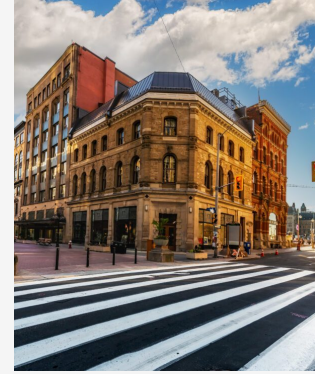


Incoming changes to consumer protection legislation in Ontario, New Brunswick and Newfoundland and Labrador

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Ontario, New Brunswick and Newfoundland and Labrador have introduced new legislation to overhaul their respective consumer protection regimes. This Osler Update provides a general overview of notable changes that are expected to affect businesses selling products or services to consumers located in one or more of these jurisdictions over the course of 2024 and into 2025. Some of the proposed changes relate specifically to financial service providers and are analyzed in further detail in our [companion Osler Update](#).

To prepare for these changes, businesses selling goods or services to consumers in these jurisdictions will need to carefully review their practices to ensure compliance with consumer protection legislation.

Ontario

On December 6, 2023, Ontario's [Bill 142](#) (the *Better for Consumers, Better for Businesses Act, 2023*) received royal assent.

Bill 142 represents the culmination of a three-year review and consultation process. On December 1, 2020, Ontario's Ministry of Government and Consumer Services (as it was then called) issued a [consultation paper](#) proposing a significant conceptual overhaul to Ontario's current *Consumer Protection Act, 2002*. This was followed by another [consultation paper](#) issued by the Ministry of Public and Business Service Delivery (the Ministry) on February 26, 2023, including more detailed change proposals and limited draft legislative language. Given that these consultations primarily focused on amendments to discrete areas of Ontario's current Consumer Protection Act to address, for instance, the growing use of mobile apps and online shopping platforms, a wholesale replacement of the Ontario's current Consumer Protection Act may have therefore caught some observers and industry participants by surprise. Not only did the new Ontario Consumer Protection Act speed through the legislative process with few amendments, but consultations before and after Bill 142's release do not appear to have materially swayed the Ministry's legislative approach.

Once proclaimed into force, the bill would repeal the Ontario's current Consumer Protection Act and replace it with the *Consumer Protection Act, 2023* and amend the Ontario *Consumer Reporting Act* (CRA). There remains significant uncertainty as to compliance requirements for providers given that the new Ontario Consumer Protection Act leans heavily on yet-to-be-

proposed regulations for substantive details. It is also unclear how much public consultation will be part of the drafting process for such regulations, or the timing for the regulations.

As the first major overhaul of Ontario's consumer protection legislation in approximately 20 years, the new Ontario Consumer Protection Act makes significant changes to supplier obligations and the consequences of contravention.

Notable upcoming changes

Streamlined rules for various types of consumer agreements

Part 3 of the new Ontario Consumer Protection Act aims to reduce confusion by establishing a single set of core requirements — relating to matters such as disclosure, content, delivery, amendments and continuations — that apply to various types of “consumer contracts” and layering some additional obligations on top for certain types, such as timeshare contracts, personal development services contracts and direct contracts (also known as “door-to-door” sales). Subject to yet-to-be proposed regulations, many of the core requirements remain substantially unchanged and have merely been consolidated.

Contract amendment and continuation rules

A change that may be less welcome for suppliers is new restrictive language on contract renewals. In the consultation papers, the Ministry proposed a default rule of “explicit consent” for all contract amendments and continuations, subject to certain exceptions pursuant to which amendment or continuation by “notice” would be permitted. However, despite the heavy discussion in the consultation papers, the new Ontario Consumer Protection Act provides very little detail surrounding contract amendments and continuations and has deferred the resolution to the forthcoming regulations. As it stands, subsection 19(2) of the new Ontario Consumer Protection Act prohibits a supplier from amending or “continuing” a consumer contract except as otherwise provided for in the regulations. The term “continuation” is defined to include the renewal or extension of a fixed-term consumer contract.

Ontario is already an outlier in its detailed requirements for renewal notices under [sections 41 and 42 of the General Regulations](#) to the current Ontario Consumer Protection Act. It remains to be seen how the new regulations will qualify the approach to contract continuations and whether any distinction between fixed-term and indeterminate-term contracts will be clarified. Automatically renewing subscription contracts are common in the online marketplace, so suppliers will have to review the new regulations carefully to ensure compliance.

Prohibited contract terms and broadened rescission rights for consumers

Under the new Ontario Consumer Protection Act, consumer rights as they relate to unfair practices, prohibited terms or acknowledgements and unilateral amendments are broadened in three main respects. First, the new Ontario Consumer Protection Act expands the non-exhaustive list of what constitutes a false, misleading or deceptive representation to account for recent market activity. Second, it effectively extends the period available for consumers to claim rescission to “within *the later of* one year after entering into the consumer contract *and one year after the unfair practice occurs*” (emphasis added) as opposed to generally “within one year after entering into the agreement” under the Ontario's current Consumer Protection Act. Third, any consumer contract containing a prohibited term or acknowledgement can be cancelled in its entirety at the consumer's discretion within one year of entering into the contract. This approach goes further than that typically observed in other provinces where only the impugned terms are deemed unenforceable.

Prohibited terms or acknowledgements include any terms that:

- mandate arbitration;
- prohibit participation in class proceedings;
- negate or vary any implied conditions or warranties;
- place a monetary limit on consumer claims for breaches of implied warranties or conditions; or
- prevent a consumer from publishing or communicating a review of the supplier.

In light of this new change, businesses selling products or services to consumers located in Ontario that intend to use a single set of consumer terms that apply on a national or North American basis will need to consider how best to comply with these new prohibited terms or acknowledgement restrictions under the new Ontario Consumer Protection Act.

Other changes

The new Ontario Consumer Protection Act has several other new provisions that will be relevant to certain sectors of businesses selling products or services to consumers in Ontario, including provisions regulating suppliers engaged in “contract breaking” services and an exit option for certain timeshare owners.

Financial product and services changes

For a discussion on the changes affecting financial service providers — such as changes relating to “purchase-cost-plus leases”, the notice of security interest regime under the new Ontario Consumer Protection Act and the Ontario *Personal Property Security Act* and changes under the CRA — please refer to the [companion Osler Update](#).

Retroactivity

Another unexpected aspect of the new Ontario Consumer Protection Act is its potential retroactivity, as any existing consumer contract (or a related agreement) would be subject to any and all provisions of the new Ontario Consumer Protection Act to the extent prescribed by regulations. In its [submission dated November 20, 2023](#), regarding Bill 142 to the Standing Committee on Justice Policy, the Ontario Bar Association noted that “[t]he ability to alter fundamental rights and obligations in all existing consumer contracts would have disruptive effects on consumers, suppliers, and the economy...”. However, ultimately, no changes were made to Bill 142 to address this concern. As a result, suppliers will need to consider how to comply with this potential retroactivity.

Compliance and enforcement

Under the Ontario’s current Consumer Protection Act, the maximum fines for an individual or corporation convicted of an offence under the Ontario’s current Consumer Protection Act are \$50,000 and \$250,000, respectively. The new Ontario Consumer Protection Act would increase the maximum fines to \$100,000 for individuals and to \$500,000 for corporations to further deter offences and egregious business conduct.

Furthermore, if a consumer succeeds in a refund action at the Ontario Superior Court of Justice in relation to a supplier’s failure to provide a refund in compliance with the new Ontario Consumer Protection Act, the Court must order that the supplier refund the

consumer for an amount three times the original refund obligation (subject only to the Court's discretion in cases of "inequity").

The new Ontario Consumer Protection Act introduces a new administrative penalty scheme under section 95, which gives the Director (as defined under the new Ontario Consumer Protection Act) the ability, by order, to impose an administrative penalty of up to \$50,000 if the Director is satisfied that the person has contravened or is contravening a provision of the new Ontario Consumer Protection Act. Such a penalty can be imposed regardless of whether an offence is being prosecuted and is an "absolute liability" order (i.e., it can apply even if "all reasonable steps" were taken by a supplier who had "an honest and reasonable belief" in a mistaken set of facts).

The Director's order-making power has also been extended to cover any business that is "facilitating" another person's contravention of the new Ontario Consumer Protection Act. It is not yet clear how this will be imposed, as the term "facilitating" has not been defined. However, the consultation papers give the example of a finance company that bills on behalf of an online subscription service. If that subscription service provider has engaged in unfair practices, the intermediary finance company could be ordered to stop charging certain amounts to the consumer.

Details anticipated under future regulations

Despite detailed treatment in the consultation papers, some changes have not been included in the statute and will instead be included in the regulations. For example, the 2020 consultation paper proposed limiting price changes under contracts to circumstances where the consumer explicitly consents to them (as amendments to the existing contract) or where the underlying contract gives the consumer a right to cancel without cost at any time. The Ministry has deferred this proposal to the regulations and intends to seek additional input during the regulatory development phase.

Similarly, the regulations may ultimately include options regarding how a consumer may exit a subscription-based contract, a topic that received considerable attention in the consultation papers. In particular, in response to legislation in the United States and the European Union, the Ministry proposed a rule mandating the right for consumers to exit certain contracts (such as subscriptions or memberships) in the same way they entered the contract. However, the Ministry has stated that it has also deferred this topic to the regulations.

Finally, the regulations may reveal further changes that have not been anticipated or included as part of the original consultation papers, such as new proposed gift card rules. Under the new Ontario Consumer Protection Act, the term "gift card" would be replaced with "prepaid purchase card" and clearly state that gift cards and other forms of prepaid purchase cards do not have an expiration date. This rule will apply regardless of whether the card is in physical or digital format and whether it was purchased in a physical or online store.

Many critical regulatory issues are addressed in the regulations to the current Ontario Consumer Protection Act and have been similarly excluded from the new Ontario Consumer Protection Act itself, like exemptions to certain provisions in Ontario's current Consumer Protection Act and the specific details related to cost of credit disclosure and rewards programs. While there has been no indication that the approach to these topics will change, there can be no certainty until the regulations are released.

Going forward

The ultimate impact of the new Ontario Consumer Protection Act will depend significantly on the associated regulations. Nevertheless, the scale of the update to Ontario consumer

protection in Bill 142 is already clear and warrants attention from all suppliers in Ontario, whether due to a shift in approach for their regulated business (a shift that may be applied retroactively) or simply because the consequences of contravention have become more severe.

New Brunswick

Bill 16, the *Consumer Protection Act*, passed third reading on March 22, 2024, and is awaiting royal assent. The bill was introduced by the Government of New Brunswick late last year and will enact a new *Consumer Protection Act* in New Brunswick when it comes into force. The New Brunswick Consumer Protection Act will consolidate the existing patchwork of consumer protection legislation and introduce new rules in respect of high-cost credit products, unfair practices, unsolicited goods and services, Internet sales contracts, future performance contracts and personal development services contracts. No in-force date has been announced. Much like Ontario's new Consumer Protection Act, the New Brunswick Consumer Protection Act defers many key substantive and procedural details to yet-to-be-proposed regulations.

New areas of regulation

The New Brunswick Consumer Protection Act introduces brand new rules in respect of unfair practices, unsolicited goods and services, Internet sales contracts, future performance contracts and rewards points agreements.

Unfair practices

The new unfair practices rules will prohibit a supplier from engaging in "unfair practices" — ranging from exerting undue pressure or influence on a consumer to enter an agreement to failing to disclose a material fact in relation to a consumer transaction. The list of unfair practices closely resembles the list of practices specified under consumer protection legislation in several other provinces.

Unsolicited goods

The new unsolicited goods or services rules will relieve a consumer from liability in respect of goods or services that the consumer did not request or where there is a "material change" in the goods or services (or their supply), unless the supplier can establish that the consumer consented to such a change.

Internet sales

Subject to some limited exceptions, the new Internet sales rules will offer consumers certain cancellation and refund rights in respect of products or services purchased online where the supplier fails to provide the consumer with certain pre-sale and post-sale disclosure.

Future performance contracts

The new rules focused on future performance contracts will regulate consumer agreements for which the supply of goods or services does not occur or payment in full is not made at the time the agreement is entered into.

Reward points

Consumer agreements that provide for a supply of rewards points to the consumer would be

regulated under new rules that, among other things, impose disclosure requirements on suppliers, restrict the circumstances in which rewards points may expire and exempt agreements that are below a certain yet-to-be-prescribed value threshold.

Compliance and enforcement

In addition to imposing a fine and/or a term of imprisonment on a person for committing an offence, a court may now order that person to pay an amount as restitution to the aggrieved person(s) for any loss suffered as a result of the offence.

Consolidation of existing patchwork of consumer protection legislation

Upon receiving royal assent, the New Brunswick Consumer Protection Act will eventually replace the *Gift Cards Act*, *Direct Sellers Act*, *Cost of Credit Disclosure and Payday Loans Act*, *Collection and Debt Settlement Services Act* and *Credit Reporting Services Act* (current New Brunswick Acts).

While the provisions under such old legislation remain largely intact, there are some changes. Notably, a new addition to the existing gift card rules would allow a consumer to demand the refund of an amount remaining on a gift card if it is below a certain yet-to-be-prescribed threshold. A similar rule under Québec's consumer protection legislation prescribes a threshold balance of \$5.

The administrative monetary penalty regimes under the current New Brunswick Acts would be consolidated under the New Brunswick Consumer Protection Act and the maximum penalty would be reduced to \$10,000 for individuals and \$25,000 for persons other than individuals. Under the current New Brunswick Acts (except the *Gift Cards Act*), the maximum penalties range from \$15,000 to \$25,000 for individuals and \$75,000 to \$100,000 for persons other than individuals and, under the *Gift Cards Act*, the maximum fine is \$140 to \$1,100 per punishable offence.

Newfoundland and Labrador

Newfoundland and Labrador is poised to join a growing number of provinces in Canada that have implemented a high-cost credit regime. On December 21, 2023, the Government of Newfoundland and Labrador announced the proclamation of [Part VII.2](#) of the [Consumer Protection and Business Practices Act](#) (CPBPA), which will regulate high-cost credit products when it comes into force. The province has also introduced [two regulations](#) [PDF] under the CPBPA, which will regulate high-cost credit products and the licensing of high-cost credit grantors. These changes are collectively set to take effect on June 1, 2024. You can read about these changes and how they are expected to affect financial service providers operating in Newfoundland and Labrador in our [companion Osler Update](#).

Osler will continue to monitor the progress of the new Ontario Consumer Protection Act, the New Brunswick Consumer Protection Act and the updates to the CPBPA and their associated regulations. Stay tuned for [our presentation on June 11](#) on upcoming consumer protection changes and please reach out to any member of our Retail and Consumer Products or Financial Services Regulatory teams if you would like to discuss your business' compliance going forward.