

Old *Consumer Protection Act* and Regulations

- Limited coverage
 - only covered executory contracts (defined as Ks between buyer and seller where delivery of goods or performance of services or payment in full is not made at time contract entered into), direct sales contracts, credit transactions and agreements and leases
 - didn't reflect the changing world of consumer contracts – electronic agreements, agreements made between consumer and suppliers over the phone

- Minimal disclosure requirements
 - in terms of what information is required to be disclosed
 - name and address of seller and buyer, description of goods and services sufficient to identify them, itemized price of the goods or services and a detailed statement of the terms of payment
 - **New Act, Draft Regulations** for, e.g. future performance agreements, add a number of other requirements (fp.2):
 - Description of any additional charges that may apply
 - Total amount that would be payable by the consumer under the agreement
 - Currency in which amounts are expressed, if not Canadian currency
 - Date or dates on which the goods and services are proposed to be supplied
 - Date on which the services to be supplied will be completed
 - Supplier's delivery arrangements for goods
 - For services, the place where they will be provided, the person to whom they will be provided and the supplier's method of providing them
 - Supplier's cancellation, return, exchange and refund policies
 - If credit is extended, the disclosures required by the part of the Act dealing with Credit Agreements

- No requirements around timing of disclosure to ensure consumer has opportunity to accept or decline agreement
 - **New Act** ensures that disclosure of information occurs *before* consumer enters into agreement (Remote agreements CPA, s. 45); that consumer receives the agreement in writing (Future performance agreement, CPA, s. 22) and in some cases (Internet agreements, CPA, s. 38. (2) and Remote agreements, ra.3) requires supplier to give consumer express opportunity *before*

consumer enters into an agreement to accept or decline the agreement

New Consumer Protection Act, 2002 and Regulations

- PIAC very pleased to see how responsive and comprehensive these proposed regulations and the accompanying legislation is for consumers.
- Reflect a very balanced approach to the new challenges faced by consumers regarding contracts for goods and services as a result of introduction of electronic commerce into the marketplace.
- Environment where the consumer's transaction with the supplier is not direct but faceless and moreover with larger and larger corporate entities.
- Situation requires consumer protection laws that redress the increasing imbalance between the consumer and the supplier in such transactions.

Some important general rights for consumers

Ambiguities to favour consumer

- S. 11. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.

Clear disclosure and delivery of information obligations on suppliers

- CPA S. 5.
- (1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensive and prominent.
- (2) If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be retained by the consumer
 - o Draft regulations (pp.2-3) address s. 5 of the Act and even go further to suggest that where there is a requirement in the CPA that something be in writing, only those electronic records that are visible and in text form be accepted as substitutes for paper records.
 - o PIAC supports this proposal but indicated that there needs to be provision to allow consumers to obtain hard copies of electronic records upon request. There are situations where a document may be too large to easily read or access electronically or where a

consumer may have difficulty producing a copy of an electronic document.

- We also note that s. 5 of the Act, distinguishes between “disclosure” and “delivery” of information. We suggest that this is perhaps an unnecessary distinction and much prefer the way that other consumer protection legislation subsumes “delivery” of information into “disclosure”. The Nova Scotia Government’s regulations which apply to Internet agreements contains the following definition of disclosure: “ A supplier is considered to have disclosed to a consumer the information required to be disclosed if the information is prominently displayed in a clear and comprehensive manner and the consumer is able to retain or print the information.”¹

Why are disclosure provisions important new protections for consumers?

- Reality of most consumer contracts - not bargained for, but are standardized contracts or contracts of adhesion (where weaker party has no choice as to the contract’s terms)
- Result can be contracts whose terms are not brought to consumer’s attention, contracts whose fine print is too small to read, or electronic contracts that are not easily visible or apparent to consumers – may be found through links located on the bottom of a website, or on another page of a website
- Cases where consumer became aware, after the fact, of contract terms:
 - Carter v. Interlog – consumer discovered that terms of Internet service provider agreement included suspending account for non-payment, but absorbing all incoming e-mail (so that senders had no knowledge that their e-mail had not been received by Carter). Consumer was also informed that contract terms included, if she cancelled account, that all e-mail absorbed into it would be destroyed after 30 days without her having access to the account
 - Credit card insurance program – consumer discovered that she had been enrolled in insurance program with high monthly premiums, for number of years, having no knowledge of affirmatively consenting to the program (credit card issuer claimed consumer expressly authorized initial contract and that when the original financial institution issuing the credit card was taken over by another financial institution, all cardholders were automatically enrolled in the insurance program if they had previously been enrolled.)*
 - *Note - new Act relieves consumers from legal obligations with respect to unsolicited goods and services (s.13)

¹ N.S. Reg. 91/2002, s. 4.

Protection of consumer's legal rights to class actions

- CPA S. 8.(1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgement in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.
- An important right to be granted to consumers, particularly in digital age where many internet-based contracts contain provisions requiring mandatory arbitration. Such clauses are inserted into non-negotiated consumer contracts by businesses.
- Mandatory arbitration clauses raise concerns for consumers because they allow businesses to potentially insulate unlawful, unfair or deceptive practices from any meaningful review. By preventing resort to the courts, it is difficult for consumer plaintiffs to obtain information through traditional discovery processes or challenge negative aspects of consumer products or services that may have an impact upon large numbers of consumers. Mandatory arbitration clauses may also have the effect of protecting businesses from negative publicity
- Class actions are potentially valuable legal tools for consumers because amounts involved in individual consumer transactions where there is a dispute with a supplier are generally not significant enough to warrant a legal action, but may be of sizable value collectively, to warrant a legal action via a class proceeding

Consumer relief for unsolicited goods or services

- As indicated above, CPA has important general provision giving consumer relief from legal obligations regarding unsolicited goods and services (s.13)
- Even offers a definition of unsolicited in s.13. (3) which affirms the requirement for affirmative consent by consumer to a consumer agreement: "A request for goods and services shall not be inferred solely on the basis of payment, inaction or the passing of time."
- Other important provision – material change deemed unsolicited (s.13. (4) – where there is a material change in the goods and services being received by consumer "goods and services shall be deemed to be unsolicited from the time of the material change forward unless the supplier is able to establish that the consumer consented to the material change".

Government's powers to make public, records of business compliance with the Act

- PIAC very pleased to see that Act requires Minister to maintain public record of a number of undertakings, compliance orders and orders under s.103
 - o concern - reg. (10.1) language isn't strong enough and is vague with respect to the requirements for maintenance of a public record: it states that the material shall be made available to the public "from time to time" by posting it on a Government of Ontario website or in printed form
 - o doesn't reflect the importance of this Ministry's commitment to ensuring consumers have access to important information that they need to know about the goods and services that they purchase.

- Other concern – provision for power to require payment of fees by consumer
 - o also disappointing to see that Act gives the Minister the power to require payment of fees for the inspection of public records maintained under section 103.
 - o We would strongly argue against retaining such a provision. The provision of fees for access to information that consumers need to know is inimical to the purpose of the Act, which is "consumer protection".
 - o Imposing such fees cannot also be justified based on the corresponding fees that apply to access to information requests, because the situations are not comparable. The nature of the information that would be publicly disclosed under this provision of the *Consumer Protection Act* would have a strong public interest component that affects a wide scope of products and services purchased by millions of consumers across the province.

New e-commerce protections for consumers

Future Performance Agreements

(Refers to Part IV, Sections 21-26 of the Act)

- defined in Part I, s. 1 of CPA as: "a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement".
- important provision because it describes a broad and common area of consumer agreement such as internet service, telephone, wireless and cable TV agreements

- Act and regs. – set out requirements for future performance agreements i.e. must be in writing, delivered to consumer and contain certain prescribed requirements (reg. Fp.2), consumer has certain rights of cancellation (for not receiving copy of agreement w/in certain time pd., for late delivery under the agreement or commencement of performance under the agreement)
- PIAC's concern with this reg.- doesn't describe how agreement is to be conveyed to consumer
 - o only describes what a future performance agreement should contain.
 - o makes no mention of how agreement is to be conveyed to the consumer, in contrast to the regs. for remote agreements or Internet agreements, which describe how a copy of the agreement is delivered to the consumer – ra.4 and ia.3).

Canceling future performance agreements

- S. 23 of the Act gives consumer right to cancel a future performance agreement within one year if the consumer does not receive a copy of the agreement that meets the requirements set out in the previous section
- no rule regarding notifications of cancellation of future performance agreements by consumers in the regulations
 - o provision under Part IX of the Act (Consumer Remedies) that deals with notification of cancellation is confusing:
 - S. 94. (1) states if a consumer has a right to cancel a consumer agreement under the Act, they may cancel the agreement by giving notice in accordance with section 92.
 - S. 92. (1) states that if Act requires consumer to give notice to request a remedy, the consumer may do so “by giving notice in accordance with this section”. The section then proceeds to illustrate how the consumer may give notice in a very broad and open-ended description
 - o Compare Nova Scotia govt' regs. regarding Internet contracts - much simpler for the consumer to understand and apply. S. 7 (1) states: “A consumer may notify a supplier of cancellation of their internet sales contract in any manner or form that indicates the consumer's intent to cancel the contract.”² The second part of the regulation lists (non-exclusively) manners and forms of notification – personal service, registered mail, telephone, courier, fax, e-mail.

What's missing – rules restricting cancellation fees

- Nothing in the Act or the regs. protecting consumers from unreasonable cancellation fees.

² N.S. Reg. 91/2002, s.7 (1).

- Cell phone companies currently capturing consumers and inhibiting competition by promoting multi-year contracts with significant benefits
- advertisements don't mention the fees that apply if the consumer cancels the contract before the term of the contract is over.
 - o Rogers AT&T wireless indicates on its website under "Terms and Conditions" link found at the bottom of the site³, that the consumer must pay an early cancellation fee of \$20 plus tax, times the no of months remaining in the service agreement, to a maximum of \$200. The cancellation fee may be waived but only under the most stringent kind of conditions: that the device is returned in complete and original condition to the store where it was purchased, the cancellation is requested within 30 days of activation **and** the account has incurred less than 30 min. of airtime usage and 150 kilobytes of data usage
 - o Bell Mobility⁴ imposes early cancellation fees of \$99 on a 12-month contract and \$199 on a 24-month contract.
 - o PIAC's view: Fees are disproportionately high in the case of consumers who change their minds shortly after purchasing the service. The fees should better reflect the relationship of the costs incurred by the company to the benefit received by the consumer.

Remote Agreements

(Refers to Part IV, Sections 44-47 of the Act)

- Remote agreement is defined in the Act (Part IV, s. 20) as: "a consumer agreement entered into when the consumer and supplier are not present together."
- Act and regs. Provide for disclosure of information (prescribed by the reg. Ra.3) before consumer enters into agreement, copy in writing to be delivered to consumer w/in prescribed period, consumer's right to cancel agreement
- PIAC supports provisions that specifically apply to such agreements. As indicated, they are increasingly important in an age where consumer agreements are less and less in the form of direct or face-to-face contacts.
- same issue arises here wrt notification of cancellation of remote agreements by the consumer as with future performance agreements. Neither is covered in the regulations. S. 47 of the Act allows for cancellation of a remote agreement under certain conditions; the cancellation right then brings the notification provisions under Part IX of

³ <http://www.shoprogers.com/About/English%20gsm%20ts%20%20cs%20511.pdf> Accessed January 12, 2004.

⁴ http://www.bell.ca/shop/en/jsp/content/cust_care/pdfdocs/mobil_agreement.pdf Accessed on January 12, 2004.

the Act into play. Therefore, the same concerns expressed above with respect to future performance agreements apply here.

Internet agreements

(Refers to Part IV, Sections 37-40 of the Act)

- defined as “consumer agreement formed by text-based internet communications” (CPA, s. 20)
- Act and regs. Set out consumer rights re:
 - o disclosure of prescribed information *before* consumer enters into internet agreement,
 - o requirements with respect to the “manner of disclosure” – that it is accessible and available in a manner that ensures consumer has “accessed the information” and is “able to retain and print the information” (CPA, s. 38. (3))
 - o requirement for supplier to deliver copy of agreement to consumer w/in prescribed period, what must be contained in internet agreement, consumer rights wrt cancellation
- Rules regarding conditions under which a consumer may cancel an Internet contract are covered in the Act (s. 40), but not the regs.
 - o Not clear why this has been done, given that cancellation conditions applying to other consumer agreements are found in the regulation pertaining to Procedures for Consumer Remedies.
- Rules not as comprehensive as other jurisdictions in providing opportunities for cancellation of contract by consumer (CPA, s. 40 allows for cancellation w/in seven days from receiving the agreement if doesn’t disclose required info. or give consumer express opportunity to accept or decline agreement or supplier doesn’t provide copy of agreement to consumer w/in 30 days)
 - o Can we presume that the provision of the Act applying to Future Performance agreements (s.26) allowing for cancellation if the supplier does not make deliver under the agreement within a certain time frame or does not begin performance of the obligations under the agreement within a specified date, would apply to Internet contracts, based on s. 4 of the Act (s.4 - where a consumer agreement meets the criteria of more than one type of agreement to which this Act applies “shall comply with the provisions that apply to each type of agreement for which it meets the criteria except where the application of the provisions is excluded as prescribed”)?
 - o The regulation on overlap (1.10) suggests that s. 26 would apply – but this is extremely confusing to work through in order to understand what powers consumers have under the rules – it would be much easier to state this in the provision dealing with Internet agreements

Consumer Remedies regulation

(corresponds to S. 18, Part III Unfair Practices (rescinding agreement due to unfair practice), Part IV, ss. 20(2) (limitations on cancellation), Part IX, Consumer Remedies, ss. 91-101 of the Act)

- Part IX of the Act sets out the procedures for consumer remedies where the Act gives the consumer the right to cancel an agreement (s.23 - future performance agreement, s. s. 40 - Internet agreement, s. 43 – direct agreement, s. 47 – remote agreement)
- Regulation sets out the obligations on a consumer upon cancellation

Other important consumer protections re: credit and credit repair

- New Act - transparency for consumers in credit transactions
- New Act – reflects reality of credit in consumers’ lives
 - o We live in a world where consumers are increasingly dependent on credit. As a result, consumers need to have rules that apply broadly and that also allow for more complete disclosure of all aspects of credit agreements. We are very pleased to see that the regulations respond quite comprehensively to these concerns.

Credit Repair regulation

(Part V, ss 48-54 of the Act)

- credit repair regulation and its related statutory provisions in the *Consumer Protection Act* have been removed from the existing credit reporting legislation, the *Consumer Reporting Act*.
- Our overall concern with this kind of regulation and its related statutory provision is that it is regulating a practice, the credit repair business, which by the Ministry’s own statutory declaration (see reg. 5.3(2) – one of the disclosure requirements includes this statement: “If a consumer reporting agency maintains a credit file with respect to you, you have the right to dispute with the agency, at no cost to you, the accuracy or completeness of the information about you in its file. You do not need to hire a credit repairer, or anyone else to exercise this right.”) is not necessary for consumers.
- PIAC would prefer that the necessity for credit repair agencies be eliminated by changes to related legislation, the *Consumer Reporting Act*.

The focus on protections with respect to credit repair only reinforces an existing problem in the current *Consumer Reporting Act* where the onus is placed on the consumer to ensure that their credit report is accurate. This onus only encourages consumers to use credit repair agencies. What is required is a change to the *Consumer Reporting Act*.

- PIAC has supported, in the recent past, a private member's Bill that would amend the *Consumer Reporting Act* to ensure that every person who refers to a consumer report in connection with a transaction or denies a benefit based on information received from a consumer reporting agency, informs the consumer that a consumer report is being referred to and provides the consumer with the name and address of the consumer reporting agency supplying the report.

Issue: Cancellation of a credit repair agreement

The statute allows for cancellation by a consumer of a credit repair agreement, but neither the provision nor the regulation sets out the means by which a consumer may cancel a credit repair agreement.

Credit Agreements

(Part VII of the Act, sections 66-85)

- PIAC pleased to see broader application of this section
 - o Issues related to credit agreements are significant for consumers (for e.g. the Financial Consumer Agency of Canada, which monitors federally regulated financial institutions, reported in its 2002-3 Annual Report that large numbers of complaints (almost one-quarter of all inquiries and complaints) to their consumer information line concerned questions about how interest was calculated on their credit cards, and “for assistance in understanding letters that described changes in their credit card fees”⁵)
 - o As stated in backgrounder to the regs - thus including retailers offering credit, finance companies offering loans and “payday” lenders
 - o What protections do provisions of the Act and accompanying regs offer to borrowers entering into payday loan contracts?
 - Act and regs. focus on disclosure (ss. 77-81)

⁵ Financial Consumer Agency of Canada, *Connecting with Canadians, Annual Report 2002-2003* at 38-39.

- Regarding representations made by lender (s.77)
- Regarding the credit agreement itself (ss.79 – 81)
 - Regs. (7.11, 7.12) contain approx. 14 new requirements for initial disclosure under fixed and open credit (CPA., s. 1 “credit that anticipates multiple advances to be made as requested by the borrower in accordance with the agreement and which does not define the total amount to be advanced to the borrower under the agreement, although it may impose a credit limit”) arrangements as well as subsequent disclosures (7.15)
- Act also sets out maximum liability for unauthorized charges (charges incurred without authorization of borrower when card is used after having been lost or stolen) (s. 69, reg. 7.6(2) - \$50)
- Act also sets out provisions where disclosure of the annual percentage rate for credit agreement is required – advertising (reg. 7.9(3), credit card applications (reg. 7.10 (1), initial disclosure statements – fixed and open credit agreements - PIAC in favour of harmonized rules wrt disclosure of cost of credit – allows consumers to comparison shop between federally regulated (banks) and provincially regulated (finance companies) institutions
- APR also helps consumers understand real cost of some forms of credit (such as payday loans) – interest figure that estimates what a comparable rate would be under a loan that has both non-interest fees and interest costs if consumer made all the payments only as interest (where there are no non-interest charges, APR and the annual interest rate are the same)

Final thoughts

- Act and regulations are detailed, because of their comprehensive application, but confusing – both would require consumers to have skills in statutory interpretation to read and apply provisions
- Part I of the Act sets out principles regarding overlap (s.4 - where a consumer agreement meets the criteria of more than one type of agreement to which this Act applies “shall comply with the provisions that apply to each type of agreement for which it meets the criteria except where the application of the provisions is excluded as prescribed”). The preamble to the regulation on overlap interprets this section as meaning that where an agreement meets the criteria of more than one type of

agreement under the Act, the agreement must comply with the provisions that apply to each type of agreement, except where the regulations exclude any provisions' application.

- The regulation on overlap sets out the specific exclusions in order to determine which set of rules apply to agreements that meet the criteria of more than one type of agreement under the Act
- The problem with this provision and the accompanying regulation is that it is confusing and not easily understood by consumers (or for that matter, anyone looking at the regulations). The reason for this is that the omnibus provision or regulation which applies to a number of provisions or regulations. It thus forces the user of the legislation to have to go back and forth between the omnibus provisions and the specific provisions in order to understand what is permitted for any type of consumer agreement or what protections are in place for the consumer.
- The regulation is also expressed negatively, not affirmatively, so that it is difficult to determine easily what rules *do* apply to consumer agreements, which is what consumers need to know. Most consumers do not specialize in statutory interpretation. It is also difficult to determine how to deal with overlap between the regulations made pursuant to the specific provisions governing various consumer agreements – does the same overlap principle apply to the regulations?
- From the consumer's perspective, it would be much clearer and simpler to set out all the elements that apply to a provision and its related regulation, in that provision and its related regulation.