

THE COMMON LAWYER

Time for Change – The Future of Consumer Protection in Ontario

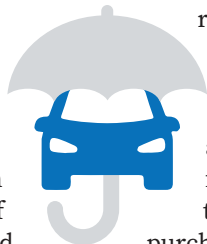


By Justin Jakubiak and Bree Pierce

CONSUMER PROTECTION IS DUE FOR AN UPGRADE.

The law has been unchanged for the better part of 20 years. The current law, the Consumer Protection Act, 2002, ("CPA") is not without its flaws and can be quite confusing. The goal of the CPA is to "support a fair and competitive marketplace where consumers can make their own choices without being subject to unfair business practices." However, it is somewhat bulky and is not reader friendly, with rights and obligations divided by type and industry. The intention of the CPA and its impact can often end up in a conflict, impeding business and setting unrealistic expectations on all parties.

Within our practice we have noticed an upward trend of "over-protection" – an extreme approach that puts an unreachable standard on businesses.



Perfection, or peril. We can give you two examples from ongoing matters we are involved with.

The first involves a car dealer client who, in the ordinary course, pulled a CarFax report for a potential purchaser. The report showed a fairly substantial accident, about \$20,000 in damage, but only about \$1,500 in repairs. Two weeks later, the purchaser pulled the trigger and bought the car.

Approximately eight months later the purchaser went to resell. When a further CarFax was pulled during this transaction, it revealed that the repairs, and the damage, had been significantly more than the previous report indicated and that this information was available after the date of the first CarFax report, but before the vehicle was delivered. The purchaser sued our client. One of the purchaser's arguments is that an updated CarFax should have been pulled and provided to the purchaser just prior to delivery. Is that reasonable, or an extreme interpretation of a dealership's consumer protection obligations under the law? The matter is still ongoing.

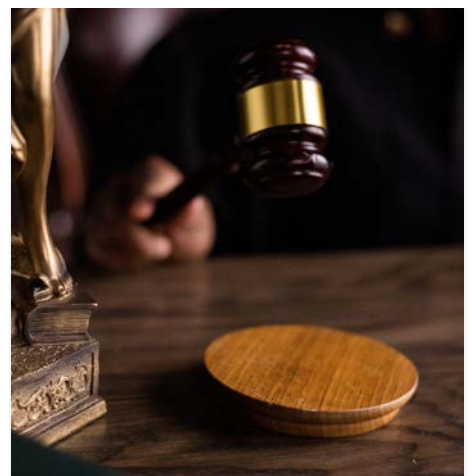
We also just wrapped up a 7-day License Appeal Tribunal hearing relating to a Private Career College matter. Our client, a relatively new trucking school, had been largely left to their own devices since opening in 2020. COVID had impacted the schedule

of inspections that ordinarily would have been conducted by agents of the Ministry of Colleges and Universities to ensure compliance with the relevant legislation.

Our client had been working with their assigned Ministry inspector to ensure their record keeping practises were in line with the relevant requirements. They followed the inspector's guidance and received her approval on most of their administrative practises. Notwithstanding her approval, the next inspector came around two months later and told them they were way out of compliance on several fronts.

When our client raised the inconsistency in standards to the new inspector, the response was radio silence. There was no follow-up, no clarification, and no further guidance. Five months later, they received a Notice of Immediate Suspension and a Notice of Refusal to Renew Registration!

A big focus of the hearing was the idea of consumer protection: the administrative aspects of the relevant legislation were designed to protect the





consumer, ie. the student. The standard imposed on our client, however, was perfection. The Ministry argued strict compliance with the legislation was mandatory and context was irrelevant. To the Ministry, it didn't matter if a previous inspector had okayed the practice, nor did it matter that the Ministry had failed to provide the same level of guidance other schools received: the legislation said what it said. The consequence: stripping our client of their livelihood. We of course appealed and are awaiting the decision.

These cases are just two of many, but fortunately, the end might be in sight.

Revolutionizing Consumer Protection

Back in 2019, the government of Ontario first recognized the need to update consumer protection legislation. The "Rebuilding Consumer Confidence Strategy" was designed to be a comprehensive review of the CPA. It would update the CPA to reflect our new modern age. Scary to think that 2002 is practically ancient history when you think about the marketplace technology and innovations that have emerged in the past 20 years!

Over the past few years, there have been a series of consultation papers, proposals, and research conducted by the Government to understand what needs to change. The focus of this consultation has been to understand how best to enhance consumer protection and reduce the burden for businesses in general, while addressing specific problems with greater efficiency.

All of this has culminated in Bill 142, Better for Consumers, Better for

Businesses Act, 2023. The goal of the Bill is ultimately to repeal the Consumer Protection Act, 2002 and replace it with the Consumer Protection Act, 2023. The Bill was introduced on October 23, 2023. It has some wide-reaching impacts that will affect this industry, among many others. Some key highlights are below.

Contract Requirements

The Bill proposes to make several changes to the contents of consumer contracts. The CPA at present divides contracts into different types: future performance, time share, personal development services, internet, direct, remote, and reward points. If your first thought in trying to understand what (or why) those categories are what they are is HUH?, you are not alone. The Bill proposes to create one universal set of rules to govern all types of contracts, with some limited exceptions. This is designed to make it easier to comply: these core rules will be written in clear, simple language and recognize our "digital-first" marketplace, where more and more contracts are entered into online rather than in person.

The Bill also updates the disclosure requirements of information to be provided to consumers. The form of disclosure remains the same ("clear, comprehensible and prominent"), but that information must now be delivered in a manner "likely to come to the consumer's attention." These terms cannot be hidden within a contract or not easily accessible.

The Bill also seeks to improve consumer rights by changing the ways in which contracts can be amended. Amendments are currently permitted, but the Bill would require the explicit

consent of the consumer, with some narrow exceptions. Continuations and renewals of contracts would likely be captured by this proposed change.

On the flip side, the Bill proposes to prohibit certain terms. There are three key things that would be prohibited:

- terms that prevent consumers from posting negative reviews or comments, including clauses stating that a business can bill a consumer if it considers the consumer to have disparaged the business.
- clauses that purport to limit a business' liability if a product fails.
- clauses that mislead a consumer about their statutory rights.

With respect to terms on statutory rights, this includes any terms that might suggest to consumers they do not have the right to pursue consumer protection claims in Ontario Courts.

Under the proposed changes, if any of the prohibited terms were included, they would be void and unenforceable and permit the consumer to cancel the contract within one year.

Clearer Definitions of Unfair Practises

A significant change proposed by the Bill is to be more explicit with respect to what is considered an "unfair practise" by providing some additional examples of unconscionable representations. That list would be expanded to include the following:

- 1 Taking 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 contract or similar factors.
- 2 Charging a price for goods or services that grossly exceeds the price at which similar goods or services are available from similar suppliers.

3 Entering into a consumer contract with a consumer, if the person doing so knows or ought to know that the consumer is unable to receive a substantial benefit from the subject matter of the contract.

4 Entering into a consumer contract with a consumer, if the person doing so knows or ought to know that there is no reasonable probability that the consumer will be able to pay the full price charged for the goods or services.

5 Including terms in a consumer contract that are so harsh, oppressive or adverse to the consumer that the terms of the consumer contract are inequitable.

6 Including terms in a consumer contract that make the contract excessively one-sided in favour of someone other than the consumer.

7 Subjecting a consumer to undue pressure to enter into, amend or terminate a consumer contract.

8 Using control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer contract.

9 Charging a consumer for assistance obtaining any benefit, right or protection to which the consumer is entitled under this Act, unless,

before the consumer agrees to pay the charge, the person discloses,

i. the entitlement's existence and direct availability to the consumer, and

ii. the cost, if any, the consumer would be required to pay for the entitlement if the consumer obtained the entitlement directly.

Many of the above terms are of particular relevance to the auto industry, especially with respect to lower income consumers. It may put more of a burden onto the dealer to verify the finances of their customers. It may require disclosure of spiff agreements insofar as the consumer bears any of the cost.

Increased Penalties

A final significant change proposed by the Bill is the cost of non-compliance. The Bill proposes to double the applicable fines. For individuals, the fine is increased from \$50,000 to \$100,000; for corporations, up from \$250,000 to \$500,000.

The Bill also contemplates triple damages for withholding refunds. If a consumer is entitled to a refund and it has not been provided within 15 days, the consumer has the option of taking that business to Court. If they do have to go to court, the consumer is entitled to recover three times the refund amount.

Who is Benefitting from the Bill?

While the Bill may sound like it favours the consumer, there are many aspects to it that work in a businesses' favour. It clarifies and simplifies a business' contractual obligations, making it easier for all parties to understand. It provides additional clarity to what sort of conduct could cause a business to run afoul of the prohibition on unfair practises. Effectively, it makes it easier for a business to understand what it can and can't do, and for a consumer to know their limits with respect to privacy legislation.

There is no clear answer yet for what the transition period will look like if the Bill is to come into place – that is, no indication if the provisions will apply retroactively or not. We will keep you posted on what this might mean for your business.

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