

Significant Changes Proposed to the Ontario Consumer Protection Act

Suhuyini Abudulai

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On December 1, 2020, the Ministry of Government and Consumer Services (the Ministry) issued a consultation paper, “Improving Ontario’s Consumer Protection Act: Strengthening Consumer Protection in Ontario,” seeking public feedback on proposed changes to the *Consumer Protection Act, 2002* (Ontario) (the Act). The Ministry is in process of a comprehensive review of the Act, the first in over 15 years. Since the Act came into force, there have been many developments in the marketplace. Technological innovation has transformed consumer transactions, introducing new products and services and new entities that were not contemplated when the consumer protection framework under the Act was developed.

The consultation focuses on proposals that the Ontario government may potentially develop into law to replace the current Act with a new Act. Given the significant changes being considered and potential impact, businesses that operate in Ontario and transact with consumers should review the consultation paper. Responses to the consultation paper are due by February 1, 2021.

The following is an overview of some of the significant proposals in the consultation paper.

Stronger Disclosure Rules for Consumer Agreements

The paper acknowledges that consumer transactions are more frequently taking place in an online environment and consumers are entering into ongoing or long-term contracts via subscription services and memberships. Additionally, consumers are leasing household appliances more often. The paper notes that the Act could better address automatic roll-overs, renewals or price increases in contracts in respect of the foregoing.

The Act currently categorizes consumer agreements by type and requirements differ depending on how the agreement is entered into. Consumer agreements often fall within more than one type (e.g., internet agreement, remote agreement or future performance agreement). As communications technology continues to change the way consumers interact with businesses, the paper notes the ensuing confusion and difficulty in determining which category of consumer agreements applies to a particular contract. As such, the Ministry is considering creating one set of core requirements for written consumer agreements (i.e., combining the requirements for internet, remote and future performance agreements).

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Protecting Against Unilateral Agreement Changes

The Act allows for amendments to a consumer agreement if prescribed conditions are met (e.g., prescribed notice requirements are satisfied, or clear consent is obtained from the consumer). The approach that allows amendment by notice is somewhat convoluted and the consumer has the option of terminating the agreement or keeping it unchanged. The Ministry is considering the following requirements for amendments to consumer agreements:

- The consumer expressly consents, in writing if the initial agreement needed written consent;
- The business sends advance notice of change and the agreement is one which the consumer can cancel at any time without termination costs or the changes do not increase the consumer's obligations or reduce the obligations of the business;
- Automatic agreement renewal would only be permitted if the consumer has an ongoing ability to cancel at no cost;
- Agreement renewal may be either by express consent (in writing, if required by the agreement) or by a renewal process that provides the consumer with advance notice and renews the agreement into an indefinite term (e.g., monthly) with no termination costs.

If adopted, the amendment restrictions would apply to all contracts entered into after the amendments come into force **and to existing contracts one year after the in-force date** (e.g., a subscription to a service entered into before the amendment is in force could not be amended or renewed without either clear consent or adopting a cost-free termination right after one year following the in force date of the amendment).

Controlling Price Changes with Termination Costs

The paper addresses consumer agreements that include price escalation clauses allowing a business to increase prices yearly (e.g., HVAC lease agreements). Such escalation clauses may also set out a formula for the price increases.

The Act allows price escalation clauses. The Ministry is considering **banning changing the amount charged during the term of an agreement unless the consumer has the ability to cancel cost-free at any time** (e.g., the monthly or annual payments under the agreement must be the same until the agreement ends). Agreements that allow consumers to cancel without penalty at any time would be permitted to increase prices by either price escalation or notice.

Enhanced Protection for Unfair Practices

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The Act prohibits the making of false, misleading, deceptive or unconscionable representations to consumers. The paper proposes to amend the unfair practices regime by adding more examples to the list of unfair practices under the Act, and taking a stronger approach to certain practices such as price gouging and convincing consumers to enter into excessively one-sided agreements (e.g., the proposed changes would address conduct such as entering into agreements where there is no reasonable probability of the consumer paying their obligation in full).

As to addressing unfair practices, the Act requires a consumer to give notice to a business within one year of entering the agreement. The paper proposes amending this requirement such that the remedy for unfair practices is available until the later of one year after entering into the agreement and one year after the unfair practice took place.

Contract Breaking Offers

Some businesses offer services to consumers to assist them in getting out of contracts the consumers have signed – the consumers pay these businesses in advance. Currently, some advance payments are permitted under the Act (e.g., home renovators), however, advance payments are generally restricted.

The paper proposed a new advance fee ban for contract breaking services to prohibit payment until the consumer receives a clearly agreed upon outcome.

Lease Agreements

The paper addresses concern with lease and rental agreements under which a consumer would eventually pay more than they would to buy the leased/rented product outright – the paper refers to these types of agreements as “purchase cost plus leases.”

The Ministry notes that it has received concerns from consumers that some leases are costly to end and consumers may be required to make all remaining lease payments to terminate the lease. Additional concerns have been raised that lease termination costs are not prominently displayed in the lease and are contained in ‘boilerplate’ terms and conditions.

The Ministry is considering defining a category of lease under the Act where total payments, whether over the life of the lease or due to added termination costs, exceed 90% of the leased good’s retail value and, for such leases, **providing a cooling-off period regardless of whether the lease is entered into at the consumer’s home, in-store, online or otherwise**. Currently under the Act, the 10-day cooling-off period applies to direct agreements (e.g., lease agreements entered into at the consumer’s home). The following amendments to lease agreements of this type are also proposed in the paper:

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- Clear, standard format, first page disclosure obligations of key lease costs and terms;
- Limits on termination costs similar to the limits on prepayment charges for loans under the current Act – the maximum termination costs would decrease over time in keeping with a disclosed schedule, based on the implicit finance rate in the lease;
- Require service contracts connected with such leases to be optional services subject to termination by the consumer at any time, unless the service is included in the lease and its costs covered by the lease cost disclosures (e.g., APR).

Registration of Notices of Security Interests

The paper notes that the Ministry has received complaints about registered notice on title to consumers' homes for leased goods that become affixed to the property (e.g., HVAC equipment). These Notices of Security Interests (NOSIs) are often registered in the Land Registry System. Consumer complaints include businesses not discharging the NOSI after the agreement has been terminated, multiple registrations on title when an agreement is assigned, and issues for consumers trying to obtain financing, sell their homes or terminate the agreement. The paper proposes:

- Amending the Act to clarify the obligations of a business to discharge NOSIs when the agreement for the leased good is cancelled or terminated in accordance with the Act;
- Where the Director under the Act has issued a compliance order to a business that fails to discharge a NOSI, the Director would then have the ability to issue a statement which the consumer can have registered on title to discharge the NOSI themselves.

Prohibiting Misleading Consumers About Rights Including Class Action Waivers

The Act nullifies certain waivers of consumers' rights (e.g., mandatory arbitration clauses are void and a consumer can start or be part of a class action, despite any contractual term to the contrary). In other Canadian jurisdictions, mandatory arbitration clauses and class action waivers are not prohibited or otherwise restricted. As such, consumer agreements often include the proviso "to the extent permitted by applicable law" as the lead-in to such clauses. The paper proposes prohibiting any term in an agreement that suggests a consumer has waived any rights under the Act, such as the right to join a class action and the right to bring a court action under the Act. The paper further proposes to require waivers that are not applicable in Ontario to clearly excluded Ontario or Canada on their face to avoid consumers being misled.

Prohibiting Dollar Limits on Implied Warranty Claims

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The Act deems certain warranties and conditions in consumer agreements (i.e., implied warranties). The paper considers amendments to the Act to ensure that the implied warranty provisions cannot be subject to dollar limits on claims over them (e.g., forbidding agreement terms that limit the dollar value of claims for breach of implied warranties and conditions).

Enhanced Refund Recovery

If a consumer is required to sue a business for its failure to provide a refund as required under the Act, the paper proposes that the amount that the consumer can claim in such an action would be three times the amount of the required refund the consumer has not received.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.