedures. Given the vulnerability of elder consumers, and the difficulty in accessing justice, an expanded list of false, misleading, or unconscionable representations represents a proactive approach to effectively expanding consumer protections in the digital marketplace.

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.”²⁷⁰ More specifically, ACE recommends:

- Greater Ministry of Public and Business Service Delivery investigation, enforcement, and charges for violations of the CPA.
- Expanding opportunities to challenge unfair practices, including making the limitation period on raising unfair practices subject to the principle of discoverability (i.e., when the consumer becomes aware of the unfair practice).

LCO consultations confirmed that these concerns were broadly shared by many vulnerable communities.

The CPA 2023 is silent the issues raised by ACE and other advocates, subject to one important advancement: CPA 2023 s. 49(3) establishes a “discoverability” principle such that consumers have the right to bring a complaint for unconscionable acts a year from the time when the unconscionable term or act was discovered, as opposed to a limitation of two years from when the contract was agreed to.

The LCO notes that most of the reforms addressing the consumer protection needs of older Ontarians are consistent with reforms recommended in other parts of the Final Report, including recommendations respecting deceptive and unconscionable practices, dark pattern designs, improved enforcement, and improved access to justice. As a result, the LCO will not be repeating them there.

That said, the LCO believes one specific recommendation is necessary: s. 9(2) para 1 of the CPA 2023 states that it is an “unconscionable representation” 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.”²⁷¹

This sections list of criteria does not include age. The LCO believes this section would be improved, and older Ontarians would be better protected, if it did so.

RECOMMENDATIONS

The LCO recommends the provincial government:

23. Amend CPA 2023 s.9(2)(1) to add “age” as a prohibited criterion.





6. Improving Enforcement and Access to Justice

Access to Justice and Consumer Protection

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.”²⁷²

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.*²⁷³

*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.*²⁷⁴

Access to justice is a longstanding concern for the LCO. As a result, we have placed particular emphasis on whether Ontario’s consumers have access to effective dispute resolution and enforcement processes.

The challenge is that the sum of money at issue in many digital transactions is often very small. As a result, traditional contract remedies, such as litigation, are prohibitively expensive and complex for most consumers trying to enforce their rights.

Legal needs surveys consistent rank consumer issues high on the list of Canadian’s legal needs. For instance, the 2014 Canadian Forum on Civil Justice (CFCJ) surveyed 3,264 Canadian on legal needs in 84 different categories.²⁷⁵ The study 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.²⁷⁶ The study’s findings include:

- 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.²⁷⁷

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.”²⁷⁸

CPA 2023

Access to justice is facilitated in the CPA 2023 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).²⁷⁹

Consumers relying on the ministry complaint process are limited to refunds of monies already paid or the cancellation of an agreement. Enforcement of other rights and damages (including exemplary and punitive damages) requires an application to court, which is obviously complex, expensive, and time-consuming. A search of case law suggests consumer protection actions are rare, with only a handful of cases reported in the last three years.²⁸⁰

CPA 2023 includes three new provisions addressing access to justice issues. These will:

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).²⁸¹
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.²⁸²
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).²⁸³

The LCO commends these developments, many of which were proposed and discussed in LCO's earlier *Consultation Paper*. As discussed below, however, more could be done to ensure consumer redress is effective in the digital marketplace.

6.1 Investigations, Consent Agreements, and Interpretive Guidance

LCO consultations and research confirm that consumers 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. This strongly suggests the need for more proactive and systemic forms of investigation, redress, and legislative enforcement.

Several experts suggest that enforcement measures could be improved by using long-standing legislative powers and new powers introduced in CPA 2023. For example, the Ministry has authority to issue stop orders, undertake inspections, negotiate compliance agreements, and issue interpretive guidance of its legislation, but these powers appear to be seldom used.²⁸⁴

Some of these powers could be used proactively to improve consumer protection, promote legal certainty, and support good business practices. For example, the Ministry could systematically review a sample of existing ToS and practices and publicly issue interpretive guidance and standard term language. The Ministry could also undertake more investigations and resolve more disputes through Compliance Agreements.

6.2 Data Collection and Evidence-Based Enforcement/Policy-making

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.*²⁸⁵

Consumer enforcement and policymaking would particularly benefit from improved data on consumer complaints. According to a 2022 OECD survey of 28 countries and 15 leading platforms, there is a need “for better complaint data [given] the lack of accurate data on consumer complaints relating to online marketplaces.”²⁸⁶ Participating countries noted the lack of such data makes it difficult to achieve the “accurate identification of issues affecting consumers in online marketplaces.”²⁸⁷ Without such data, “[m]ost countries reported that their key challenges... [were] persuading marketplaces to take proactive measures to prevent or reduce consumer harm.”²⁸⁸

Consumer complaint data can come from either the Ministry of Public and Business Services or suppliers. The LCO recommends better data collection and dissemination from both sources. Supplier complaint data is no doubt the more challenging of the two. The LCO notes that CPA 2023 includes the regulatory authority “prescribing and governing record-keeping requirements in respect of consumer contracts.”²⁸⁹ It is not clear if this power has been used to collect data, or to what effect. In any event, the Ministry should consider using this power to establish best practice standards or guidelines for suppliers regarding consumer complaints, including reporting on the number of complaints, nature of complaints, and outcomes.

6.3 Minimum Standards for Investigations of Consumer Complaints

The LCO believes there are good reasons to establish best practice standards or guidelines for Ministry complaints and informal dispute resolution processes.

At present, the Ministry requires that consumers raise an issue with the supplier before they file a complaint to Consumer Protection Ontario for review and potential investigation.²⁹⁰ This rule may be problematic because there are no standards for how suppliers are supposed to handle consumer complaints, meaning that consumers have no assurance that suppliers will address complaints at all.

Once again, the OECD has produced very helpful research identifying the concerns and risks for consumers who must use supplier complaint procedures. Not surprisingly, the OECD’s survey of consumer and product safety authorities in 27 jurisdictions, and 15 digital marketplace providers, 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 there is considerable variability regarding:

- Return policies.
- Paid “purchase protection” offers.
- Inconsistent policies across products and platforms.
- Mandatory complaint timelines.²⁹¹

Moreover, only about half of digital marketplaces surveyed “indicated that they have processes to mediate and resolve disputes if requested by consumers.”²⁹²

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.”²⁹³ Digital platforms were found to have variability where some:

- Provided some mediation services to consumers.
- Provided a link to the online dispute resolution platform created by government.
- Demonstrated a range in response time from 1-2 days to several weeks.
- Have “a dedicated team responsible for processing reports from consumer protection authorities and coordinating 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.”²⁹⁴

As noted above, the Ministry could use its existing authority to prescribe record-keeping requirements to develop a set of clear and actionable principles governing informal dispute resolution with consumers.

This reform would establish an equal playing field among businesses while normalizing meaningful access to justice for consumers in everyday transactions.

The EU DSA might provide a good precedent for this initiative, as the legislation aims to:

*...[impose] 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.*²⁹⁵

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.²⁹⁶ The definition of such systems in leading jurisdictions like the EU suggest it may be easier for Ontario to follow.²⁹⁷

RECOMMENDATIONS

The LCO recommends the Ministry of Public and Business Service Delivery:

- 24. Increase the use of investigations and systemic investigation, issue more consent agreements (including fines) and interpretive guidance.**
- 25. Establish minimum standards for investigations of consumer complaints.**

6.4 CPA Fines

CPA 2023 includes three important amendments respecting penalties and fines. The first reintroduces an amendment to the CPA originally proposed in 2006 and sets a \$50,000 limit on administrative penalties that may be imposed by the Minister of Public and Business and Service Delivery for breaches of the CPA.²⁹⁸

The second increases compensation for consumers in specific circumstances in which refunds may be available by tripling the refund amount.²⁹⁹

A third amendment increases the maximum amount a court may impose as a fine for breaches of the CPA by an individual to \$100,000 and on a corporation to \$500,000.³⁰⁰

By adopting these measures, the provincial government has explicitly recognized that fines are an important regulatory tool. These amendments also acknowledge that traditional CPA or contractual remedies are generally not worth the cost and effort for individual consumers.

That said, these amendments may not go far enough. Small losses by thousands of individual online consumers can add up to substantial profits for a supplier, as proven by the Fortnite example discussed earlier in this report.³⁰¹ The LCO notes there are class action claims against Epic/Fortnite underway in Quebec and British Columbia.³⁰²

The Fortnite example is a dramatic illustration of a potentially serious consumer protection problem: Consumer losses in equivalent cases may be at a scale Ontario’s CPA 2023 simply does not contemplate. Indeed, for some suppliers the cost of CPA non-compliance may amount to a licensing fee absent a commensurate penalty.

Australia recently addressed this gap. 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.³⁰³ This included fines up to a maximum of \$AU50M. Early reports suggest the legislation’s sliding scale has revised firm’s risk calculation to encourage compliance by design.³⁰⁴ Interestingly, the Australian legislation also protects small businesses from unfair fines by classifying them as consumers, thus extending consumer protections to “mom and pop shops” to level the competitive playing field.³⁰⁵

Similarly, the EU's *Digital Services Act* (DSA) and *Digital Marketplaces Act* (DMA) have legislated a sliding scale for fines, including DSA fines of up to 6% of the global turnover of a large online service provider and DMA fines of not less than 4% and not exceeding 20% of a platform's total worldwide turnover in the preceding financial year.³⁰⁶

CPA 2023 does not have any equivalent provisions. CPA 2023 does, however, give the Minister the authority to make regulations:

*...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.*³⁰⁷

This authority is limited, however, by the maximum fines specified under CPA 2023. Investigation and prosecution by the Ministry can result in fines of up to \$100,000 for individuals and \$500,000 for corporations (if found guilty through a prosecution process and ordered by a court).³⁰⁸

The LCO believes that the CPA 2023's fines and penalties provisions should meet mutually supporting objectives: On the one hand, they should effectively promote compliance with the new legislation. On the other hand, they should ensure large suppliers do not have an unfair regulatory advantage over small suppliers. This balance could be achieved by legislating or regulating higher potential fines or a sliding scale for breaches of the CPA by both individuals and corporations.

Finally, other jurisdictions have taken an important step forward toward proactive compliance by creating a schedule of minimum administrative penalties.

Sliding scale and minimum penalties would be major amendments to the new remedial provisions that were adopted in CPA 2023. Accordingly, the LCO recommends these proposals be subject to further consultation and development.

RECOMMENDATIONS

The LCO recommends the provincial government:

26. Consider amending the CPA 2023 to define a sliding-scale of penalties commensurate with the size of the business entity which is in administrative breach or convicted under the CPA, the severity of the breach of consumer rights, as well as other factors as may be prescribed.

27. Consider amending the CPA 2023 to increase the maximum allowable fine for administrative penalties and convicted offences to an amount commensurate with the size and scale of larger digital marketplace entities, and in accordance with other such requirements as may be prescribed.

6.5 Statutory and Disgorgement Damages

Statutory Damages

LCO consultations demonstrate support for adopting a model of statutory damages into CPA 2023.

Statutory damages would allow a consumer to opt for damages defined in legislation/regulation as an alternative to court ordered damages. Statutory damages make enforcement faster and more predictable while clarifying non-compliance risks to businesses.

The LCO also heard that existing damages for consumers – including exemplary and punitive damages – 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.

The best-known statutory damages scheme in Canada is the *Copyright Act* s. 38.1, which has been in operation for over two decades.³⁰⁹

Disgorgement Damages

CPA 2023 s. 69(2) specifies that a consumer who successfully brings an action under the Act may seek:

- To recover the “full payment” to which they are entitled.
- Three times the amount of a refund.

CPA 2023 s. 69(3) further states that a court may order “exemplary or punitive damages or such other relief as the court considers proper” in addition to an order under s. 69(2).

During consultations, the LCO heard that these sections are generally ineffective for three reasons. First, the damages available to consumers are generally small amounts, even in case of “three times” refunds. Second, the legal and evidential threshold to prove exemplary or punitive damages is very high. Enforcement 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.³¹⁰ Third, these remedies are only available by court order, thus presupposing the need for litigation. As a result, consumers have little incentive to seek damages in most transactions. Indeed, in many cases the cost of vindicating a consumer’s rights be much higher than any potential court award.

Disgorgement is a legal concept intended, in part, to address these situations. 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.

The best-known example of disgorgement in Canada is in patent law. A patent holder may 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.³¹¹

In the United States, disgorgement is a long-standing principle of consumer protection law.³¹² US states with disgorgement remedies see it as an effective way to systemically discourage unfair practices that may not result in loss or costs to individual consumers.³¹³ In the digital marketplace, for instance, a disgorgement remedy might be available where a platform systemically 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 (the substance of which was litigated in Canada, although not in respect of disgorgement damages).³¹⁴

The US FTC has recently sought to expand the ambit of consumer disgorgement as a damage and remedy for the panoply of practices taking place in the digital marketplace.³¹⁵ Competing case law, leading up to a decision of the US Supreme Court, suggests the issue is both relevant to new activities in the digital marketplace, and remains a legally live question.³¹⁶

Disgorgement is less well known in Canadian consumer law. During our consultations, the LCO was told that disgorgement may be an effective remedy for consumers and deterrent for anti-consumer business practices in the digital marketplace. For example, a disgorgement remedy might be effective where a platform profits from deceptive software or contract design practices resulting in unwanted purchases.

The LCO also heard that disgorgement may merit consideration in CPA 2023 as Canadian caselaw evolves. For instance, the 2020 Supreme Court of Canada case *Atlantic Lottery Corp. Inc. v. Babstock* discusses a common law threshold for finding disgorgement damages “where the plaintiff has a legitimate interest in preventing the defendant’s profit-making activity.”³¹⁷ The possibility of disgorgement damages was debated in the recent 2024 Ontario Court of Appeal case *Hoy v. Expedia Group, Inc.* While not dismissing the possibility of disgorgement damages under CPA 2002, the court determined only “exceptional circumstances” under the common law threshold would prevail.³¹⁸

A statutory amendment of CPA 2023 confirming the availability of disgorgement damages would clarify conflicting case law, remove another onerous litigation barrier, and better protect consumers from practices they have no ability to negotiate in the digital marketplace related to monetization, data brokering, and other practices.

RECOMMENDATIONS

The LCO recommends the provincial government:

28. Amend CPA 2023 to incorporate a new section defining statutory damages, under which 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.

29. Amend CPA 2023 s. 107(1) with new regulatory authority for prescribing and governing matters relating to statutory damages.

30. Consider amending the CPA 2023 to add a disgorgement remedy.

Several participants further noted that earlier governments had a separate and fully funded Ministry of Consumer Protection, and expressed concern that this function and role has been diminished over time.

Consumer advocates also told the LCO about a Private Member's Bill introduced in Ontario shortly after LCO commenced consultations. In early June 2023, a member of Ontario's Official Opposition introduced Bill 122, *Ontario Consumer Watchdog Act, 2023*.³²⁰ The bill proposes that the Minister of Public and Business Service Delivery "develop and implement a plan to establish a consumer watchdog organization" with several notable characteristics, including:

- A mandate independent of government with responsibility for overseeing consumer protection matters in Ontario.
- Powers to investigate businesses or other entities to determine compliance.
- Systemic powers to investigate and report on the unfair activities or practices of sectors or groups of businesses or other entities.
- Administering penalties to businesses or other entities.
- Publishing the number of consumer complaints against businesses or other entities submitted to the organization, the number of consumer complaints investigated.
- Determining whether existing legislation is no longer serving consumers as a result of the legislation being outdated or poorly enforced.³²¹

6.6 Other Consumer Protection Initiatives

Consumer Protection Agency

During consultations, the LCO heard broad and enthusiastic support for establishing an Ontario-based independent consumer support, advocacy, or watchdog organization, modelled on recently introduced Ontario legislation and existing organizations like Quebec's Option Consommateurs.

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.³¹⁹

RECOMMENDATIONS

The LCO recommends the Ministry of Public and Business Service Delivery:

31. Consider establishing an Ontario consumer assistance organization, modelled on proposed legislation including Bill 122, *Ontario Consumer Watchdog Act, 2023* and organizations like Quebec's Option Consommateurs.

Terms of Service Registries

A ToS registry was recently adopted in California with enactment of the *Social Media Accountability and Transparency Act*.³²² This Act requires social media companies to submit reports to the Attorney General with latest versions of their ToS; to provide details about specific policies in defined areas; and to collect and report on data related to ToS violations. All ToS reports will eventually be made available to the public through a single searchable database.³²³

The Act does more than just require social media companies to submit their ToS. It also establishes and clarifies standard terms and practices for digital platforms, including privacy notices requiring specific disclosures and general information.³²⁴ The Act further 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.³²⁵

California’s social media registry is not the only such registry. California has established a second mandatory registry to better track, audit and report on data brokers and the use of consumer data.³²⁶ The United States Federal Consumer Financial Protection Bureau has also recently proposed a database of ToS contracts offered by supervised non-bank financial institutions.³²⁷

The US examples highlight the growing importance of ToS registries as an emerging consumer protection tool.

The LCO believes a centralized, machine-readable ToS registry has considerable potential to improve consumer protection in Ontario’s digital marketplace. For example, a ToS registry could:

- Simplify online disclosures by making them more consistent and organized.
- Measure and benchmark the effectiveness of online disclosures and alternative ToS.
- Track changes to ToS and provide consumer notifications, counter-balance unilateral contract changes and provide a means to alert consumers to “key information” or other high-risk concerns.
- Increase certainty and establish jurisdiction over suppliers conducting transactions in Ontario.
- Improve evidence-based consumer research and policymaking by governments, academics, courts, litigants, advocates, and industry.

Terms of Service Testing

Some jurisdictions have proposed legislative amendments requiring businesses to test the effectiveness of their disclosures in their respective target market “to assess how the information is understood and used by consumers, and to take necessary steps to mitigate any problems identified.”³²⁸

Trustmarking

Finally, the OECD has considered how “[t]echnical solutions, including machine-readable disclosures, can provide a possible way forward in certain contexts.”³²⁹ For example, technology could 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.”³³⁰

The OECD writes how:

*Standardized, simplified and clearly structured tables, summarizing key information could address these concerns. Examples include the Schumer box in the context of credit card agreements, or proposals for standardized short-form privacy notices. As an alternative, researchers have recently proposed the introduction of standardized privacy levels that consumers only need to understand once and then can easily apply across all digital services that collect data from consumers.*³³¹

Precedents exist 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.³³² 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).*³³³

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.”³³⁴

RECOMMENDATIONS

The LCO recommends the Ministry of Public and Business Service Delivery:

32. Study options to develop, deploy and monitor a terms of service registry for businesses operating under the Consumer Protection Act 2023, “trustmarking” for consumer ToS, and related initiatives.



7. Appendix A: Recommendations to Improve Consumer Protection in the Digital Marketplace

Dedicated Legal Framework for Online Consumer Contracts

The LCO recommends the provincial government:

1. Amend CPA s. 16(1) para 2 to establish legislative authority over “such other online contracts as may be prescribed.”
2. Amend CPA s. 107(1) to add authority to make regulations governing online contracts by:
 - Prescribing the disclosure of information for online contracts.
 - Prescribing the form and content of online contracts.
 - Prescribing the making, amending or continuation of online contracts.
 - Prescribing exemptions or one or more amounts for the purposes of subsection 16(5) [monetary threshold] and prescribing unfair practices for the purposes of Part 2.

Eliminating Monetary Threshold for Online Consumer Contracts

The LCO recommends the provincial government:

3. Use its authority under s. 107(1) 5. to eliminate monetary thresholds for online contracts, subject to exemptions on a case-by-case basis.

Improving Notice and Disclosure

The LCO recommends the provincial government:

4. Amend CPA 2023 s. 17(1) to state that “the supplier shall disclose such key information as may be prescribed....”
5. Use its authority under CPA 2023 s. 107(1) 3. and 4. to define and prescribe the form and content of key information that must be disclosed in an online contract once those consultations have been completed.

6. Consult with a broad range of stakeholders on the form and content of key information disclosures for online contracts in Ontario.

Prohibiting Deceptive, Unfair or Unconscionable Online Practices

The LCO recommends that the provincial government:

7. Amend CPA 2023 sections 8(2) and 9(2) to specifically enumerate a range of false, misleading, or deceptive representations and unconscionable acts that take place in the digital marketplace.
8. Use its existing authority under CPA 2023 s. 107(1) 1. and 3. to identify and enumerate false, misleading, or deceptive representations and unconscionable acts that should be prohibited under ss. 8(2) and 9(2).
9. Consult with a broad range of stakeholders to comprehensively identify such representations or acts.

Prohibiting “Dark Pattern” Design

The LCO recommends the provincial government:

10. Amend CPA 2023 s. 9(2) to specifically identify a range of unfair and unconscionable practices related to deceptive contracting, software, and user interface design practices that attempt to or actually steer, deceive, coerce, or manipulate consumers into making choices.
11. Amend CPA s. 107(1) to add authority to make regulations prescribing and governing different types of deceptive contracting, software, and user interface design practices in online notice and contracts.
12. Consult with a broad range of stakeholders to comprehensively identify such practices.

Establishing “Good Faith” Unilateral Contract Amendments

The LCO recommends the provincial government:

13. Amend CPA 2023 s. 19 to allow a supplier to amend or purport to amend a consumer contract if the modification is proposed in good faith and does not have the effect of undermining any term, affirmation, promise or performance requirement made by the supplier in the original consumer contract and is made in accordance with the regulations.
14. Use its regulatory authority under CPA 2023 s. 107(1) para. 6 to clarify and define circumstances under which unilateral amendments are permissible, including:
 - Prescribing disclosure of appropriate information.
 - Prescribing the form and content of such disclosure.
 - Prescribing the disclosure, form and content of key information related to the amendment or continuation.
 - Prescribing any requirement for affirmative consent to the modified services or product.
 - Prescribing the ability of consumers to exit the contract.
 - Prescribing reasonable standards of fair dealing for amendments made in good faith.
15. Consult with a broad range of stakeholders to comprehensively identify such practices.

Plain Language Consumer Contracts

The LCO recommends that the provincial government:

16. Amend CPA s. 4(1) to clarify that where a supplier is required to disclose information it must be clear, comprehensible, prominent, and accessible.
17. Use existing regulatory power under CPA s. 107(1) to prescribe and govern matters relating to s. 4(1) including related to accessibility, or otherwise amend CPA s. 107(1) to establish this regulatory power.

Failure to Accommodate as an Unconscionable Practice

The LCO recommends the provincial government:

18. Amend CPA 2023 s. 9(2) para 1 by adding the failure to accommodate consumers as an unconscionable act.
19. Amend CPA s. 107(1) to prescribe and govern matters relating to s. 9(2) including prescribing the form and content of accommodation which should be provided.
20. Consult with a broad range of stakeholders to comprehensively identify such practices.

Age-Appropriate Design Code

The LCO recommends the provincial government:

21. Consult with appropriate stakeholders to establish an Age-Appropriate Design Code for online services in Ontario that target youth.
22. Study the creation of a Consumer Privacy Act for Ontario that would clarify how commercial collection, use, analysis, and disclosure of information is best protected on behalf of vulnerable youth.

Protecting Older Online Consumers

The LCO recommends that the provincial government:

23. Amend CPA 2023 s.9(2)(1) to add “age” as a prohibited criterion.

Enforcement and Access to Justice

The LCO recommends the Ministry of Public and Business Service Delivery:

24. Increase the use of investigations and systemic investigations, issue more consent agreements (including fines) and interpretive guidance.
25. Establish minimum standards for investigations of consumer complaints.

CPA Fines

The LCO recommends that the provincial government:

26. Consider amending the CPA 2023 to define a sliding-scale of penalties commensurate with the size of the business entity which is in administrative breach or convicted under the CPA, the severity of the breach of consumer rights, as well as other factors as may be prescribed.
27. Consider amending the CPA 2023 to increase the maximum allowable fine for administrative penalties and convicted offences to an amount commensurate with the size and scale of larger digital marketplace entities, and in accordance with other such requirements as may be prescribed.

Statutory and Disgorgement Damages

The LCO recommends that the provincial government:

28. Amend CPA 2023 to incorporate a new section defining statutory damages, under which 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.
29. Amend CPA 2023 s. 107(1) with new regulatory authority for prescribing and governing matters relating to statutory damages.
30. Consider amending the CPA 2023 to add a disgorgement remedy.

Other Consumer Protection Initiatives

The LCO recommends the Ministry of Public and Business Service Delivery:

31. Consider establishing an Ontario consumer assistance organization, modelled on proposed legislation including Bill 122, *Ontario Consumer Watchdog Act*, 2023 and organizations like Quebec's Option Consommateurs.
32. Study options to develop, deploy and monitor a terms of service registry for businesses operating under the Consumer Protection Act 2023, "trustmarking" for consumer ToS, and related initiatives.



8. Endnotes

- 1 Information about the LCO's Consumer Protection in the Digital Marketplace project is available online: <https://www.lco-cdo.org/digitalmarketplace>. The LCO earlier released a consultation paper: *Consumer Protection in the Digital Marketplace: Consultation Paper* (June 2023) online: <https://www.lco-cdo.org/digitalmarketplace>.
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- 3 *Consumer Protection Act* (2002, S.O. 2002, c. 30, Sched. A) (CPA 2002), online: <https://www.ontario.ca/laws/statute/02c30>.
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- 10 See LCO, *Consumer Protection in the Digital Marketplace: Consultation Paper* (June 2023) online: <https://www.lco-cdo.org/digitalmarketplace>.
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- 13 See LCO, "Letter and Submissions of the LCO to the Standing Committee on Justice Policy" (December 4 2023), online: <https://www.lco-cdo.org/digitalmarketplace>.
- 14 Standing Committee on Justice Policy, "Hansard Transcript" (Hansard, 43rd Parliament, 1st Session, November 21 2023 at 16:10 to 17:00), online: <https://www.ola.org/en/legislative-business/committees/justice-policy/parliament-43/transcripts/committee-transcript-2023-nov-21>.
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- 77 See Marina Pavlovic, “Consumer First, Digital Citizenry Second: Through the Gateway of Standard-Form Contracts” in Elizabeth Dubois and Florian Martin-Bariteau (eds.), *Citizenship in a Connected Canada: A Research and Policy Agenda* (University of Ottawa Press, 2020) at 160-163.
- 78 *ProCD, Inc. v. Zeidenberg* (86 F.3d 1447 (7th Cir., 1996)); *Rudder v. Microsoft Corp.* ([1999] OJ No 3778 (Sup Ct J)).
- 79 *Consumer Protection Act* (2002, S.O. 2002, c. 30, Sched. A) (CPA 2002), online: <https://www.ontario.ca/laws/statute/02c30>.
- 80 Ontario, Bill 142: *Better for Consumers, Better for Businesses Act, 2023* (introduced October 23, 2023; Royal Assent December 6, 2023; in-force on a day to be proclaimed) (CPA 2023), online: <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-142>.
- 81 *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A; (ON) General Regulation, *O. Reg. 17/05*, ss. 32, 33, 37 .
- 82 Suhuyini Abudulai, *The Annotated Ontario Consumer Protection Act, 2023 Edition* (LexisNexis, October 2022) at 26, 27, citing *Ramdath v. George Brown College of Applied Arts and Technology* ([2012] O.J. No. 5389, 2012 ONSC 6173 (Ont. S.C.J.), affirmed [2013] O.J. No. 3151, 2013 ONCA 468) and *Woodhouse v. Snow Valley Resorts ((1987) Ltd., [2017] O.J. No. 232, 2017 ONSC 222 (Ont. S.C.J.))*.
- 83 Suhuyini Abudulai, *The Annotated Ontario Consumer Protection Act, 2023 Edition* (LexisNexis, October 2022) at 34, citing *Ramdath v. George Brown College of Applied Arts and Technology* ([2012] O.J. No. 5389, 2012 ONSC 6173 (Ont. S.C.J.), affirmed [2013] O.J. No. 3151, 2013 ONCA 468).
- 84 “Consumer agreements” at CPA 2002 s. 4; “internet agreements” at CPA s. 37-40; “remote agreements” at CPA s. 44-47.
- 85 CPA 2002 s. 15.
- 86 Under CPA 2002 consumers may have a right to written contracts in various contexts, including internet agreements, direct agreements, and remote agreements, as well as in specific transactions like time share properties, loan brokering, or credit repair, among others.
- 87 CPA 2002 s. 15.
- 88 Ministry of Government and Consumer Services, *Improving Ontario’s Consumer Protection Act: Strengthening Consumer Protection in Ontario* (December 2020), at 3, online: <https://www.ontariocanada.com/registry/view.do?language=en&postingId=35387>.
- 89 CPA 2002 s. 7.
- 90 CPA 2002 s. 8.
- 91 “Internet Agreements” (CPA 2002 s. 37-40); “Direct Agreements” (CPA 2002 s. 41-43.1) “Remote Agreements” (CPA 2002 s. 44-47).

- 92 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.
- 93 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.
- 94 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").
- 95 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>.
- 96 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 12.
- 97 LCO discussion with representatives of the Ministry of Public and Business Service delivery (March 4 2024). See also CPA 2023 at s. 16(1) para 2, which established legislative regulatory power over "consumer contracts entered into online."
- 98 Ontario, Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act (Ministry of Public and Business Service Delivery, February 2023), online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.
- 99 Ontario, Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act (Ministry of Public and Business Service Delivery, February 2023), online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en> at 3.
- 100 See LCO Letter and Submissions to the Ministry of Public and Business Service Delivery in re Consumer Protection Act Review (March 17 2023), online: <https://www.lco-cdo.org/digitalmarketplace>. See also LCO, *Consumer Protection in the Digital Marketplace: Consultation Paper* (June 2023) online: <https://www.lco-cdo.org/digitalmarketplace>. The LCO also provided detailed submissions and extensive testimony to the Standing Committee on Justice Policy. See LCO, "Letter and Submissions of the LCO to the Standing Committee on Justice Policy" (December 4 2023), online: <https://www.lco-cdo.org/digitalmarketplace> and Standing Committee on Justice Policy, "Hansard Transcript" (Hansard, 43rd Parliament, 1st Session, November 21 2023 at 16:10 to 17:00), online: <https://www.ola.org/en/legislative-business/committees/justice-policy/parliament-43/transcripts/committee-transcript-2023-nov-21>. The LCO's work was also extensively cited with approval on 3rd reading of Bill 142: *Better for Consumers, Better for Businesses Act, 2023* (Hansard, 43rd Parliament, 1st Session, December 4 2023 at 16:40-17:25), online: https://www.ola.org/en/legislative-business/house-documents/parliament-43/session-1/2023-12-04/hansard#P1303_287298.
- 101 LCO discussion with representatives of the Ministry of Public and Business Service delivery (March 4 2024).
- 102 CPA 2002 included specific provisions related to "Internet Agreements" (s. 37-40); "Direct Agreements" (s. 41-43.1) and "Remote Agreements" (s. 44-47). CPA 2023 replaces this with a single reference to "online" contract (s. 16(1) para 2).
- 103 Several sections of CPA 2002 – including those related to internet agreements, remote agreements, and future performance agreements – provide that rights, protections and obligations in the legislation apply only where the contract "exceeds a prescribed amount." The amount is set in regulation. *O. Reg. 17/05: GENERAL* under *Consumer Protection Act, 2002* (online: <https://www.ontario.ca/laws/regulation/050017>) defines this threshold amount as \$50 for internet agreements, future performance agreements, remote agreements, and others (at ss. 23.1, 27, 31, 34, and 36). CPA 2023 reiterates this approach, though regulations setting a threshold amount have yet to be introduced. See CPA 2023 s. 16(5), 55(1), and 107(1) para 5.
- 104 CPA 2002 included specific provisions related to "Internet Agreements" (s. 37-40); "Direct Agreements" (s. 41-43.1) and "Remote Agreements" (s. 44-47).
- 105 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.
- 106 CPA 2002 s. 38(1-3) and s. 40, referring to Ontario Regulation 17/05 s. 32 "disclosure of information."
- 107 CPA 2002 s. 38(1-3) and s. 40, referring to Ontario Regulation 17/05 s. 32 "disclosure of information."
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- 109 See CPA 2023 ss. 21-22 "purchase-cost-plus leases;" s. 23-25 "personal development services;" s. 27-37 "credit agreements;" s. 38-41 "leases;" s. 42-43 "prepaid purchase card contracts;" s. 56-57 "timeshares;" and s. 107(1) para 23 "motor vehicle repairs."

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- 115 *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).
- 116 DPWRA, s. 1.
- 117 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.
- 118 Ontario, Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act (Ministry of Public and Business Service Delivery, February 2023), online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.
- 119 Ontario, Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act (Ministry of Public and Business Service Delivery, February 2023), online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en> at 3.
- 120 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”).
- 121 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.
- 122 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.
- 123 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>
- 124 CPA s. 107(1) para 5.
- 125 See European Commission, Functioning of the European ODR Platform: Statistical report 2020 (December 2021) at 1, online: https://commission.europa.eu/document/download/0233fd66-17b7-4405-9ff3-bf1f22856614_en?filename=2021-report-final.pdf.
- 126 European Commission, Functioning of the European ODR Platform: Statistical report 2020 (December 2021) at 2, online: https://commission.europa.eu/document/download/0233fd66-17b7-4405-9ff3-bf1f22856614_en?filename=2021-report-final.pdf.
- 127 European Commission, Functioning of the European ODR Platform: Statistical report 2020 (December 2021) at 2, online: https://commission.europa.eu/document/download/0233fd66-17b7-4405-9ff3-bf1f22856614_en?filename=2021-report-final.pdf.
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- 129 European Commission, Functioning of the European ODR Platform: Statistical report 2020 (December 2021) at 3, online: https://commission.europa.eu/document/download/0233fd66-17b7-4405-9ff3-bf1f22856614_en?filename=2021-report-final.pdf.
- 130 British Columbia, *Business Practices and Consumer Protection Act* [SBC 2004] CHAPTER 2, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/04002_00.
- 131 For more information visit the BC Civil Resolution Tribunal website at <https://civilresolutionbc.ca/>.
- 132 BC Civil Resolution Tribunal, *Annual Report 2022/2023*, at 17, online: <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf>.
- 133 BC Civil Resolution Tribunal, *Annual Report 2022/2023*, at 22, online: <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf>.
- 134 BC Civil Resolution Tribunal, *Annual Report 2022/2023*, at 22, online: <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf>. The CRT clarifies that most instances of a refusal are where “the applicant failed to provide required information, did not comply with the CRT rules, or refused to follow directions issued by the CRT... [and where] a claim that is outside the tribunal’s jurisdiction” (at 29).
- 135 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).
- 136 See *Consumer Protection Act*, O. Reg. 17/05: General at s. 32.
- 137 CPA 2002 s. 5(1); CPA 2023 s. 4(1).
- 138 See Omri Ben-Shahar and Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).
- 139 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>.
- 140 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) at 12.
- 141 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3-4.
- 142 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>.
- 143 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 2, 7, online: <https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm>.
- 144 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>.
- 145 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.
- 146 See American Law Institute, “§ 5. Unconscionability” in *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 100, “market context.”
- 147 A discussion of various examples of “market contexts” and other potentially consequential (and often not obvious) terms regularly used in consumer contracts is available in LCO’s *Consultation Paper* at section 2.3 “Examples of Terms from Existing ToS Contracts in Canada,” online: <https://www.lco-cdo.org/wp-content/uploads/2023/06/LCO-Consumer-Consultation-Paper-Updated-Final.pdf>.
- 148 Florencia Marotta-Wurgler, “Does Contract Disclosure Matter?” (168 *Journal of Institutional and Theoretical Economics* 1 (March 2012) at 1.
- 149 Florencia Marotta-Wurgler, “Does Contract Disclosure Matter?” (168 *Journal of Institutional and Theoretical Economics* 1 (March 2012) at 1.
- 150 Yannis Bakos, Florencia Marotta-Wurgler, and David R Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (43 *Journal of Legal Studies* 1 (January 2014) at 1.
- 151 Yannis Bakos, Florencia Marotta-Wurgler, and David R Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (43 *Journal of Legal Studies* 1 (January 2014) at 1.
- 152 Florencia Marotta-Wurgler, “Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s Principles of the Law of Software Contracts” (78 *University of Chicago Law Review* 165 (2011) at 1.
- 153 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.

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- 155 US Federal Trade Commission, “Twitter to pay \$150 million penalty for allegedly breaking its privacy promises – again” (May 25, 2022), online: <https://www.ftc.gov/business-guidance/blog/2022/05/twitter-pay-150-million-penalty-allegedly-breaking-its-privacy-promises-again>.
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- 164 *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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- 170 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>.
- 171 For example, under Canada’s *Bank Act* (S.C. 1991, c. 46), s. 627.57 specifies that: “(1) If an institution is required under this Division to disclose information in an application form or before entering into an agreement in respect of a product or service, it shall, at the time of that disclosure, disclose the information that is prescribed by presenting it prominently in a single prominently displayed information box.” Online: <https://laws-lois.justice.gc.ca/eng/acts/b-1.01/page-69.html#wbdisable=true>.

- 172 In 1988 the US legislated the *Truth-in-Lending Act* (15 U.S.C. §§ 1601-1667f, as amended) to create the “Schumer Box” which mandates certain key terms to be in large, prominent font sizes in contracts and promotional material to better inform consumers and make it easier to shop and compare. In relation to credit card lending, the “key terms” mandated in the Schumer Box include annual fee if applicable; annual percentage rate for purchases; other APRs (balance transfer, cash advances, default APRs); Grace period; Finance calculation method; and other transaction fees (balance transfers, late payments, exceeding credit limit fee, cash advances).
- 173 There are many examples of consumer trustmarking schemes. Examples of this in Ontario include the VQA standard for locally produced wines. A federal example is the CSA seal of approval for electrical device safety. Some scholars examine the potential of trustmarking systems for consumer contracts to better standardize terms and to ease and improve comprehension at a glance. See for instance : Georg von Wangenheim, “Certification as Solution to the Asymmetric Information Problem?” in P. Rott (ed.), *Certification – Trust, Accountability, Liability, Studies in European Economic Law and Regulation 16* (2019), online: https://doi.org/10.1007/978-3-030-02499-4_2; Jeffrey Belson, “Certification marks, guarantees and trust” (European Intellectual Property Review 2002; and K. Damon Aiken, Sohyoun Shin & Vincent Pascal, “An International Investigation of Source Influence Effects of Internet Trustmarks” (Journal of Internet Commerce,13:2, 89-115, 2014), online: <https://www.tandfonline.com/doi/abs/10.1080/15332861.2014.934646>.
- 174 *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.
- 175 *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.
- 176 Research compiled directly through online activities March 18, 2024.
- 177 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 127.
- 178 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 127.
- 179 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3.
- 180 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 100-102.
- 181 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022), at 3-4.
- 182 CPA 2002 s. 14(1); CPA 2023 s. 8(1).
- 183 CPA 2002 s. 15(1); CPA 2023 s. 9(1).
- 184 CPA 2002 s. 14(2); CPA 2023 s. 9(2).
- 185 CPA s. 14.
- 186 CPA s. 15.
- 187 CPA 2002 s. 14(2); CPA 2023 s. 8(2).
- 188 CPA 2023 s. 17(1).
- 189 CPA 2023 s. 49(1).
- 190 CPA 2002 s. 14(2); CPA 2023 s. 9(2).
- 191 CPA 2023 14(1)(f) states: “No person shall include a term or acknowledgement in a consumer contract or a related agreement if it is a term or acknowledgement that[...] (f) prevents or has the effect of preventing a consumer from publishing or communicating a review of the supplier or of the goods or services supplied.”
- 192 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>.
- 193 See the following: EU, *Digital Markets Act* (Regulation (EU) 2022/1925, PE/17/2022/REV/1), online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R1925>; *Digital Services Act* (Regulation (EU) 2022/2065, PE/30/2022/REV/1), online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065>. 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; 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\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(05)).

- 194 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\(05\)](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>.
- 195 See: *Uber Technologies Inc. v. Heller* (2020 SCC 16), online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do> ; see also *Douez v Facebook*, 2017 SCC 33 at para 50. (A longer discussion and examination of these practices is in LCO’s Consultation Paper at section 10.2 and 10.3).
- 196 *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.
- 197 *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.
- 198 *Douez v Facebook*, 2017 SCC 33 at para 50.
- 199 *Douez v Facebook*, 2017 SCC 33 at paras 52, 58, 72.
- 200 *Douez v Facebook*, 2017 SCC 33 at paras 56.
- 201 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 2, online: <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm>.
- 202 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 53, online: <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm>.
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- 208 Organization for Economic Cooperation and Development, *Dark Commercial Patterns* (October 2022), at 31-32, and “Annex F” at 68-71, online: <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm>
- 209 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.
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- 212 CPRA/ Cal. Civ. Code § 1798.140(l)).
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- 226 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022) at 14.
- 227 American Law Institute, *Restatement of the Law, Consumer Contracts* (tentative draft no. 2, as published, 2022) “§ 3. Adoption of a Modification of Standard Contract Terms” at 67-68.
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- 229 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>.
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- 235 See United States, “PlainLanguage.gov,” online: <https://www.plainlanguage.gov/about/definitions/>.
- 236 See United States, “PlainLanguage.gov,” online: <https://www.plainlanguage.gov/about/definitions/>.
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- 246 A case law search of CanLii.org finds only one human rights case from 2014 that included reference to the “Consumer Protection Act.” In that case the applicant was deemed “vexatious” (CanLii.org search of April 3, 2024).
- 247 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>.
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- 249 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>.
- 250 See LawTimes, “School boards’ lawyer suing social media platforms hopes trial reveals inner workings of algorithms” (April 9 2024), online: <https://www.lawtimesnews.com/news/general/school-boards-lawyer-suing-social-media-platforms-hopes-trial-reveals-inner-workings-of-algorithms/385287>.
- 251 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.”
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- 278 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>.
- 279 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>.
- 280 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.

- 281 CPA 2023 s. 49(3). See also text as originally proposed in Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 12, online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.
- 282 CPA 2023 s. 14(1)(b); 14(1)(f); s. 70; s. 71(1)(c). See also text as originally proposed in Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 12, online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.
- 283 CPA 2023 s. 89(1). See also text as originally proposed in Ontario, *Modernizing Consumer Protection in Ontario Strengthening the Consumer Protection Act* (Ministry of Public and Business Service Delivery, February 2023) at 12, online: <https://www.ontariocanada.com/registry/view.do?postingId=43452&language=en>.
- 284 See CPA 2023 ss. 73-107.
- 285 See Consumers Council of Canada, *Super Complainers: Greater Public Inclusiveness in Government Consumer Complaint Handling* (April 2019), online: [https://ccshop.consumerscouncil.com/ca/Consumer-Representation/c/3214/Super-Complainers-Greater-Public-Inclusiveness-in-Government-Consumer-Complaint-Handling-\[EPUB\]/p/139702](https://ccshop.consumerscouncil.com/ca/Consumer-Representation/c/3214/Super-Complainers-Greater-Public-Inclusiveness-in-Government-Consumer-Complaint-Handling-[EPUB]/p/139702).
- 286 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 4, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 287 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 4, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 288 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 4, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 289 CPA 2023 s. 107(1) para 12.
- 290 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>.
- 291 See Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 7-8, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 292 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 17-23, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 293 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 17-23, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 294 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 17-23, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 295 Organization for Economic Cooperation and Development, *The Role of Online Marketplaces in Protecting and Empowering Consumers* (July 2022), at 38, online: <https://www.oecd.org/publications/the-role-of-online-marketplaces-in-protecting-and-empowering-consumers-9d8cc586-en.htm>.
- 296 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 249.
- 297 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 249-250.
- 298 CPA s. 95(3). This limit was originally introduced as amendments to CPA 2002 in 2006 but was never brought into force (see CPA 2002 proposed s. 104.0.1). The \$50,000 threshold proposed in 2006 and reintroduced in 2023 would be – if adjusted for inflation – around \$75,000 today.
- 299 CPA s. 69(2)(b).
- 300 CPA s. 102(5) and (6).
- 301 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>.

- 302 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>. See also CBC News, “Fortnite was designed to be ‘as addictive as possible’ for kids, B.C. parents claim in proposed class-action” (March 20, 2023), online: <https://www.cbc.ca/news/canada/british-columbia/bc-supreme-court-class-action-epic-games-fortnite-1.6784958>.
- 303 Australia, *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (in-force November 10, 2022), online: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/bills/r6923_aspassed/0000%22, amending the *Competition and Consumer Act 2010* (Act No. 51, 1974), online: <https://www.legislation.gov.au/C2004A00109/latest/text>. A helpful overview of this legislation is: Baker McKenzie, “Australia: Unfair terms penalties countdown – From 9 November 2023 prohibitions for unfair contract terms commence” (July 6 2023), online: https://insightplus.bakermckenzie.com/bm/consumer-goods-retail_1/australia-unfair-terms-penalties-countdown-from-9-november-2023-prohibitions-for-unfair-contract-terms-commence.
- 304 Baker McKenzie, “Australia: Unfair terms penalties countdown – From 9 November 2023 prohibitions for unfair contract terms commence” (July 6 2023), online: https://insightplus.bakermckenzie.com/bm/consumer-goods-retail_1/australia-unfair-terms-penalties-countdown-from-9-november-2023-prohibitions-for-unfair-contract-terms-commence.
- 305 Baker McKenzie, “Australia: Unfair terms penalties countdown – From 9 November 2023 prohibitions for unfair contract terms commence” (July 6 2023), online: https://insightplus.bakermckenzie.com/bm/consumer-goods-retail_1/australia-unfair-terms-penalties-countdown-from-9-november-2023-prohibitions-for-unfair-contract-terms-commence.
- 306 See European Commission, “The enforcement framework under the Digital Services Act” online: <https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement>, and European Commission, “About the Digital Markets Act” online: https://digital-markets-act.ec.europa.eu/about-dma_en.
- 307 CPA 2023 s. 108(1)(b).
- 308 CPA s. 102(5) and (6). 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>.
- 309 In 1997 Parliament adopted “phase two” of copyright reform in Canada with *An Act to Amend the Copyright Act* (SC 1997, c. 24) at s. 38.1. Statutory damages were adopted in recognition of how: “A copyright owner who commences proceedings for infringement must prove not only the infringement, but also the losses suffered as a result. However, it is often difficult, sometimes impossible, to prove such losses because evidence as to the extent of infringement is usually difficult and/or expensive to find. Statutory damages alleviate this difficulty by guaranteeing a minimum award of damages once infringement is established. They also ease the evidentiary burden on the plaintiff in proceedings for infringement, deter future infringements, reduce the cost of litigation and encourage the parties to settle matters out of court” (Industry Canada, “Fact Sheet on Copyright Remedies” (2011)).
- 310 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.
- 311 The leading case in this context is *Monsanto Canada Inc. v. Schmeiser* (2004 SCC 34), online: <https://www.canlii.org/en/ca/scc/doc/2004/2004scc34/2004scc34.html>. The Supreme Court of Canada further clarified the test for accounting of profits in *Nova Chemicals Corp. v. Dow Chemical Co.* (2022 SCC 43), online: <https://www.canlii.org/en/ca/scc/doc/2022/2022scc43/2022scc43.html>, writing at paras 47-48 that “Deterrence flows from disgorgement. The incentive to infringe is minimized if an infringer has to disgorge all profits causally attributable to the invention... An accounting of profits, alongside these other remedial tools, protects the patent bargain... An infringer can be liable for patent infringement even if they had no knowledge of the patent or genuinely believed that the patent was invalid... This requires disgorging only the profits causally attributable to the invention. Requiring infringers to disgorge anything more would constitute punishment and risk chilling public innovation and competition.”
- 312 American legal scholars of the “law and economics” school of thought have written extensively on disgorgement as a means to facilitate “efficient breach” of unfair contracts. As Richard RW Brooks writes in “The Efficient Performance Hypothesis” (116 *Yale Law Journal* 568 (2006)) disgorgement allows a promisee (consumer) an optional right to weigh the value of contract performance against the option to “compel performance and capture all or some of the profits when non-performance [i.e. disgorgement damages] is elected” (at 573). The key to this approach is using disgorgement as a form of damages (rather than a cause of action) to the effect of “situating the promisee to weigh the marginal costs and benefits of performance... and disgorgement of the promisor’s cost as the remedy for breach” (at 573). In other words, the consumer can weigh the various factors at play in the contract – such as the value of the service to the consumer against the way the supplier monetizes the user – and decide if the apparent infringement by supplier is a fair bargain or imbalanced (thus triggering potential disgorgement damages). See also E. Allan Farnsworth, “Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract” (94 *Yale Law Journal* 1339 (1985)), arguing that the disgorgement principle should be extended to cover certain cases of breach of contract; and Richard RW Brooks, Alexander Stremitzer, and Stephan Tontrup. “Stretch it but don’t break it: The hidden cost of contract framing” (46.2 *The Journal of Legal Studies* 399 (2017)).
- 313 See for instance: National Association of Attorney’s General, “Restitution: The Superior Remedy” (May 3, 2021), online: <https://www.naag.org/attorney-general-journal/restitution-the-superior-remedy/>.
- 314 *Douez v. Facebook, Inc.* (2017 SCC 33), online: <https://canlii.ca/t/h4g1b>.

- 315 See for instance, “The Supreme Court Rules That Disgorgement Is Not an Available Remedy Under the FTC Act – What Comes Next?” (April 26, 2021), online: <https://www.commerciallitigationupdate.com/2021/04/26/the-supreme-court-rules-that-disgorgement-is-not-an-available-remedy-under-the-ftc-act-what-comes-next/>.
- 316 See for instance, “The Supreme Court Rules That Disgorgement Is Not an Available Remedy Under the FTC Act – What Comes Next?” (April 26, 2021), online: <https://www.commerciallitigationupdate.com/2021/04/26/the-supreme-court-rules-that-disgorgement-is-not-an-available-remedy-under-the-ftc-act-what-comes-next/>.
- 317 2020 SCC 19, online: <https://www.canlii.org/en/ca/scc/doc/2020/2020scc19/2020scc19.html>. 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” (see: Steven F. Rosenhek, Robin P. Roddey, and Nicholas Carmichael, “The Supreme Court Tightens The Rules For Disgorgement Or Gain-Based Remedies” (August 5, 2020), online: <https://www.fasken.com/en/knowledge/2020/08/5-supreme-court-tightens-rules-for-disgorgement-or-gain-based-remedies>.) 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” (see Steven F. Rosenhek, Robin P. Roddey, and Nicholas Carmichael, “The Supreme Court Tightens The Rules For Disgorgement Or Gain-Based Remedies” (August 5, 2020), online: <https://www.fasken.com/en/knowledge/2020/08/5-supreme-court-tightens-rules-for-disgorgement-or-gain-based-remedies>.) 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.
- 318 See *Hoy v. Expedia Group, Inc.* (2024 ONSC 1462) at para 44-74, online: <https://canlii.ca/t/k3nbh>.
- 319 For more information see Option Consommateurs, “Who Are We?” online: <https://option-consommateurs.org/en/about/who-are-we/>.
- 320 Ontario Legislature, Bill 122, Ontario Consumer Watchdog Act, 2023 (first reading June 6, 2023), online: <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-122>.
- 321 Ontario Legislature, Bill 122, Ontario Consumer Watchdog Act, 2023 (first reading June 6, 2023), online: <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-122>.
- 322 California Legislature, AB-587 Social media companies: terms of service (Assembly Bill No. 587 CH. 269, Sept 13, 2022), online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB587.
- 323 California Legislature, AB-587 Social media companies: terms of service (Assembly Bill No. 587 CH. 269, Sept 13, 2022), online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB587.
- 324 California Legislature, AB-587 Social media companies: terms of service (Assembly Bill No. 587 CH. 269, Sept 13, 2022), online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB587.
- 325 California Legislature, AB-587 Social media companies: terms of service (Assembly Bill No. 587 CH. 269, Sept 13, 2022), online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB587.
- 326 See Government of California, “California Consumer Privacy Act (CCPA)” (updated March 13 2024), online: <https://www.oag.ca.gov/privacy/ccpa>. For specifics of the data broker registry see: California Senate Bill SB-362 *Data broker registration: accessible deletion mechanism* (October 12 2023), online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB362.
- 327 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>.
- 328 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>
- 329 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 39, online: <https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm>.
- 330 Several academic and industry examples include: K. Damon Aiken , Sohyoun Shin & Vincent Pascal, “An International Investigation of Source Influence Effects of Internet Trustmarks” (2014 Journal of Internet Commerce 13:2, 89-115), online: <https://doi.org/10.1080/15332861.2014.934646>; Georg von Wangenheim, “Certification as Solution to the Asymmetric Information Problem?” in Rott, P. (eds) *Certification – Trust, Accountability, Liability. Studies in European Economic Law and Regulation* (volume 16, March 2019), online: https://link.springer.com/chapter/10.1007/978-3-030-02499-4_2; Jeffrey Belson, “Certification marks, guarantees and trust” (E.I.P.R. 2002, 24(7), 340-352); and Mozilla, *A Trustmark for IoT: Building consumer trust in the Internet of Things by empowering users to make smarter choices* (2017), online: <https://thingscon.org/publications/report-a-trustmark-for-iot/>;
- 331 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 39, online: <https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm>.
- 332 See AdStandards Canada, “Advertising Preclearance”, online: <https://adstandards.ca/preclearance/>.

- 333 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 39, online: <https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm>.
- 334 Organization for Economic Cooperation and Development, *Enhancing Online Disclosure Effectiveness* (October 2022) at 40, online: <https://www.oecd.org/publications/enhancing-online-disclosure-effectiveness-6d7ea79c-en.htm>.

