

Law Commission of Ontario calls for further modernization of province's Consumer Protection Act

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On December 6, 2023, the government of Ontario passed the *Better for Consumers, Better for Businesses Act, 2023* (Bill 142). When proclaimed into force, Bill 142 will enact the *Consumer Protection Act, 2023* (new Ontario Consumer Protection Act), which will repeal and replace the *Consumer Protection Act, 2002* (current Ontario Consumer Protection Act).

While the new Consumer Protection Act has received positive feedback from businesses for its attempt to simplify and streamline certain overlapping compliance requirements, the Law Commission of Ontario (LCO) released the *Improving Consumer Protection in the Digital Marketplace: Final LCO Report* [PDF] (LCO report) in May 2024, calling for further “modernization” of the consumer protection regime in Ontario.

The LCO report provides a total of 32 recommendations for reforms, amendments and regulations aimed at the digital marketplace, with a specific emphasis on online terms of service and terms of use. If adopted, the LCO’s recommendations would be a significant departure from Ontario’s current plans for consumer protection in the province and would require businesses selling goods or services to consumers in Ontario to overhaul their current practices.

Overview of recommendations

The LCO report is based on the “new consumer agenda” (the agenda), which is a set of consumer-friendly policy reform principles that have gained traction in several jurisdictions, including the European Union, United Kingdom, United States and Australia.^[1] The agenda has several areas of focus, including “digital transformation” and the redress and enforcement of consumer rights.^[2]

The LCO recommendations can be grouped into the following categories:

- [notice and disclosure requirements](#)
- [the need for a dedicated legal framework for online contracts](#)
- [restrictions on unilateral changes to online contracts](#)
- [addressing new unconscionability and deceptive practices](#)

Notice and disclosure recommendations for consumer contracts in the digital market

It is largely accepted that “notice and disclosure” is an important component of consumer protection legislation and is intended to drive consumer awareness, improve the exercise of consumer choice and reduce information asymmetry. However, the LCO report authors believe that the widespread growth of online contracting has challenged historical assumptions about how and why businesses provide notice and disclosure to consumers. They feel this has created a strong need for legal reform that reflects modern consumer needs.

According to the LCO report, both the new and current Ontario Consumer Protection Acts share an outdated approach to giving consumers disclosure that is based on the characteristics of the consumer contract in question, including where the contract was signed (e.g., door-to-door sales, over the internet, in a place of business) or the nature of the service provided (e.g., tow trucks, credit agreements, motor vehicle repairs).^[3] The authors are of the view that this approach, in practice, leads to limited amounts of disclosures that consist only of “basic formalities” within transactions, such as the disclosing of a business’ name, their phone number and an itemized list of prices. They suggest this type of disclosure does not effectively protect consumers in today’s digital market.

Evidently compounding the problem, the report authors also claim that the new Ontario Consumer Protection Act has fewer notice and disclosure provisions than the current Act — and that they are less specific — all with an aim of streamlining the obligations. On the other hand, the report authors concede that the new Ontario Consumer Protection Act does implement several recommendations identified by the LCO in previous consultations, including expanding the right to cancel contracts if notice or disclosure does not comply with the legislative requirements.

However, the specific concerns raised in the LCO report are difficult to reconcile with the current state of consumer protection law in Ontario or its intended replacement. For example, it is unclear why the authors of the LCO report believe contract-specific disclosure is inadequate. Indeed, the examples listed in the report — including door-to-door sales, credit agreements and motor vehicle repair agreements — are contracts with the most significant, detailed and digestible disclosure requirements. It is difficult to label such requirements as “basic formalities”.

More important, the claim that the new Ontario Consumer Protection Act has “fewer notice and disclosure provisions” is difficult to support. As the regulations to the new Consumer Protection Act are yet to be released, any such claim is premature. The bulk of the specific disclosure and notice requirements under the current Ontario Consumer Protection Act are located in the regulations; it is reasonable to assume that the same will be true for the new Consumer Protection Act. Furthermore, through years of press releases, consultations and consultation papers, there has been no indication from the Ontario regulators that disclosure and notice obligations will be reduced. In addition, while we are aware of no new consumer cancellation rights related to disclosure and notice in the new Ontario Consumer Protection Act, “expanding the right to cancel contracts if notice or disclosure does not comply” with the legislative requirements surely creates a stricter set of disclosure and notice requirements.

Despite their concern with a reduction in disclosure obligations, the authors of the LCO report simultaneously argue that the “more disclosures, more notifications” approach underlying disclosure provisions in both the new and current Ontario Consumer Protection Acts amounts to contract “overload” for consumers, who are faced with a vast number of online contracts with varying formats, thereby impairing their ability to make informed choices. Therefore, the LCO authors believe that legislators should focus on developing more meaningful disclosure requirements that facilitate increased consumer awareness and

decision-making power.

Below, we discuss several of the main recommendations proposed by the LCO report to meet the evolving needs in an era where online contracts are very long and difficult to understand for the average consumer.

Key information

First, the LCO recommends changing the notice and disclosure requirements to provide consumers with up-front “key information” about consumer risks and choices prior to the consumer consenting to enter an online contract.

The LCO believes that the introduction of “key information” requirements would likely reduce the risks that consumers face in online contracts by making such contracts more intuitive, practical and user-friendly. For example, in the European Union, where “key information” disclosures are generally required, vague data-sharing disclosure language presented to a consumer on entering a contract, such as “sharing information with partners to improve your experience”, must be replaced with explicit details, including a list of partners and the likely impacts on the consumer. Such “key information” disclosure is designed to facilitate the process of consumers making informed decisions about whether to enter into an online contract.^[4]

There is no definition of “key information” in either Ontario Consumer Protection Act, although one government consultation paper did express a desire to ensure the disclosure of “key information in the [consumer] contract”. While the authors of the LCO report take the position that there is room in the forthcoming regulations to establish a defined set of “key information”, no specific examples are provided of what this “key information” will look like for internet agreements, how it would account for the variety of online services or how it might differ from existing disclosure obligations for certain contract types (such as mandatory disclosure statements for credit and lease agreements).

Plain-language requirement

Second, in order to facilitate improved notice and disclosure to consumers, the LCO recommends establishing a plain-language requirement and standard for consumer contracts.

Online contracts are widely known to be dense and complicated documents which may dissuade consumers from trying to read and understand them. The LCO believes that adopting plain-language standards would allow a consumer to find information they need and understand what they find the first time they read or hear it. In addition, the LCO report points out that adopting plain language is increasingly regarded as important for public accessibility and participation.

Concern about volume of requirements

Third, the LCO authors suggested that the inclusion of numerous, extremely detailed notice and disclosure requirements would not provide practical support to consumers and that such additional requirements may not be well understood by businesses. An overload of such obligations may amount to regulatory burden without tangible consumer benefits.

During the LCO report consultation process, many business representatives expressed concerns to consumers about the overwhelmingly “voluminous” and “unexplained” notice and disclosure requirements. The business representatives surveyed noted that compliance

with additional notice provisions which consumers are unlikely to read would not benefit consumers and would put Canadian businesses at a competitive disadvantage.

While this position sits uncomfortably with the LCO's simultaneous concern regarding the perceived decrease in notice and disclosure provisions in the new Ontario Consumer Protection Act, we read this recommendation as an extension of the "key information" recommendation: any new disclosure and notice requirements should be both meaningful and easily digestible for consumers. Nevertheless, the consolidation of overlapping disclosure requirements in the new Ontario Consumer Protection Act (thereby reducing duplication and confusion) appears consistent with the LCO's desire for added clarity in disclosure and notice obligations.

Dedicated legal framework for online consumer contracts

Due to a perceived lack of reference to online contracts in the new Ontario Consumer Protection Act, the LCO report proposes the institution of a dedicated legal framework for online consumer contracts. However, such a framework exists under the current Ontario Consumer Protection Act, and we are aware of no indication that such a framework will be absent from the new legislation.

Continuing a familiar line of argument, the LCO report claims that the current Ontario Consumer Protection Act has several protections for consumers with respect to "internet agreements", while the new Ontario Consumer Protection Act contains comparatively fewer. In particular, the report identifies the following protections for online contracts in the current legislation:

- 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
- disclosure of the supplier's name, telephone number and place of business premises
- disclosure of the manner of delivery, including the name of the carrier
- disclosure of the rights and obligations of the supplier in relation to cancellation, returns, exchanges and refunds

This is an unusual reading of the regime for "internet agreements" under the current Ontario Consumer Protection Act. In particular, there is no "mandatory disclosure document" for internet agreements, nor is there a "seven-day cooling-off period". While there is a seven-day cancellation right for consumers if suppliers do not meet certain legislative requirements, this is a far cry from a "cooling-off" period that applies to contracts like door-to-door sales. To introduce such a right for all internet agreements would undermine all certainty for online contracting and severely damage the online marketplace in Ontario.

The LCO's proposal to establish a dedicated legal framework for online consumer contracts includes a recommendation that the new Ontario Consumer Protection Act be amended to include more explicit protections for online contracting (or that the province should prescribe this detail through the regulations). More specifically, the LCO recommends that the regulations include requirements for prescribing the form and content of online contracts and prescribing how contracts are made, how they can be amended and the requirements for allowing contracts to continue automatically after a certain date.

However, this detail is already in the regulations to the current Ontario Consumer Protection Act, and there is no indication that a dedicated online regime will not exist under the new legislation. The authors of the LCO report further point out that the new Ontario Consumer Protection Act contains only one explicit reference to online contracting: the definition of an

online contract as “a contract entered into online when the consumer and supplier are not present together.”^[5] As noted above, most of the current disclosure requirements (and protections) for specific contract types are included in the regulations. It is difficult to opine on the comprehensiveness (or relative benefits) of the new regime without having seen the draft regulations.

The LCO authors describe the underlying need for a dedicated legal framework for online contracts to be based on the lack of specific legal provisions and the lack of regulations to adequately define “online contracts” in the new Ontario Consumer Protection Act. They are concerned that this is a legislative gap which will lead to the government applying a single generic approach to a variety of contract types, such as timeshares, personal development services, loan brokering, credit repair services and lease agreements.^[6]

However, it is not obvious that a legislative gap will result from the approach under the new Ontario Consumer Protection Act. While the new legislation has an established purpose of streamlining and simplifying the approach to contract content and disclosure requirements for the benefit of both businesses and consumers, it does so by consolidating disclosure requirement where there is already overlap; there is no current indication that requirements for specific contract types will be abandoned altogether.

Furthermore, the LCO report does not describe how this new legal framework would interact with existing frameworks for certain contract types, many of which presumably warrant protection regardless of whether they are signed in person or online. It may be that maintaining a more medium-neutral approach to contract regulation will help ensure that certain contract types, such as credit agreements, are subject to the same protections in all circumstances.

Unilateral changes to contracts

In addition to modifying notice and disclosure requirements and (re-)establishing a dedicated legal framework for online consumer contracts, the LCO recommends that the new Ontario Consumer Protection Act be amended to better protect consumers by establishing criteria for unilateral contract amendment in certain circumstances. However, such criteria already exist, and the current approach already appears to be getting stricter on suppliers.

The LCO authors suggest that while the current Ontario Consumer Protection Act regulations allow for unilateral changes to consumer agreements in certain circumstances, including sometimes requiring consent and affirmative notice, these concepts have not been included in the new Ontario Consumer Protection Act. Instead, the new Ontario Consumer Protection Act includes broad language prohibiting any business from “amending or ... purporting to amend... a consumer contract except as otherwise provided for in the regulations.”

However, the current restrictions in Ontario on unilateral amendments to consumer contracts are located in the regulations to the current Ontario Consumer Protection Act; reviewing the new Ontario Consumer Protection Act without its corresponding regulations is therefore an improper comparison. Furthermore, as noted above, unlike the current Act, the new legislation contains restrictions directly in the Act itself: a default prohibition on unilateral amendments that do not meet regulatory requirements. It is difficult to read this as anything other than a *stricter* regime on unilateral amendments than is currently in place.

Nevertheless, the LCO proposes that the new Ontario Consumer Protection Act should include additional safeguards that are both procedural and substantive in the process of introducing unilateral changes to contracts. Still, the proposals are surprising in light of the

legislative language at issue.

For instance, the LCO authors propose requiring businesses to provide reasonable notice to the consumer of unilateral changes and a reasonable opportunity for the consumer to review the proposed changes. Further, they suggest that the consumer should have a reasonable chance either to reject the proposed term and continue the contract with the existing term or to terminate the transaction without unreasonable cost, loss of value or personal burden. These suggestions are remarkably similar to the requirements that already exist under the regulations to the current Ontario Consumer Protection Act, and it is not clear what the LCO is proposing to change (or whether they wish the existing restrictions to be reflected in the new regulations).

The LCO authors also note that the provincial government appears to have incorporated within the new Ontario Consumer Protection Act some suggestions previously identified by the LCO, including introducing limitations on businesses' ability to unilaterally amend, renew or extend contracts without obtaining express consumer consent. The LCO authors consider this change to be favourable for improving consumer protection in online contracts. While this requirement is not yet clear (in the absence of the associated regulations), the authors appear to be suggesting that express affirmative consent should be required for all amendments to consumer agreements, which would be extremely burdensome for online suppliers with a significant number of subscribers (and would make Ontario a substantial outlier in the market).

As noted above, the new regulations will likely not mirror the existing restrictions, as there is a new blanket prohibition on unilateral amendments, subject to the forthcoming regulations. On this topic, the 2023 government consultation paper proposed two exceptions that might appear in the regulations, each of which would exempt the supplier from the need for express consent to unilateral changes:

- *Proposed exception #1*: when the contract is for an indefinite term and the consumer can cancel at any time without incurring termination costs
- *Proposed exception #2*: where the changes do not reduce the obligations of the business or increase the obligations of the consumer

The forthcoming regulations are expected to provide clarity on whether either of these exceptions will be adopted. The LCO authors are critical of these proposed exceptions, suggesting that they are too narrow and would leave many consumers without important consumer protections in the digital contracting space.

According to the LCO report authors, while the first proposed exception appears to be a balanced proposal (as consumers that do not like a unilaterally imposed term can opt out), there is often a lack of marketplace alternatives, leaving limited practical choice to terminate the contract. However, it is not obvious that a lack of competing services should be a legitimate justification to prevent a business from amending their service offering, and the proposed exception itself would only apply where consumers are free to walk away without termination costs.

With respect to the second proposed exception, the LCO report suggests that this exception would only apply to contracts that required "written consent" at the outset. According to the authors, this exception would leave many online contracts that do not require such written consent in the first instance (but only require notice) outside the scope of the proposed protection. It is unclear which contracts the LCO report is describing here, as no supplier could reasonably enforce a "nonconsensual" contract. If the concern is with contracts that do not require express confirmation, it is still not obvious why such contracts are outside the scope of this particular exception or why this should not be so; a unilateral amendment that

does not reduce the obligations of the supplier or increase the obligations of the consumer is surely an example where fewer administrative burdens is appropriate (even if to avoid the “regulatory overload” concern the LCO flags elsewhere in the report). This confusion emphasizes the importance the forthcoming regulations will play in piecing together the puzzle of Ontario’s future consumer landscape.

Recommendations to address unconscionable practices

The LCO authors raise a further concern regarding the increased risk of unconscionable and deceptive practices in the digital marketplace, as compared to other sales channels. Both the current and new Ontario Consumer Protection Acts regulate practices related to deception, unfairness and unconscionability and include non-exhaustive examples of each, such as excessively one-sided terms in favour of the seller; misleading statements or terms to the detriment of the consumer; undue pressure to enter into a transaction; and exploiting consumer vulnerabilities related to disability, ignorance, illiteracy and language barriers.

To the LCO’s frustration, neither the current nor the new Ontario Consumer Protection Act provides specific examples of unconscionable and deceptive practices in the digital marketplace. This may be intentional on the part of Ontario regulators: while the examples of “unfair” or “unconscionable” practices do not specifically reference online behaviour, their medium-neutral quality allows them to be applied to a broader range of similar activity without needing to be repeated for each contract type.

Nevertheless, the LCO authors note that this contrasts with other jurisdictions such as the European Union, where consumer protection modernization initiatives such as the *Unfair Commercial Practices Directive (UCPD)* include examples of forms of deception and unconscionability that are unique to the digital market. Among other examples of such practices, the UCPD mentions material information provided in an unclear manner, hidden marketing and failure to identify commercial intent, influencer marketing transparency, and free trials and subscription traps. The LCO authors consider the UCPD’s initiative an effective approach to protect consumers contracting in the digital marketplace.

In contrast to these other jurisdictions, the LCO authors claim that the new Ontario Consumer Protection Act contains only one rule that specifically considers the digital marketplace, something they characterize as an “other rule” that prohibits terms which infringe on consumers’ right to post online reviews.^[7] Notably, and unmentioned in the report, this is one of the new “prohibited provisions” that will give consumers a rescission right up to one year after entering into a contract. It is also well established that the existing list of unfair and unconscionable practices can (and will) be applied in the digital marketplace, regardless of whether “online contracting” is referenced explicitly.

Still, the LCO authors believe that introducing examples of online practices that are unfair and unconscionable to the new Ontario Consumer Protection Act had been widely supported during the consultation process. This is consistent with the suggestion that the digital marketplace needs a dedicated framework to address the complex and unique issues relating to online contracts, including problems relating “dark patterns” and the unique “unconscionable practices” risk in the digital marketplace.

Conclusion

While the LCO report contains characterizations of the current and new Ontario Consumer Protection Acts that differ from our own, it forms part of the ongoing discussions that will continue until the government releases its proposed regulations for the new legislation. Until that time, there will be lingering uncertainty as to the ultimate shape of Ontario’s future consumer protection landscape. While this uncertainty remains, stakeholders will attempt to

drive the discussion in certain directions. However, to the extent Ontario’s regulators maintain their focus on streamlining and simplifying consumer protection legislation — while still adapting to ensure protection in the modern digital marketplace — we believe the simplified modern regime will be a benefit to both consumers and suppliers.

To see the complete list of LCO recommendations, please consult the [LCO report \[PDF\]](#). The LCO has invited submissions or comments on the LCO report, which can be submitted on its webpage.

Osler will continue to monitor the Ontario government’s response to the LCO report and any new publications on the topic of consumer protection reform, including the forthcoming regulations for the new Ontario Consumer Protection Act.

For a broader discussion of the new Ontario Consumer Protection Act and key developments that are generally applicable to businesses selling products or services to consumers in Ontario, please refer to our earlier [Osler Update](#).

Stay tuned for upcoming Osler Updates on this topic, and please reach out to any member of our Retail and Consumer Products team if you would like to discuss your business’ compliance going forward.

[1] [European Commission, The New Consumer Agenda \(2020\)](#), section 2.

[2] [Communication from the Commission to the European Parliament and the Council, New Consumer Agenda](#).

[3] LCO report, page 32.

[4] LCO report, page 34.

[5] Paragraph 2 of s. 16(1) of the new Ontario Consumer Protection Act.

[6] Ontario, [“Consultation Paper on Modernizing the Consumer Protection Act, 2022”](#) (Ministry of Public and Business Service Delivery, February 2023) at 5.

[7] As per section 14(1)(f) of the new Ontario Consumer Protection Act, “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.”

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