ELECTRONIC COMMERCE, INTERNET AND THE LAW: A SURVEY OF THE LEGAL ISSUES

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Introduction

We are witnessing today the early tumultuous years of a revolution as important as any other in mankind's history. New means of human communication are emerging that one day may surpass all previous revolutions including those brought about by the printing press, the telephone, the radio, the television and computers. Its impact upon our social and economic life will be dramatic.

The coming of the so called "Information Age", the "Communications Revolution", the "Information Highway", the "Internet" and "electronic commerce" have been written about extensively and their effects are beginning to be felt by nations and their inhabitants around the globe. Rapid changes in micro-electronics, software, computer and telecommunications technologies are creating an information, knowledge-based economy premised on the networking of human intelligence. Some view the shift to a knowledge-based society as significant a change as the Industrial Revolution that reshaped western history.[1]

The new medium of communication brought about by the rapid development in, and the convergence of, software, computers, and telecommunications technologies and the content carried on electronic networks has been referred to using various suggestive, yet ambiguous terms. For example, the term "Information Highway", is often used in Canada[2], "National Information Infrastructure (NII)", in the United States[3], and "Information Society" in the United Kingdom.[4] These terms are intended to describe systems of high speed telecommunications networks, databases, advanced

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[1]For a more in-depth look at this topic, see: Don Tapscott *The Digital Economy: Promise and Peril in the Age of Network Intelligence* (Toronto: McGraw-Hill, 1996), Nicholas Negroponte, *Being Digital* (New York: First Vintage Books, 1995), Bill Gates, *The Road Ahead*, (New York: Penguin Books U.S.A. Inc., 1995).

[2]See *Connection, community, content: The Challenge of the Information Highway: Final Report of the Information Highway Advisory Council* (Ottawa: Queen's Printer, September 1995).

[3]See National Information Infrastructure Advisory Council (NIIAC) (1996). *The National Information Infrastructure: Agenda for Action* [WWW document]. URL http://www.uark.edu/~niiac.

[4]See *Information Society: Agenda for Action in the United Kingdom, Select Committee on Science and Technology* House of Lords Paper No. 77 (London: Queen's Printer, July 23, 1996).

communication systems and software intelligence that will make electronic content and information of all forms widely available and accessible.

There is widespread belief that as these networks become more interconnected and easier to use that individuals, corporations, governments and other organizations, will use the information highway to buy and sell goods electronically, share, distribute and publish information, engage in interactive multimedia communications, and receive government services and benefits.[5] The information highway will have significant national implications for Canada's emerging knowledge-based economy.[6] However, its dimensions are global.

Electronic commerce encompasses a wide spectrum of activities, some well established, most new. It is about doing business electronically; however, there is no single accepted definition of the term "electronic commerce". One reason for this is that new uses of the medium are emerging constantly.[7] Electronic commerce can be defined to include any kind of transaction that is made using digital technology, including transactions over open networks such as the Internet, closed networks such as electronic data interchange (EDI) and debit and credit cards.[8] Defined broadly it would include commercial transactions effected through any electronic means including facsimile, telex, and telephone.

The term "electronic commerce" can also be given a more limited interpretation to those trade and commercial transactions involving computer to computer communications whether utilizing an open or closed network.[9] This "narrow" definition would include an enormous, growing and diverse range of activities including electronic trading of goods and services, on-line delivery of digital content, electronic banking, electronic payment and fund transfers, electronic bills of lading, commercial auctions, collaborative design, engineering services, public procurement, and direct consumer marketing and after sales services. So understood, electronic commerce would therefore include indirect electronic commerce (electronic ordering of tangible goods) as well as direct electronic commerce (on-line delivery of intangibles). It would also involve the transfer of products (such as consumer goods and services, information services, financial and legal services) and the dissemination of traditional activities such

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[5]*The Canadian Electronic Commerce Strategy* (Ottawa: Industry Canada, 1998).

[6]Order in Council P.C. 1994-1105.

[7]Zwart, M. (1998).*"Electronic Commerce: Promises, Potential and Proposals* [WWW document]. URL http://www.law.unsw.edu.au/publications/ journals/unswlj/e-commerce/zwart.html.

[8]*Supra* note 5 at 1.

[9]*Supra* note 7.

as health care and education, as well as activities such as shopping in virtual malls.[10]

Electronic commerce is at the leading edge of the technological forces shaping the world economy. These forces are related and mutually reinforcing: improvements in information and communication technologies, globalization of markets and investment, and the shift to a knowledge-based economy. It has the potential to transform the way we work, the way we shop and the way we interact with government.[11] The significant potential of electronic commerce to transform our economic and social life was recently summed up by the Minister of Revenue's Advisory Committee on Electronic Commerce which stated that electronic commerce "represents the most radical force of change that nations have encountered since the Industrial Revolution".[12]

Since electronic commerce has the potential to transform the conduct of commercial transactions, the business of government and the delivery of goods and services and information, it is forcing us to think about how existing laws and regulations will apply to electronic commerce activities. In fact, over the last few years there has developed an enormous global recognition that existing legal frameworks need to adapt to cope with the challenges associated with electronic commerce. Much work in the area is being done by governments, businesses and other non-governmental organizations.

The following is a summary of some of the legal and regulatory issues pertaining to electronic commerce. Because of the large number of issues and their complexity, only a synopsis of the main issues is provided. As many of the novel legal issues have arisen as a result of the increasing use of the Internet for electronic commerce, the issues discussed below will focus predominantly on the legal issues arising from electronic commerce activities in the Internet and other open network environments.

The Jurisdiction Challenge

The Internet, being a new and rapidly developing means of mass communication and information exchange, raises difficult questions of private international law. A web site established in Canada, the United States or elsewhere can generally be accessed by any Internet user anywhere in the world. Advertising on a web site is capable of reaching not just the residents of the province, state or country from which the web site is operated, but residents living anywhere else in the world. Goods can be bought and

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[10](1997) *A European Initiative in Electronic Commerce, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* [WWW document]. URL http://www.cordis.lu/esprit/src/ecomcomx.htm.

[11] John Manley, Minister of Industry, (Speech to the National Press Club, October 1, 1998) [unpublished].

[12] *Electronic Commerce and Canada's Tax Administration, A Report to the Minister of National Revenue from the Minister's Advisory Committee on Electronic Commerce* (Ottawa: Revenue Canada, April 1998).

sold over the Internet. Intangible products such as computer programs and sound recordings can also be bought and sold over the Internet and electronic copies can be transmitted or delivered to customers across the globe. Contracts of all types can be negotiated and concluded in cyberspace. Services can be performed or delivered over the Internet. A defamatory statement concerning a person can be posted on a UseNet site and be distributed to all other UseNet sites around the world, making the statement available to be read by anyone anywhere with access to the Internet. A copy of an infringing work uploaded to an Internet site will automatically be re-transmitted by Internet service providers to countless other sites around the world.

It is clear that activities carried on over the Internet can have consequences in many jurisdictions. Internet communications are almost universally unrestricted to a single territory. In fact, the Internet has no territorial boundaries. For practical purposes, when business is transacted over a computer network via a website accessed by a computer in one state, it takes place as much in that state as it does anywhere. The Internet breaks down barriers between physical jurisdictions. When a buyer and seller consummate a commercial transaction over the Internet, there is no need for the traditional physical acts that often determine which jurisdiction's laws will apply and whether the buyer or seller will be subject to personal jurisdiction in the courts where the other is located. These insights were recognized by United States District Court Judge Gertner, in *Digital Equipment Corporation v. Altavista Technology, Inc.* where he stated:

> The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there", the "there" is everywhere where there is Internet access. When business is transacted over a computer network via a website accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.

On the Internet, messages can be transmitted from any physical location to any other location. But, there are no physical cues or barriers that might otherwise keep geographically remote places and people separate from one another. The traditional physical boundaries, which have also framed legal boundaries, no longer exist as sign-posts to warn people that they may be required to abide by different rules or may become subject to the jurisdiction of a new sovereign after crossing legal boundaries.[13] This point was made cogently by United States District Court Judge Preska in a case challenging the constitutionality of a New York law that attempted to protect children from pedophiles by regulating the transmission of on-line materials:

> The Internet is wholly insensitive to geographic distinctions. In almost every case, users

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[13]*Digital Equipment Corporation v. Altavista Technology, Inc.*, 960 F. Supp. 456, (D. Mass 1997) [hereinafter *Digital Equipment*].

> of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have "addresses", they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even when an Internet address provides such a clue, it may be misleading.[14]

Most legal systems are premised on the tenet that sovereign states have exclusive jurisdiction in their own territories.[15] This principle is reflected in the public international law principle that each state has jurisdiction to make and apply its own laws within its territorial boundaries.[16] Typically states' jurisdictional limits are related to geography; however, this is a virtually meaningless construct on the Internet. This unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright regulation by states that the actor never intended to reach and possibly was unaware were being accessed.[17]

States are generally hesitant to exercise jurisdiction over matters that may take place in the territory of other states.[18] Without a breach of some overriding norm, other states will, as a matter of comity, ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits.[19] To accommodate the movement of people, wealth and skills across state lines, courts in one state will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. Therefore, Individuals need not, in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.[20]

In the Internet environment where the location of the activity is potentially

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[14]*American Library Association v. Pataki,,* 969 F. Supp. 160 (S.D.N.Y.1997) [hereinafter *Pataki*].

[15]*De Savoye v. Morguard Investments Ltd.*, [1993] 4 S.C.R. 289 [hereinafter *Morguard*].

[16]*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [hereinafter *Tolofson*].

[17]*Supra* note 14.

[18]*Supra* note 15.

[19]The term "comity" was described by Estey J. in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, quoting from the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113 (1895), as follows:

> "'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

[20]*Supra* note 16.

wherever there is Internet access, determining whether the activity implicates the laws of foreign jurisdictions raises significant factual, legal and policy considerations. In fact, the commercial use of the Internet tests the limits of the traditional territorial-based concepts of jurisdiction.[21] The policy questions are particularly complicated.

The development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance. Haphazard and uncoordinated regulation internationally can only frustrate the growth of cyberspace.[22] It is troubling to force corporations that do business over the Internet, because it is cost effective, to factor in the potential costs of complying with foreign laws and defending against litigation in each and every jurisdiction. Anticipating these costs could make the maintenance of Internet-based businesses more expensive. However, it is also troublesome to allow those who conduct business on the Internet to insulate themselves from the laws and jurisdiction in every territory, except in the territory (if any) where they are physically located.[23] These considerations strongly militate in favour of a solution which will require national, and more likely global, cooperation. Significantly different laws related to Internet use can only result in chaos, because at least some jurisdictions will likely enact or apply their laws to subject Internet users to conflicting obligations.[24] A United States District Court Judge expressed this thought as follows in the *Digital Equipment* [25]:

> Physical boundaries typically have framed legal boundaries, in effect creating sign posts that warn that we will be required after crossing to abide by different rules. To impose traditional territorial concepts on the commercial use of the Internet has dramatic implications, opening the web user up to inconsistent regulations throughout 50 states, indeed, throughout the globe. It also raises the possibility of dramatically changing what may well be "the most participatory market place of mass speech that this country--and indeed the world--has yet seen.

Regulatory Challenges Related to Electronic Commerce

Companies physically carrying on business in Canada must comply with a range of statutes, regulations, and common law and equitable rules pertaining to the business activities carried on. Canada, like many other countries of the world, has a myriad of federal, provincial and municipal statutory instruments which impact upon how business may be conducted and which affect the relationships between the businesses and persons with whom the businesses interact. In the Internet environment where the

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[21] *Supra* note 13.

[22] *Supra* note 14.

[23] *Supra* note 13.

[24] *Supra* note 14.

[25] *Ibid.*

location of business activities are potentially everywhere there is Internet access, determining which jurisdictions' laws apply can be an exceptionally difficult task. However, entities carrying on business over the Internet must consider the question or assume the consequences of failing to do so.

Set out below are some of the important types of laws and regulations which can impact businesses engaging in Internet based electronic commerce. The statutory frameworks described below relate principally to the laws of the Province of Ontario and the laws of Canada applicable therein. Companies carrying on business over the Internet must obviously consider what equivalent and/or additional provisions may be applicable in other jurisdictions. The laws and regulations described below are meant to be illustrative only of the types of legislative provisions which companies carrying on business over the Internet can expect to encounter.

Professional Practice

Many statutes require that persons engaged in the practice of a profession be licensed to carry on the profession or to provide professional services to the public. Such statutes also often impose restrictions on holding out to the public that such person is qualified to practice that profession in Ontario. For example:

Doctors: No person other than a member of the Royal College of Physicians and Surgeons of Ontario may hold himself or herself out as a person who is qualified to practice in Ontario as an osteopath, physician or surgeon or in a specialty of medicine. Further, to be entitled to communicate a diagnosis identifying a disease or disorder as the cause of a person's symptom, or to order the application of a prescribed form of energy or to dispense or sell a drug or to prescribe or dispense for vision or eye problems, contact lens or eye glasses, a person must be registered with the College of Physicians and Surgeons of Ontario.[26]

Engineers: No person may engage in the practice of professional engineering or hold himself, herself or itself out as engaging in the practice of professional engineering unless the person is the holder of a licence, a temporary licence or a limited licence.[27]

Lawyers: Except where otherwise provided by law, no person, other than a member whose rights and privileges are not suspended, may act as a barrister or solicitor or hold himself out as a representative of himself or herself to be a barrister or solicitor or practice as a barrister or solicitor; and no temporary member may act as a barrister or

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[26]*Medicine Act, 1991*, S.O. 1991, c. 30

[27]*Professional Engineers Act*, R.S.O. 1990, c. P-28

solicitor or practice as a barrister or solicitor except to the extent as permitted by law.[28]

Foreign equivalents to the above referenced statutes could in certain circumstances prevent professional persons such as architects, doctors, and engineers from performing or delivering services in Ontario over the Internet to persons outside of Ontario. These statutes could also prevent professionals in other jurisdictions from providing services over the Internet to residents of the Province of Ontario. They may also operate so as to prevent persons from advertising over the Internet that they are qualified to practice in certain professions. Certain legislation also operates to impose other statutory obligations upon health care and other professionals which could be applicable to services provided over the Internet.[29]

Licensing and Registration Requirements

Many statutes in the Province of Ontario require the licensing or registration of sellers of products and providers of services. Many of these statutes are intended to protect consumers. A person intending to establish a business or sell products in Ontario has to determine whether any specific legislation governs that business. The list set out below generally describes some of the types of businesses and persons that must be licensed or registered. The list, while not complete, is intended to indicate the types of businesses for which registration or licenses are required and to indicate the types of legislative regulation which may be mandated in other jurisdictions. For example:

Extra-Provincial Corporations: No extra-provincial corporation may *carry on any of its business* in Ontario without a licence under this Act to do so, and no person acting as representative for or agent for any such extra-provincial corporation shall carry on any of its business in Ontario unless the corporation has a licence.[30]

Collection Agencies: No person may carry on the business of a collection agency or act as a collector unless the person is registered under the *Limited Partnerships Act*, R.S.O. 1990, c. L-16.. A collection agency includes people who hold themselves out to the public as providing a service or arranging payment of money owing to another person or who sells or offers to sell forms or letters represented to be a collection system or scheme.

Consumer Reporting Agencies: In order to conduct or act as a consumer reporting agency or as a personal information investigator, a person must be registered under the *Consumer Reporting Act,* R.S.O. 1990, c. C-33.

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[28] *Law Society Act*, R.S.O. 1990, c. L-8

[29] *Health Care Consent Act, 1996* S.O. 1996, c. 2.

[30] *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E-27.

Insurance Agents: To act as an insurance broker a person must be registered. Also, no person may hold himself, herself or itself out as an insurance broker or as the holder of a certificate unless the person is the holder of a certificate under the *Registered Insurance Brokers Act*, R.S.O. 1990, c. R-19.

Travel Agencies: No person shall act or hold himself, herself or itself out as being available to act as a travel agent unless the person is registered as a travel agent by the registrar. Also, no travel agent may conduct business at a place at which the public is invited to deal unless it is named as an office in the registration.[31]

Trade in or Advise on Securities: No person or company may trade in a security unless the person or company is registered as a dealer or is registered as a sales person or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer; act as an underwriter unless the person or company is registered as an underwriter; or act as an advisor unless the person or company is registered as an advisor, or is registered as a partner or as an officer of a registered advisor and is acting on behalf of the advisor, and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.[32]

Banking Services: A bank may not *carry on any business* until the Superintendent has, by order, approved the commencement and carrying on of business by the Bank. Further, every entity that acquires, adopts or retains a name that, in any language, includes the word "Bank", "Banker", or "Banking", either alone or in combination with other words, or any word or words of import equivalent thereto, and every person who, in any language, uses the word "Bank", "Banker", or "Banking", either alone or in combination with other words, or any word or words of import equivalent thereto, to indicate or describe a business in Canada or any part of a business in Canada, without being authorized to do so by the Act or any other Act of Parliament, is guilty of an offence.[33]

Selling Books and Periodicals: No person shall *carry on business* as a distributor of paperback books and periodicals unless the person is registered to do so. A registration authorizes the registrant to *carry on business* only in the area in Ontario determined by the Registrar and described in a certificate of registration issued by the Registrar and the registrant shall not carry on business outside the area so described.[34]

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[31] *Travel Industry Act*, R.S.O. 1990, c. T-19.

[32] *Securities Act*, R.S.O. 1990, c. S-5.

[33] *Bank Act*, R.S.C., 1991, c. 46.

[34] *Paperback and Periodical Distributors Act*, R.S.O. 1990, c. P-1.

It can be seen from the foregoing examples that licensing and registration requirements can apply to a range of entities which carry business in Ontario. Some types of legislation may apply irrespective of the nature of the business being carried on in Ontario. For example, the legislation directed at extra-provincial corporations and extra-provincial limited partnerships fall into this category. Registration and licensing requirements may also apply in specific sectors, such as in the case of collection agencies, consumer reporting agencies, employments agencies, travel agencies, and insurance and real estate agents. Registration and licensing requirements also apply to persons offering financial, banking and other lending services. Businesses selling specific types of products also must comply. The statutes of the type described above could in certain circumstances require foreign entities carrying on business over the Internet to comply with certain registration or licensing requirements. Similarly, companies carrying-on business over the Internet might well need to comply with comparable statutory requirements elsewhere if, under the applicable legislation, they are considered to be carrying on business in other jurisdictions.

Consumer Protection and Discriminatory Practices Legislation

Various statutes apply generally to persons carrying on business in Canada, or particular Provinces of Canada, that are designed to protect consumers or to promote specific social policies including those related to human rights and discriminatory business practices. It is possible that such legislation would apply to persons that are held to carry on business on-line or that offer goods or services over the Internet. For example:

Misleading Advertising: Under the *Competition Act,* R.S.C. 1995, c. 34, s. 52(1). it is a criminal offence to make a representation to the public which is false or misleading in a material respect where the representation is made for the purpose of promoting, directly or indirectly, the supply or use of a product for the purpose of promoting, directly or indirectly, any business interest by any means whatsoever. Further, under the Ontario *Business Practices Act,* R.S.O. c. B-18 certain "unfair practices" are prohibited. Unfair practices include false, misleading or deceptive consumer representations including representations that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have; a representation that goods are of a particular standard or quality, if they are not; a representation that a specific price advantage exists, if it does not; a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the representation is false or misleading; a representation using exaggeration, innuendo or ambiguity as to material fact or failing to state a material fact of such use or failure deceives or tends to deceive; or a representation that misrepresents the purpose or intent of any solicitation of or any communication with the consumer.

Writing and Signature Requirements: Many jurisdictions have enacted or inherited

legislation based upon the English *Statute of Frauds*. This legislation mandated formal writing requirements for certain classes of contracts such as contracts of guarantee, contracts for the sale of land, and contracts not to be performed within a year.[35] Writing requirements have historically also been part of sale of goods legislation in the common law provinces.[36] While several provinces have repealed certain of the statutory provisions requiring signatures and writings, writing requirements still exist. For example, under the *Ontario Consumer Protection Act*, R.S.O. 1990, c.31, 19(1) [hereinafter OCPA], every executory contract for the sale of goods or services where the purchase price, excluding the cost of borrowing, exceeds fifty dollars (other than an executory contract under an agreement for variable credit) must be in writing and must contain certain prescribed information. Further, an executory contract is not binding on the buyer unless the contract is signed by the parties, and a duplicate original copy thereof is in the possession of each of the parties.

Privacy and Data Protection: The common law provinces do not recognize a general right of privacy such as a tort for the invasion of privacy.[37] However, Four Canadian Provinces (Newfoundland, Saskatchewan, Manitoba and British Columbia) have enacted privacy statutes to create a statutory tort for a person who wilfully and without claim of right violates the privacy of another person.[38] Under such legislation it is a tort to use a person's likeness, name or voice for advertising, sales promotion, or other commercial use without the person's consent. Under the Québec *Civil Code*, Articles 35 and 36, an express right of privacy is also provided. This right of privacy includes the right in respect of the use of personal documents and appropriation of image. The Province of Québec has also enacted data protection rules which extend to businesses in that Province.[39] In October of 1998, the Federal Government also introduced into the House of Commons the *Personal Information and Protection and Electronic Documents Act*, Bill C-6.

Broadcasting and Telecommunications

The distribution of "new media" over the Internet is potentially subject to regulation by the CRTC. In fact, proceedings are now before the CRTC to consider the extent to which the CRTC can and should regulate new and emerging services, including on-line commercial multi-media services pursuant to the *Broadcasting Act*, R.S.C 1991, c. 11.

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[35] *Statute of Frauds*, R.S.O. 1990, c. S-19.

[36] See for example, *Sale of Goods Act*, R.S.O. 1990, c. S-1.

[37] Peter Burns, *"The Law and Privacy: The Canadian Experience"* (1976) 54 Can. Bar. Rev. 1.

[38] See *Privacy Act*, R.S.B.C. 1979 c. 336, *An Act Respecting the Protection of Privacy*, R.S.S. 1978, c. P-24, *An Act Respecting the Protection of Personal Property*, R.S.N. 1990, c. P-22, and the *Privacy Act*, R.S.M. 1987, c. P-125.

[39] See Articles 37-41, *Québec Civil Code* and *An Act Respecting the Protection of Personal Information in the Private Sector*, S.Q. 1993, c. 17.

There are also significant issues arising under the *Telecommunications Act,* R.S.C. 1993, c. 38.

Personal Jurisdiction

As noted above, the use of the Internet to conduct electronic commerce raises the difficult conflicts of law question as to when a foreign court will assume jurisdiction over a person not residing within its territorial boundaries. This section of the paper will provide an overview of the concepts of personal jurisdiction under Canadian and American law, and a summary of some of the case law that has developed related to personal jurisdiction and Internet based electronic commerce.

Personal Jurisdiction Under Canadian Law - General Principles

The rules of civil procedure of most Provinces in Canada set out the circumstances in which a party to a proceeding may serve the originating process outside of the Province. For example, under the Rules of Civil Procedure applicable in the Province of Ontario, Rule 17.02, a party to a proceeding may, without court order, be served outside Ontario with an originating process where the proceeding against the party consists of a claim or claims, *inter alia*, in respect of real or personal property in Ontario; in respect of a tort committed in Ontario; in respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed; or against a person ordinarily resident or carrying on business in Ontario. The Ontario rules also provide that a court may grant leave in other circumstances to serve an originating process outside of Ontario.

To prevent overreaching, courts in Canada have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions.[40] For constitutional reasons, a court in Canada may exercise jurisdiction only if it has a "real and substantial connection" with the subject matter of the litigation.[41] This requirement is intended to satisfy the principle of "order and fairness", a guiding element in Canadian law in the determination of an appropriate forum.[42] The exact limits of what constitutes a reasonable assumption of jurisdiction are not rigid and they have not been fully refined in Canada.[43] However, the test is intended to prevent a Canadian court from unduly entering into matters in which the jurisdiction in which

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[40] *Supra* note 16.

[41] *Supra* note 15.

[42] *Hunt v. Lac D'Amiante du Quebec Limitee* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

[43] *Ibid.*

the court is located has little interest.[44]

A court in Canada may also refuse to exercise jurisdiction over extraterritorial or transnational transactions through the doctrine of *forum non-conveniens*. Under this doctrine, a court may refuse jurisdiction where there clearly is a more appropriate jurisdiction in which the case should be tried than the domestic jurisdiction chosen by the plaintiff.[45] The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties.[46] All factors pertinent to making this determination must be considered.[47]

Residents of Canada who use the Internet need to be concerned not only with the circumstances under which a court in another Province may assume jurisdiction with respect to Internet activities, but also whether courts in jurisdictions outside of Canada could assume jurisdiction. Because communications over the Internet have worldwide implications, it can be a daunting challenge to know with certainty when foreign courts will assume personal jurisdiction over Canadians with respect to Internet activities. Since a substantial number of Internet users are located in the United States and since the courts in that country have now started to examine these issues, a review of American law is provided below. These cases should also be of interest to Canadians given certain analogies between Canadian and American principles of law in this area.[48]

Personal Jurisdiction Under American Law - General Principles

In the United States personal jurisdiction may be either general or specific in nature, depending on the nature of the contacts in a given case. General jurisdiction exists when the defendant is domiciled in the forum state or its activities in the state are "substantial" or "continuous and systematic". Specific jurisdiction arises in circumstances where the defendant's contacts with the forum state are insufficient to establish general jurisdiction, but the defendant's activities in the forum are sufficient

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[44]*Supra* note 16.

[45]*Amchen Products Inc. v. British Columbia* (Compensation Board), [1993] 1 S.C.R. 897.

[46]*Ibid.*; *Frymer v. Brettschnider* (1994) 28 C.P.C. (3d) 84 (Ont.C.A.), *MacDonald v. Lasnier et al* (1994) 21 O.R. (3d) 177 (Ont. G. D.).

[47]In Ontario, for example, key considerations are the location of the majority of the parties and key evidence; the location of key witnesses; geographical factors suggesting the natural forum; the avoidance of a multiplicity of proceedings; the applicable law and its weight compared with the factual questions to be decided.

[48]See *Morguard*, in which the observation is made by Mr. Justice La Forest that the position taken in the United States through the instrumentality of the Due Process clause in the Constitution of the United States may be similar to the constitutional limits of a Provincial court over defendants residing outside the province, *supra* note 15.

to establish jurisdiction for the purposes of the litigation.[49] Whether or not a court has personal jurisdiction over a defendant depends upon the unique facts of each case.[50]

The starting point in analyzing personal jurisdiction issues in federal cases is the "long-arm" statute in effect in the state in which the court is located.[51] As such, where there is no applicable federal statute governing personal jurisdiction, federal courts apply the law of the state in which the district court sits.[52] However, the laws of the forum state are subject to the limits of the Due Process clause of the 14th Amendment of the Constitution of the United States. Therefore, the defendant, must be amenable to suit under the forum state's long-arm statute and the Due Process requirements of the United States constitution.[53] In some instances, a state's long-arm statute merely confirms jurisdiction co-extensive with that permitted by the Due Process Clause. In this case, the analysis required is to determine whether the non-resident has sufficient contacts with the forum state to satisfy due process such that it is appropriate to exercise general or specific jurisdiction.[54]

In determining whether a court has specific jurisdiction over a defendant, the crucial federal constitutional inquiry is whether, given the facts of the case, the non-resident defendant has sufficient contacts with the forum state that the district court's exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice".[55] The defendant's conduct and connection with the forum state must be such that the defendant should reasonably anticipate being haled into court there.[56] Where the defendant is the national of a foreign country, the interests of the foreign nations are, for reasons of comity, respected.[57]

Various tests have been enunciated in the United States to determine whether a court has specific jurisdiction in a given case. For example, the Ninth Circuit Court of Appeals employs a three-pronged test to determine whether a court has specific jurisdiction: (1) the defendant must perform an act or consummate a transaction within the forum, purposely availing himself of the privilege of conducting activities in the

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[49]*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408; *Data Disc, Inc.* v. *Systems Technology Associations, Inc.*, 557 F.2d 1280 (9th Cir. 1977).

[50]*Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482 (9th Cir. 1993).

[51]*Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298 (9th Cir. 1974).

[52]*Supra* note 50.

[53]*Flight Devices Corp. v. Van Dusen Air Inc.*, 466 F.2d 220 (6th Cir. 1972).

[54]*Data Disc Supra* note 45, *California Software Incorporated v. Reliability Research, Inc.*, 631 F.Supp. 1356 (C.D. Cal. 1986) [hereinafter *California Software*].

[55]*International Shoe Co. v. Washington*, 326 U.S. 310.

[56]*World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286.

[57]*International Technologies Consultants Inc.* v. *Euroglas S.A.*, 41 U.S.P.Q. 2d, 1820 (6th Cir. 1997).

forum and invoking the benefits and protection of its laws; (2) the claim must arise out of or result from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.[58] These three tests have been called purposeful availment, relatedness and reasonableness.[59] The Sixth Circuit Court of Appeals has a similar test: (1) the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.[60]

What is needed in any particular case to satisfy the "purposeful availment" test differs according to the underlying cause of action. Therefore, in performing the relevant analysis, the courts direct their attention to determining the nature of the underlying cause of action.[61] In general terms, the "purposeful availment" requirement is satisfied when the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state", and when the defendant's conduct and connection with the forum are such that he "should reasonably anticipate being haled into court there".[62] The essence of the minimum contacts test is "that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[63] The purposeful availment prong assures that a non-resident defendant will be aware that it could be sued in the forum state and is designed to protect a non-resident from being haled before a court solely because of "random, fortuitous or attenuated" contacts over which it has no control.

Under American law, a court may assert jurisdiction over a defendant who conducts its activities outside the physical boundaries of the forum state. In this regard, the United States Supreme Court has observed that it "is an inescapable fact of modern commercial life that a substantial amount of businesses is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State".[64] Therefore, so long as a commercial actor's efforts are purposely directed towards residents of another state, American courts have consistently rejected

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[58]*Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267 (9th Cir. 1995); *Panavision International, L.P. v. Toeppen*, 938 F.Supp. 616 (C.D. Cal. 1996).

[59]*Burger King Corp. v. Rudzewicz*, 471 U.S. 462

[60]*CompuServe, Inc. v. Patterson*, 39 U.S.P.Q. (2d) 1502 (6th Cir. 1996) [hereinafter *Compuserve*].

[61]*Panavision International, L.P. v. Toeppen*, 938 F.Supp. 616 (C.D. Cal. 1996).

[62]*Supra* note 59; *supra* note 56.

[63]*Hanson v. Denckla*, 357 U.S. 235; *supra* note 55.

[64]*Supra* note 59; *supra* note 56.

the notion that an absence of physical contacts can defeat personal jurisdiction there.[65] On this basis, the soliciting of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors, acts which are all accomplished without the physical presence of an agent, have all been held under American law to satisfy the minimum contacts required for personal jurisdiction.[66] Indeed, it has been questioned "whether, in an age of e-mail and teleconferencing, absence of actual personal visits to the forum is any longer of critical importance."[67]

The purposeful availment prong differs depending upon the underlying cause of action.[68] For example, a defendant will be considered to have purposely availed itself of the privilege of doing business in a forum when obligations created by the defendant or business operation set in motion have a realistic impact upon the commerce of that state. Or, if the defendant has purposely availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.[69] The minimum contacts requirement can be met when a suit is based on a contract which has a substantial connection with the forum state,[70] as long as the defendant has purposely availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[71] By way of further example, in tort, setting jurisdiction can be predicated on intentional actions aimed at the forum state that cause harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state.[72] This doctrine is known as the "effects test".[73]

As stated above, for a court to have specific jurisdiction over a defendant, the claim must arise out of or result from the defendant's forum related activities. If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will ordinarily be deemed to have arisen from those contacts.[74] Courts in the Ninth Circuit follow a "but for" analysis for this prong of the test. That is, if the plaintiff would not have suffered a loss "but for" the defendant's forum related

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[65] *Plus System, Inc. v. New England Network, Inc.*, 804 F.Supp. 111 (D. Col. 1992).

[66] *Supra* note 60, citing *Southern Mach. Co. v. Mohasco Industries*, 401 F.2d (6th Cir. 1968).

[67] *Agency Rent A Car System, Inc.* v. *Avis, Inc.*, 98 F.3d 25 (2d. Cir. 1996).

[68] *Supra* note 61.

[69] *Supra* note 60.

[70] *McGee v. International Life Insurance Company*, 355 U.S. 220

[71] *Hanson supra* note 63.

[72] *Edias Software International, llc. v. Basis International Ltd.*, 947 F.Supp. 413 (D. Ariz. 1996) [hereinafter *Edias*].

[73] *Supra* note 61.

[74] *Supra* note 60.

activities, courts hold that the claim arises out of the defendant's forum related activities.[75]

For specific jurisdiction to exist, the acts of the defendant or the consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.[76] This prong of the test requires that the court's exercise of jurisdiction comport with "fair play and substantial justice". The minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has the requisite minimum contacts with the forum. However, where minimum contacts have been established, the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.[77] Some cases have also held that where the first two elements of a *prima facie* case are present, purposeful availment and a cause of action arising from the defendant's contacts with the forum state, an inference arises that this third factor is also present.[78]

Courts in the United States consider various factors in determining whether the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. These factors include the extent of the defendant's purposeful interjection, the burden on the defendant in defending in the forum, the extent of conflict with the sovereignty of the defendant's state, the forum state's interest in adjudicating the dispute, the most efficient judicial resolution of the controversy, the importance of the forum to the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum.[79] In a tort setting, if a non-resident, acting outside of the state, intentionally causes injuries within the state, local jurisdiction is presumptively not unreasonable. Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that would render the jurisdiction unreasonable.[80]

As a result of the increasing nationalization of commerce and modern transportation and communication within the United States, there has been less of a perceived need for the Federal Constitution to protect defendants from inconvenient litigation. The trend of United States courts to broaden the permissible scope of jurisdiction as a result of the

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[75]*Ballard v. Savage*, 65 F.3d 1495 (9th Cir. 1995); *Ziegler v. Indian River Country*, 64 F.3d 470 (9th Cir. 1995).

[76]*Supra* note 60.

[77]*Supra* note 64.

[78]*Supra* note 60.

[79]*Supra* note 50.

[80]*Supra* note 61.

widespread use of new communications technologies was commented on in *California Software,*[81] wherein the court stated the following:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines.
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> This observation is just as applicable today as it was in 1957. Through the use of computers, corporations can now transact business and communicate with individuals in several states simultaneously. Unlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching. Thus, while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts.

While United States courts have stated that there has been less of a perceived need for the constitution to protect defendants from inconvenient litigation, the courts have also continually reiterated that the Due Process rights of a defendant should be the courts' primary concern where personal jurisdiction is at issue. In *CompuServe*[82] the United States Sixth Circuit Court of Appeals summarized the recent trend of the United States cases and their applicability to Due Process concerns pertaining to the Internet:

> The Supreme Court has noted, on more than one occasion, the confluence of the "increasing nationalization of commerce" and "modern transportation and communication and the resulting relaxation of the limits that the Due Process Clause imposes on courts' jurisdiction. Simply stated, there is less perceived need today for the federal constitution to protect defendants from "inconvenient litigation", because all but the most remote forums are easily accessible for the pursuit of both business and litigation. The Court has also, however, reminded us that the due process rights of a defendant should be the courts' primary concern where personal jurisdiction is at issue.
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> The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able "to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.

The courts, particularly in the United States, have now started to canvass the

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[81] *Supra* note 54.

[82] *Supra* note 60.

significance of activities carried on over the Internet to the issue of personal jurisdiction. As the case law discussed below will show, some courts have recognized that the Internet is an entirely new means of information exchange and that analogies to other forms of inter-jurisdictional contact are less than satisfactory.[83] Some cases have also recognized that finding jurisdiction over a defendant who has done nothing more than establish a web site open to all could have far reaching implications which would eviscerate the personal jurisdiction requirement as it currently exists.[84]

Internet Activity and General Jurisdiction

As described above, under American law, general jurisdiction permits a court to exercise personal jurisdiction over a person with respect to any cause of action arising in the jurisdiction. General jurisdiction exists when a person is domiciled in the forum state or its activities there are "substantial" or "continuous and systematic". Does the establishment and operation of an Internet web site in one jurisdiction which is accessible and open to all residents of another state, constitute an activity that is "substantial" or "continuous and systematic" in the latter state so as to create a general jurisdiction over the operator of the web site? Cases to date have held this not to be so.[85] In so holding, the courts have largely focused on the implications of finding personal jurisdiction through the instrumentality of the operation of a website. In *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q. (2d) 1826 (S.D. Cal. 1996), the court stated the following with respect to the plaintiff's allegation that general jurisdiction could be asserted by the mere establishment by the defendant of a website:

> In his opposition papers, Plaintiff has alleged that Fallon maintains a World Wide Web ("Web") site. Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a Web site used by Californians cannot establish jurisdiction by itself.

A similar result was reached in *IDS Life Insurance Company v. SunAmerica, Inc.*, 1997 WL 7286 (N.D.Ill. 1997).[86] The court's opinion on this issue was expressed in that case as follows:

> Plaintiffs ask this court to hold that any defendant who advertises nationally or on the

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[83] *Maritz, Inc. v. Cybergold, Inc.*, 40 U.S.P.Q 2d 1729 (E.D. Miss. 1996).

[84] *The Hearst Corporation v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997).

[85] *Graphic Controls Corporation v. Utah Medical Products, Inc.* 1997 WL 276232 (W.D.N.Y. 1997); *Nexos Resources (U.S.A.) Ltd. v. Southam Inc.*, 1997 WL 662451 (C.D.Cal. 1996); *Cybersell, Inc. v. Cybersell, Inc.*, Civ. 96-0089 (D. Ariz. 1996), Aff'd 44 U.S.P.Q. (2d) 1928 (9th Cir. 1998).

[86] 1997 WL 7286 (N.D.Ill. 1997).

> Internet is subject to its jurisdiction. It cannot plausibly be argued that any defendant who advertises nationally could expect to be haled into court in any state, for a cause of action that does not relate to the advertisements. Such general advertising is not the type of purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable.

Internet Activities and Specific Jurisdiction

Although the courts in the United States have not accepted that there may be "general jurisdiction" over a non-resident by virtue of the operation of a web site in another state, United States courts have now accepted that activities of non-residents over the Internet are capable of having significance with respect to the question of specific jurisdiction. Determining the significance in a given case is still far from settled. As noted above, the jurisdiction of courts in the United States over a person in a particular case is determined by examining compliance with the relevant long-arm statute as well as the established limits imposed by the due process requirements of the American constitution. Compliance with the due process requirement also depends upon the nature of the underlying cause of action. Therefore, It is not an easy task to enunciate a single test to determine when an American court will assume jurisdiction over a non-resident by virtue of activities carried on over the Internet. Examples of specific situations considered by the courts to date are considered below.

Carrying On Business and Personal Jurisdiction

Jurisdiction over a person is often asserted on the basis that the person carries on business or transacts business in the state. The wording of particular long-arm statutes creating personal jurisdiction on this basis often differs from jurisdiction to jurisdiction. For example, in the Province of Ontario, Rule 17.02 of the Rules of Civil Procedure expressly provides that a party to a proceeding may, without court order, be served outside Ontario with an originating process where the proceeding against the party consists of a claim or claims "against a person ordinarily resident or carrying on business in Ontario". In some states of the United States, the "transaction of any business" within the state allows the exercise of jurisdiction over non-residents, to the extent permissible under the Due Process clause.

It is not clear in what circumstances activities carried on over the Internet by a non-resident will be sufficient to fall within the "carrying on business" or "transacting of any business" requirements of long-arm statutes and satisfy the minimal contacts requirements with respect to the exercise of jurisdiction. In some Provinces of Canada, the phrase "carrying on business" ordinarily suggests that the business must have some fixed place in the jurisdiction and that the business must have been carried on for a substantial period of time. It also suggests some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained

for a period of time.[87] An isolated act does not constitute carrying on business within the jurisdiction.[88] However, a marketing strategy which includes periodic visits to a Canadian Province and advertising in the Province may constitute carrying on business in the Province.[89]

Is the "carrying on business" or "transaction of any business" requirement met by a person who conducts business outside of a State or Province over the Internet? The answer to this question is not yet completely settled, although a substantial amount of case law on this question exists in the United States.[90] The trend in the cases on this issue is that the exercise of personal jurisdiction over a foreign defendant is directly proportionate to the nature and quality of the commercial activity that the entity conducts over the Internet. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of information over the Internet, personal jurisdiction is likely to be proper. At the opposite end of the spectrum are situations where a defendant has simply posted information on an Internet web site which is accessible to users in foreign jurisdictions. A passive web site that does little more than make information available to those who are interested in it, is unlikely to create grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of personal jurisdiction is apt to be determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site.[91] In this regard, the quality of the electronic contacts may be measured with reference to the intended object of the activity.[92]

Tortious Activity and Personal Jurisdiction

The increasing interconnectedness of global networks and the concomitant increase in communications over this medium has brought with it a new potential for damage to be

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[87]See, *T.D.I. Hospitality Management Consultants Inc. v. Browne*, [1994] 9 WWR 153 (Man. C.A.); *Wilson v. Hull*, [1995] A.J. No. 896 (Alta. C.A.).

[88]*Appel v. Anchor Ins. & Invest. Corp. Ltd.* (1921), 21 O.W.N. 25 (H.C.).

[89]*Applied Processes Inc. v. Crane Co.* (1993) 15 O.R. (3d) 166 (Ont. G.D.); *Interamerican Transport Systems Inc.* v. *Grand Trunk Western Railroad* (1985), 51 O.R. (2d) 568 (Ont. Div. Ct.).

[90]See, *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D. Conn. 1996); *Heroes Inc. v. Heroes Foundation*, 41 U.S.P.Q. (2d) 1513 (D.C. 1996); *Bensusan Restaurant Corporation v. King*, U.S.P.Q. (2d) (2nd. Cir. 1997), *Transcaft Corp. v. Dooman Trailor Corp.*, 45 U.S.P.Q. (2d) 1097 (N.D. Iol. 1997).

[91]See, *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Penn. 1997) [hereinafter *Zippo*] in which these three categories of situations are suggested.

[92]*Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, 1997 WL 148567 (S.D.Ind. 1997).

suffered as a result of tortious conduct over such networks. For example, the torts of passing off, negligence, and defamation may be committed over electronic networks. Long-arm statutes in the United States as well as corresponding rules of civil procedure in the Provinces of Canada often permit an action to be brought in the jurisdiction in which the tort is committed or in respect of which damage is sustained arising from a tort, wherever committed.

To determine the personal jurisdiction of a court over a person in connection with an extraterritorial or transnational tortious activity, the courts in Canada have to undertake a two step process. The first step is to determine whether the applicable long-arm rules of civil procedure are satisfied. The second is to determine whether there is a real and substantial connection between the action and the province in which the claim is brought. There may be, in many instances also, an issue as to whether the forum in which the suit is brought is the *forum conveniens* for the suit.

It will often be a difficult process to determine whether a tort is committed in the jurisdiction in which the suit is brought. For transnational torts, the situs of the tort may be located in more than one place. If one part of the tort occurs in state A and another occurs in state B, the tort could reasonably for jurisdictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. In Canada, a flexible, qualitative and quantitative test has been adopted to determine where a tort has been committed. In *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 [hereinafter *Moran*], Dickson J. rejected any rigid or mechanical theory for determining the situs of a tort. Rather, he suggested the question be determined by posing the question in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether there was a "real and substantial connection" between the jurisdiction and the wrongdoing. This test has been described as where the tort in substance occurred. For example, in the case of the tort of negligence, the weight of authority in Canada is to the effect that the tort is committed in the jurisdiction which has the most real and substantial connection to the alleged negligent act. With respect to negligent misrepresentation, the tort is committed in the jurisdiction where the advice, or opinion, or representation is received and relied or acted upon.[93] In actions for defamation, the tort has traditionally considered to have been committed where the defamatory material is disseminated or published.[94]

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[93] *National Bank of Canada v. Clifford Chance*, (1996) 30 O.R. (3d) 746 (Ont. G.D.).

[94] *Jenner v. Sun Oil Co. Ltd. et al*, [1952] O.R. 240 (Ont. H.C.); *Pindling* v. *National Broadcasting Corp. et al*, (1984) 49 O.R. (2d) 58 (Ont. H.C.); *Shevill* v. *Presse Alliance S.A.* [1995] 2 A.C. 18; *Hubert* v. *DeCamillis*, (1963) 41 D.L.R. (2d) 495 (B.C.S.C.). Also see, *California Software*, *supra* note 54, and *Edias*, *supra* note 72, in which the courts examined issues pertaining to personal jurisdiction in the context of electronic communications.

Advertising and Marketing

Several American cases have canvassed whether the use of a web site by a non-resident to advertise its wares or services using allegedly infringing trade-marks of a person in the forum state will be sufficient to create personal jurisdiction over the non-resident in the forum state. To date, courts in the United States have reached conflicting decisions on this point. However, It does appear that it is less likely that personal jurisdiction will be assumed where the defendant's jurisdictionally significant actions consist only of posting information on an Internet website which is accessible to users in a foreign jurisdiction.[95]

Criminal Law and Jurisdiction

The primary basis of criminal jurisdiction is territorial, and the reasons for this are obvious. States ordinarily have little interest in prohibiting activities that occur abroad and they are also hesitant to incur the displeasure of other states by indiscriminate attempts to control activities that take place wholly within the boundaries of those other countries. This territorial principle is enshrined under Canadian criminal law in Section 5.2 of the *Criminal Code* which sets forth the general rule that no person shall be convicted of an offence committed outside Canada.

Given the international reach of the Internet, Canada may well have legitimate interests in prosecuting persons for activities that take place abroad but have unlawful consequences here, or in prosecuting persons for unlawful activities that take place here where the consequences are felt abroad. Numerous offences under the Criminal Code are capable of being transnational including those related to fraud,[96] distribution of pornography,[97] extortion (Section 346), false pretenses (Section 361 and 362), impersonation (Section 403), unauthorized use of a computer (Section 342.1), intimidation (Section 423), crimes related to gaming and betting (Sections 2.01-2.06) and many others.

Just as Canada has an interest in prosecuting transnational offences, so do other jurisdictions in which crimes are carried out, or carried out in part, or where the effects of crimes are felt. For example, in the United States it is well established that a person may be punished who commits an extraterritorial act which is intended to have an effect within the state.[98] Accordingly, activities carried on over the Internet may potentially be subject to the criminal laws of this country and those of other states.

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[95]See, *Zippo*, supra note 92.

[96]See *R. v. Selkirk*, [1965] 2 O.R. 168 (Ont. C.A.); *Re Chapman* [1970] 3 O.R. 344 (Ont. C.A.).

[97]See *R. v. Peccirich* (1995) 22 O.R. (3d) 748 (Ont. Prov. D.).

[98]*Strassheim v. Daily*, 221 U.S. 280; *United States v. Columa Colella*, F. 2d 356 (5th Cir. 1979).

The Canadian and United Kingdom law on the issue of jurisdiction over transnational offences was thoroughly reviewed by the Supreme Court of Canada in *Libman v. The Queen*, (1985) 21 CCC (3d) 206 (S.C.C.) [hereinafter *Libman*]. The court noted that transnational offences have been dealt with in a rather confusing fashion by the courts. The court noted that the primary basis of criminal jurisdiction is territorial. However, the court also observed that it is permissible under international law to exercise jurisdiction on other bases.

In reviewing the case law, the court in *Libman* noted that with respect to crimes that are transnational in nature, it could be argued that the basis for a court assuming jurisdiction is premised on where the act is planned or initiated, the place where the impact of the offence is felt, the place where the offence is initiated, the place where the offence is completed, the place where the gravamen or essential element of the offence takes place, or the place where a substantial or any part of the chain of events constituting the offence takes place. After an extensive review of the law, the court expressed the opinion that "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada". "It is sufficient that there be a 'real and substantial link' between an offence and this country, a test well known in public and private international law". The court did not explore what may constitute a "real and substantial link" in a particular case. It did state, however, that the "outer limits of the test may . . . well be coterminous with the requirements of international comity."

Invariably, the jurisdiction of a court in a criminal matter will need to be resolved by a careful analysis of the wording of the statute creating the offence. Thus, to make a determination of the potential criminality of an action, the specific activities will need to be reviewed in connection with the wording of the potentially applicable criminal statute. From the foregoing it may be concluded, however, that if there is a real and substantial link between an offence in this country, Canadian courts will have jurisdiction to try the offence in this country. Similarly, it is conceivable that other countries may assume jurisdiction in similar circumstances.[99]

Jurisdiction and Intellectual Property

The inherently transnational nature of the Internet makes it increasingly likely that acts of infringement will take place or have impacts in multiple jurisdictions. Acts of infringement may be initiated in one jurisdiction and completed in another. For example, a work protected by copyright could be transmitted electronically from outside of Canada to users inside of Canada. A work stored on a computer located inside of

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[99]See *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996) in which the operator of a computer bulletin board located in California was convicted in the State of Tennessee for knowingly using and causing to be used a facility and means of interstate commerce for the purpose of transporting obscene, computer generated material.

Canada could be electronically transmitted simultaneously to users in many countries outside of Canada. Further, digital information networks make it possible for a person in one country to be able to manipulate information resources in other countries in ways that may violate those countries' copyright or other intellectual property laws.[100] In the patent context, one can easily envisage a claim for a process involving the use of digital computers where part of the process is carried out in Canada with one or more steps of the process taking place outside of Canada. Use of a trade-mark to advertise a service over the Internet clearly also raises the specter of rights of foreigners. Increasingly, therefore, local courts will be faced with jurisdictional questions pertaining to unlicenced transnational uses of intellectual property.

While uses of intellectual property will increasingly have national effects, as a general principle intellectual property rights such as those related to copyrights and patents are territorial in nature. A patent for an invention gives a monopoly within the territory of the country which grants it. Outside that territory it has no force or effect. As such, statutory rights conferred by copyright[101] and patent[102] legislation do not ordinarily render unlawful anything done outside the domestic forum. A similar presumption against extraterritorial application applies to trade marks[103] but this rule does not apply to the same extent internationally.[104] There is authority that a person outside a local forum can be liable for infringement of a domestic patent if the foreigner had a common design with persons in the jurisdiction to infringe it.[105] There is also authority that under copyright law authorization given outside of a domestic forum to

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[100]See Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 20 Colum.VLA J.L. & Arts 571, and Ginsburg *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. Copyright Soc'y. U.S.A. 318.

[101]*Def Lepp Music v. Stuart-Brown* [1986] R.P.C. 273 (Ch.D.); *Atkinson Footwear Ltd. v. Hodgskin International Services Ltd.* (1994) 31 I.P.R. 186 (H.C.N.Z.). The law on this issue is the same in the United States. See, *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 30 U.S.P.Q. (2d) 1746 (9th Cir. 1994); *Nintendo of America Inc. v. Aeropower Co. Ltd.*, (4th Cir. 1994); *Kolbe v. Trudel*, 39 U.S.P.Q. (2d) 1537 (D. Ariz. 1996); *ITS I TV Productions, Inc. v. California Authority of Racing Fairs*, 785 F.Supp. 854 (E.D. Cal. 1992). See, however, *GB Marketing USA, Inc. v. Geroc Steiner Brunnen GmbH & Co.*, 782 F.Supp. 763 (W.D.N.Y. 1991).

[102]*Potter v. The Broken Hill Proprietary Company Ltd.* [1906] 3 C.L.R. 479 (H.C. Aust.); *Norbert Steinhardt and Son Limited v. Meth* (1960 - 61), 105 C.L.R. 440 (H.C. Aust.); *Badische Anilin und soda Fabrik v. Henry Johnson & Co.*, [1897] Ch.D. 322 (C.A.).

[103]See *Rey v. Lecouturier* [1908] 2 Ch. 715 aff'd. [1910] A.C. 262, and *James Burrough Distillers plc v. Speymalt Whiskey Distributors Ltd.* (1989) S.L.T. 561.

[104]For example, in the United States the *Lanham Act* has been construed to have extraterritorial effect where foreign conduct would cause harm to United States commerce. See, *Les Ballets Trockadero de Monte Carlo Inc. v. Trevino*, 41 U.S.P.Q. (2d) 1109 (S.D.N.Y. 1996). There is also authority in the commonwealth that a local court in a passing off action can restrain passing off abroad. See *Alfred Dunhill Limited v. Sunoptic S.A.* [1979] F.S.R. 337.

[105]*Morton-Norwich Products Inc. v. Intercen Limited* 1978 R.P.C. 501 (Ch.D.). This liability is based on a theory that a person may be liable as a joint tortfeasor provided he had a common design with a person or persons within the jurisdiction.

do one of the exclusive acts conferred by copyright legislation in the domestic forum is also infringement.[106] While these situations do permit courts in limited situations to grant relief with respect to conduct occurring outside of a domestic forum, they do not significantly change the rule that rights conferred under intellectual property legislation are generally intended to apply solely to acts occurring within the domestic forum.

In the United Kingdom, a claim that acts done outside of that country constitute an infringement of the copyright law of a foreign country are not justiciable in the United Kingdom. Two bases have been given for this. The first is that the issues of whether a copyright exists in another country and whether the plaintiff has title to it there are treated as questions *in rem* and not *in personam*.[107] It has also been argued that such an action cannot be brought because it would not fall within the conflicts of law double actionability rule set out in *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1. This rule prescribes that an act done in a foreign country is a tort and actionable as such in England only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort, and (b) actionable according to the law of the foreign country where it is done. Since a foreign copyright is territorial in operation and the act complained of would not be a tort if committed in England, it cannot be brought within the terms of the first part of the rule.[108]

The rule in *Phillips v. Eyre* was subject to considerable criticism by the Supreme Court of Canada in *Tolofson*. There, the Supreme Court noted that the first part of the rule is strictly related to jurisdiction while the second rule deals with choice of law. The Supreme Court also noted that pursuant to its earlier decision in *Morguard* a court may exercise jurisdiction over a dispute in Canada only if it has a "real and substantial connection" with the subject matter of the litigation. In *Tolofson*, the Supreme Court also established that, as a general rule, Canadian courts ought to apply the *lex loci delecti* rule as a rule for defining the obligation and consequences in tort actions. The court also doubted whether the requirement under English law that the wrong be actionable in the domestic forum was really necessary.

As a result of the decisions of the Supreme Court in *Morguard* and *Tolofson*, it is submitted that an action can be brought in Canada with respect to the infringement of a foreign copyright if it can be established that there is a "real and substantial connection" between the litigation and the Canadian forum, and there clearly is not a more appropriate forum than the domestic court in which the case should be tried. If there is, although the court may have jurisdiction to try the action, the court could refuse

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[106]See *Abkco Music & Records Inc. v. Music Collection International Limited*, 1995 R.P.C. 657 (Eng. C.A.).

[107]*Tyburn Productions Ltd. v. Conan Doyle* [1990] 1 All E.R. 909 (Ch.D.), *Atkinson Footwear Ltd. v. Hodgskin International Services Ltd.* (1994) 31 I.P.R. 186 (H.C.N.Z.).

[108]L. Collins, ed. *Dicey & Morris on the Conflicts of Laws*, vol. 2, 12th ed.(London: Sweet & Maxwell, 1993) at 1515 - 1517.

to exercise jurisdiction over the extraterritorial or transnational infringement through the doctrine of *forum non-conveniens*.[109]

Several American courts have held that actions may be brought before them with respect to activities that contravene foreign copyright laws. For example, in *London Film Productions Limited v. Intercontinental Communications, Inc.*, 580 F.Supp. 47 (S.D.N.Y. 1994) the plaintiff, a British corporation, commenced an action against a New York corporation based in New York City for infringements of the plaintiff's copyright. The alleged infringement occurred in Chile and other South American countries. The defendant moved to dismiss the plaintiff's complaint, arguing that the court should abstain from exercising jurisdiction over the action on the grounds that none of the alleged wrongdoings constituted violations of American law and that the court would have to construe alien rights, with which it had no familiarity. It also alleged that the suit would violate, in principle, the doctrine of *forum non-conveniens*. The court ruled that it had jurisdiction to hear the matter based on the theory that copyright infringement constitutes a transitory cause of action and hence may be adjudicated in the courts of a sovereign other than the one in which the cause of action arose. The court also noted that it was not bereft of interest in the case as it had an obvious interest in the conduct of its citizens in foreign countries. A similar ruling was made in *Creative Technology Ltd. v. Aztech Systems Pte Ltd.*, 35 U.S.P.Q. (2d) 1590 (9th Cir. 1995) [hereinafter *Creative Technology*]. There, the United States Ninth Circuit Court of Appeals stated that United States courts can entertain actions under the copyright laws of foreign nations. It also ruled that a foreign court had the right to apply American copyright law to infringements occurring within the United States in litigation occurring in the foreign court.[110]

While a court in Canada may have jurisdiction to try a dispute with respect to an infringement of copyright occurring outside of Canada, or partly in Canada and partly elsewhere, where there is a "real and substantial connection" between the litigation and the Canadian court, Canadian copyright law will not necessarily be applied to determine the rights of the parties. In such an action the law of the country in which the

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[109] *Amchen Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

[110] See also *ITSI T.V. Productions, Inc. v. California Racing Authority of Racing Fairs*, 785 F.Supp. 854 (E.D.Cal. 1992) (Court holding that United States copyright law should not have extraterritorial effect and that infringing acts that take place entirely outside of the United States are not actionable in the United States courts in the absence of any showing that the defendant committed any direct act of copyright infringement in the United States or that the defendant was contributorily or vicariously liable for the acts of infringement committed by others in the United States.); *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 30 U.S.P.Q. (2d) 1746 (9th Cir. 1994) (Court determining it did not have jurisdiction over a claim for copyright infringement consisting solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad.); *Curb v. MCA Records Inc.*, 36 U.S.P.Q. (2d) 1824 (D. Tenn. 1995) (Court holding that domestic violation of the authorization right is an infringement, sanctionable under the *Copyright Act* of the United States, wherever the authorizee has committed an act that would violate the copyright owner's exclusive rights conferred under the United States *Copyright Act*.)

infringement occurs will govern the rights of the copyright owner. As stated previously, copyright legislation does not generally have any extraterritorial application and national treatment is mandated by both the Berne Convention and the Universal Copyright Convention. To determine the applicable choice of law a Canadian court would have to localize the infringing conduct to determine what law to apply.[111] A similar analysis would also have to be done on an action for the infringement of a trademark[112] and for misappropriation of trade secret claims.[113]

Determining where any particular infringement has occurred with respect to infringements over global networks can be a daunting task. It may not be possible to localize all of the infringing conduct in one forum.[114] Difficulties have already been encountered with respect to broadcasts which originate in one country but are received in another. Should communication of works be localized by the law applicable in the country where it originates, for example, where a broadcast is made, or in the country where it is received? An Austrian Supreme Court that addressed this issue concluded that the law of the country of emission as well as the copyright provisions of all those countries which are situated at least to a considerable extent within the regular reception scope of the broadcasts must be applied.[115]

The issue as to whether a communication of a work originating outside of Canada but received in Canada would infringe Section 3(1)(f) of the Act was considered by the Supreme Court in *C.A.P.A.C. v. International Good Music Inc.*, [1963] S.C.R. 136. The case involved an action against an American radio and television station in the State of Washington. It was alleged that this company had communicated by radio communication, television programs beamed at Canada. These programs consisted of musical works within the repertoire of the plaintiff performing rights society. An issue arose as to whether the Exchequer Court of Canada had the power to grant an order for service *ex juris*. Under the rules then applicable, service *ex juris* was permitted for actions "founded on a tort committed within the jurisdiction". After quoting from the decision of the Ontario High Court in *Jenner v. Sun Oil Co. Ltd*, [1952] O.R. 240. concerning whether defamatory statements broadcast in the United States and received in Ontario constituted a tort committed within the jurisdiction, the Supreme Court

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[111]M. Nimmer and P. Geller (eds.), *International Copyright Law and Practice* (New York, N.Y.: Mathew Bender, 1988 -)(loose-leaf) Rel. 7, Int-41-45, *Creative Technology.*

[112]See *Atlantic Richfield Co. v. Arlo-Globus International Co.*, 41 U.S.P.O. 2d 1946 (S.D.N.Y. 1996). (Law of foreign state applied even though both plaintiff and defendant carried on business in the forum state because the foreign court has the most significant interest in the activities constituting the unfair competition claim.)

[113]See *Softel Inc. v. Dragon Medical and Scientific Communications, Inc.*, 43 U.S.P.Q. 2d 1385 (2nd Cir. 1997).

[114]See Geller, supra note 100 and Ginsburg supra note 100.

[115]*The Tele-Uno II* decision, English translation, 23 IIC 703.

concluded there was an arguable case that the broadcast of the musical works into Canada from the United States was a tort committed within Canada:

> I have not formed, and would not, at this stage of the proceedings, wish to express, an opinion as to whether or not, assuming as established the allegations contained in the statement of claim, the appellant has a good cause of action against the respondents, but I am satisfied that, on the basis of those allegations and the other material which was before the learned President, the appellant has got "a good arguable case". To me it seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some 1,000,000 persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programs, has thereby communicated in Canada such musical works by radio communication, within the provisions of the *Copyright Act*, R.S.C. 1952, c. 55. The purpose of this action is to determine that very legal point and, in my opinion, it should not be determined at this stage of the proceedings, but ought to be tried.

Geller has suggested that it is artificial to require that legal theory choose between localizing infringements either at the point of origin or at the point of reception. He suggests instead a remedial approach which asks where, in practice, relief may be seamlessly and coherently enforced.[116] Given the difficulties in localizing transnational infringements such an approach is a commendable one. As noted above, in *Libman*, the Supreme Court of Canada after an extensive review of the law on the jurisdiction of Canadian courts over transnational criminal offences expressed the opinion that "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada." Thus, for a criminal court in Canada to apply the Canadian *Criminal Code* to transnational offences it is sufficient that there be a "real and substantial link" between an offence and this country, a test well known in private intellectual law. The territorial principle is enshrined under Canadian criminal law. In this regard, Section 5.2 of the *Criminal Code* states that "no person shall be convicted of an offence committed outside Canada." The Supreme Court has also ruled that for the purpose of determining the situs of a tort that courts should not apply a rigid or mechanical theory. Rather the question should be answered by asking whether it was inherently reasonable for the action to be brought in the particular jurisdiction, or whether there was a "real and substantial connection" between the jurisdiction and the wrongdoing.[117]

It is submitted that if Canadians committing transnational criminal offences may be convicted under Canadian criminal law if a significant portion of the activities constituting the offence take place in Canada, then Canadian copyright law can also be

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[116]Supra note 111.

[117]*Moran.*

applied to transnational infringements where a significant portion of the activities constituting the alleged infringement take place in Canada such that there is a "real and substantial link" between the allegedly infringing acts and this country. No case has expressly stated this to be so, but such an approval is consistent with the policy objective of providing a seamless and coherent mechanism for enforcing the rights of copyright holders and with the approach taken by the Supreme Court in other conflicts of laws contexts. This approval would not offend the policies underlying the non-extraterritoriality rule, particularly if the conduct of the defendant is intended to, and does have, an effect within Canada.[118]

Contract Issues

Electronic commerce is dependent on the law of contract. Uncertainty as to the application of contract principles could impact on the willingness of persons to contract electronically.

Contractual issues pertaining to electronic commerce existed when most commerce was conducted over closed systems, such as electronic commerce using EDI. With the emergence of the Internet, more businesses and smaller businesses can access the advantages offered by EDI without expensive proprietary systems. However, The use of open networks and the expansion of commerce with persons unknown to one another, has raised a number of contract issues. These are summarized below.

Who Are the Contracting Parties?

The new virtual environment makes it difficult to determine who the contracting parties are and where they are located. It is essential that persons engaging in electronic commerce have the ability to validate the identity of the parties with whom they are conducting business. Some readers may be familiar with the cartoon depicting a dog seated at a computer surfing the Internet, the joke being that on the Internet no one knows that the dog is a dog. The problem with identifying the parties to electronic commerce transactions has important ramifications. Digital technology makes it inexpensive and simple to copy another person's trading name or image. The design and development of a glamorous web page is also far cheaper than the creation of an imposing shop front.[119]

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[118]See *GB Marketing U.S.A. Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F.Supp. 763 (W.D.N.Y. 1991). (Foreign defendant which purposely injected into the American market infringing goods was not permitted to use the principle of non-extraterritoriality to shield itself from the application of *American Copyright Law*.)

[119]*Supra* note 7.

Some methods for identifying contractual parties electronically have been developed. The most widely used of these technologies is the digital signature. Digital signatures are an authentication technology which can be used to establish the identity of a person or a business, and to prove that a document is genuine and unaltered. Secure technologies, most notably cryptography, also require a certification mechanism to independently verify information about transactions and transacting parties. There are still many unanswered questions concerning the use of cryptography and the status of certification authorities. These include:

1. How central is the role of certification?

2. Should certification be limited to certifying public (cryptographic) keys?

3. Is it important to clarify the liability of those entities that certify information and their responsibilities? If so, how can this be achieved?

4. What role, if any, should governments and international organizations play in ensuring international interoperability of certification mechanisms and mutual recognition of certification authorities?[120]

Writing and Signature Requirements

Most commercial contracts need not take any particular form to be enforceable. However, some contracts must be "in writing" or be accompanied by a "signature" to be valid. For example, sale of goods legislation in some provinces require there to be a "writing" for sale of goods worth fifty ($50) dollars or more.[121] *The Statute of Frauds* which has been adopted in most provinces requires, among other things, any contract that is not fully performed within one year to be evidenced by a written memorandum, signed by the party against whom the contract is to be enforced.[122] Some consumer protection legislation, such as the OCPA requires "executory contracts" to contain specific types of information and be "signed" by each of the parties.[123]

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[120]David Johnston et al., *Cyberlaw: What You Need to Know about Doing Business On-line* (New York: Stoddard , 1997) at 96-115.

[121]G.H.L. Fridman, *Sale of Goods in Canada,* 3d ed. (Toronto: Carswell,1986) at 44 - 47. This requirement does not exist in all provinces. For example, it does not exist under the *British Columbia Sale of Goods Act*, R.S.B.C. 1979, c. 370. The Manitoba provision has been repealed, S.M. 1982 - 83 - 84, c. 93, and so has the Ontario requirement, Bill 175, An Act to Amend the Statutes of Ontario, s. 54.

[122]This requirement has been repealed in the Province of Ontario, Bill 175, An Act to Amend the Statutes of Ontario, s. 55., R.S.O. 1990, c. c-31.

[123]An "executory contract" is defined in the OCPA as "a contract between a buyer and a seller for the purchase and sale of goods or services in respect of which delivery of the goods or services or payment in full of the consideration is not made at the time the contract is entered into."

The need for some contracts to be "in writing" or to be "signed" by the parties raises questions as to whether these requirements are met when parties contract electronically. These issues are more complicated in transnational transactions where the formal requirements may be different in the *lex loci contractus*, and under the proper law of the contract. The weight of authority is that compliance with the *lex loci contractus* is sufficient for formal validity of a contract and, it appears as well, the contract will be considered to be formally valid if it complies with the proper law of the contract. However, the *Statute of Frauds* has been held to be procedural and therefore may apply to all contracts before a forum court regardless of the proper law of the contract.[124]

To overcome the potential obstacles of the writing and signature requirements, the federal government introduced legislation in the fall of 1998 to allow departments to adopt a set of general provisions authorizing the use of electronic communications. Provinces and territories are being encouraged to undertake statutory reforms along similar lines using the *Uniform Electronic Commerce Act* approved in principle by the *Electronic Commerce Project* of the Uniform Law Conference of Canada (ULCC). The *Uniform Electronic Commerce Act* is modeled after the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce adopted in 1996.[125]

Where and When a Contract is Formed

Where and when a contract is formed is determined objectively in light of the facts and circumstances of each case, including the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject matter of the contract. If both parties are in the same country at the time of the making of the contract, or if it is contained in a single document signed by both parties at the same place, there is no difficulty in determining where the contract is made. Where, however, contracts are concluded over great distances or by the use of novel communication technologies, a sophisticated analysis may be required to determine when and where a contract is formed.

The general rule is that a contract is formed when acceptance of an offer is communicated by the offeree to the offeror. If it is necessary to determine where a contract is formed, this is usually the place where acceptance is communicated to the offeror. This follows from the rule generally accepted under Canadian and English law

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[124]McLeod, *The Conflict of Laws*, (Toronto: Carswell, 1983) at 494-95.

[125]For a summary of the Model Law and the *Uniform Electronic Commerce Act*, see John Gregory "Solving Legal Issues in Electronic Commerce", in 28th Annual Workshop on Commercial and Consumer Law, University of Toronto, October 16-17, 1998, [hereinafter *Solving Legal Issues in Electronic Commerce*].

that to make a binding contract, not only must an offer be accepted, but also the acceptance must be notified to the offeror. Consistent with this rule, the Canadian and English courts have held that even where there is not mutual presence at the same place and at the same time, if communication is instantaneous or near instantaneous, for example by telephone, radio communication or telex the contract is made when acceptance of the offer is communicated by the offeree to the offeror.[126]

There are many different ways in which electronic messages are sent and received. Messages may be sent directly by a sender to a recipient. The messages may need to travel great distances and may traverse many parts of the Internet to ultimately reach the destination of the recipient. A message may also reach its destination, but not actually reach the person for whom it is intended immediately. There are questions as to whether the "instantaneous communication" rule will apply to these situations and if it does, the circumstances in which it will apply.

Need for Written Documents for Evidence

The law of evidence and many legal rules assume the existence of paper and signed or original records. Most electronic records are, in practice, being admitted in court. Nevertheless, it still is desirable to clarify the status of electronic records.

The Uniform Law Conference of Canada adopted the *Uniform Electronic Evidence Act* in August of 1998. This proposal for legislation focuses on questions of authentication, the best evidence rule and the relevance of recognized standards of record-keeping to the admissibility of the records. In October 1998, the Government of Canada introduced amendments to the *Canada Evidence Act* to make it consistent with the Uniform Law Conference of Canada *Uniform Electronic Evidence Act.*

Payment Systems and Electronic Money

Electronic commerce cannot develop without sound, user-friendly, efficient and secure electronic payment systems.[127] The Internet facilitates transactions between parties who may be located on opposite sides of the globe, who are transacting business at any time of day or night, and for small or large amounts of money. Creating a user-friendly, efficient and secure electronic payment system in this context poses some challenging problems.

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[126]Re *Viscount Supply Co. Ltd.*, (1963) 40 D.L.R. (2d) 501 (Ont. S.C.), *Entores Ld. v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (Eng. C.A.); *Brinkibon Ltd. v. Stahag Stahlund*, [1982] 1 All E.R. 293 (H.L.).

[127]*Supra* note 10.

One of the most popular ways for paying for a consumer transaction completed on the Internet today is by credit card. There are security risks involved when credit card data is not transmitted through a secure server or is not encrypted before transmission. Credit cards are also not accepted for all forms of transactions. Alternate payment mechanisms have also been the focus of considerable attention. These include digital cash, digital cheques and smart cards or stored value cards.[128] Credit card issuers are also collaborating on a Secure Electronic Transactions (SET) protocol for international electronic commerce.

Government concerns over electronic payment systems have focused on the impact these systems have on monetary policy and policies on financial markets, technology development and consumer protection.[129] The first concern is that electronic payment systems may create new types of "currency" that may affect monetary policy. Some experts in governments have also expressed concern that electronic money may facilitate "money laundering" operations. One of the significant technology development issues is whether governments should take initiatives regarding methods of cryptography, protocols, or other systems standards, and, if so, to what extent they should be involved. There is concern that as almost all of the technologies and systems are still experimental and undergoing improvements, government policy on standard setting or technology could have a significant impact on the industry. Consumer protection issues include the qualification of electronic money issuers, operating conditions for payment systems and evaluation of systems from the perspective of consumer protection. Specific issues singled out for further study by the OECD are:

1. Liability of issuers in the case of loss or theft of electronic money;
2. Reimbursement of issuers if electronic money is damaged or value data is lost;
3. Consumer liability for unwittingly receiving forged electronic money;
4. Rules involving errors in downloading electronic money (by merchants);
5. Treatment of chargeback when transactions are canceled;
6. Rules for converting electronic money into currency; and
7. Government regulation of issuers and deposits.[130]

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[128] *Supra* note 7.

[129] OECD, *Business-to-Consumer Electronic Commerce: Survey of Status and Issues*, (OECD/GD, 1997) (97) 219 [hereinafter *OECD Business-to-Consumer Electronic Commerce*].

[130] *Supra* note 129 at 32-35.

Cryptography Policies

The ability to ensure that transactions and information are only available to the intended recipients is fundamental to confidence in electronic commerce. The most common way of maintaining the confidentiality of information and transactions is to use encryption. Because encryption can be used to mask illegal activity in electronic commerce it has become harder for law enforcers to detect and intercept illegal activity. The use of encryption also impacts on the ability of tax authorities to detect tax fraud and non-compliance with taxpayers' obligations.[131]

In October 1998 the Government of Canada announced its policy on cryptography. The policy is intended to encourage the growth of electronic commerce, allow Canadian producers to export their products globally within the framework of international agreements, and maintain the capability of law enforcement agencies to ensure public safety.[132] The Policy consists of following principles:

> Canadians are free to develop, import or use whatever cryptography products they wish.
>
> The government does not intend to implement mandatory key recovery requirements or licensing regimes.
>
> The government encourages industry to establish responsible practices, such as key recovery techniques for stored data.
>
> The government will act as a model user of cryptography through the practice of the Government of Canada Public Key Infrastructure (GOC PKI).
>
> The government encourages and supports industry-lead accreditation of private sector certification authorities.
>
> Canada will continue to implement cryptography export controls in keeping within the framework of its international commitments.
>
> Canada will take into consideration the export practices of other countries and the availability of comparable products when rendering export permit decisions.
>
> The export permit application process will be made more transparent and

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[131]Industry Canada, *A Cryptography Policy Framework for Electronic Commerce: Building Canada's Information Economy and Society, Task Force on Electronic Commerce,* (Ottawa: Industry Canada, February 1998) [hereinafter *A Cryptography Policy Framework for Electronic Commerce*].

[132]Electronic Commerce Task Force, News Release, " Minister Manley Outlines Canadian Cryptography Policy" (1 October 1998).

procedures will be streamlined to ensure the least regulatory intervention necessary.

The government also proposes to make amendments to the Criminal Code and other statutes as necessary to criminalize the wrongful disclosure of keys, deter the use of encryption in the commission of a crime, deter the use of cryptography to conceal evidence, and apply existing interception, search and seizure and assistance procedures to cryptographic situations and circumstances.

Consumer Protection

From the consumer's perspective, electronic commerce offers significant benefits including convenience, increased access to information, lower prices and choice of products.[133] However, electronic commerce also has properties that facilitate fraud and make prosecution difficult. Its international nature also raises the prospect that consumer protection legislation in the jurisdiction in which the consumer resides may not apply in the merchant's country. Studies have shown that building trust and confidence in electronic commerce is an essential prerequisite for businesses to win consumers over to electronic commerce.[134] As such, finding appropriate frameworks to increase such trust and confidence will have favourable ramifications for business-to-consumer electronic commerce.

The issues most often identified as being in need of attention are fairness and truthfulness in advertising, labeling and other disclosure requirements such as warranties, guarantees, product standards and specifications, refund mechanisms in case of canceled orders, defective products, returned purchases and lost deliveries, and a means of qualifying merchants pertaining to the foregoing.[135] The Canadian Working Group on Consumers and Electronic Commerce, composed of consumer and business associations and governments, is finalizing Canadian guidelines on consumer protection in electronic commerce. These guidelines are intended to define consumer protection requirements and provide the basis for development of voluntary and legislative measures related to consumer information, contract formation, privacy, security and redress.[136] Canada is also taking part in the OECD project to develop international guidelines for consumer protection in electronic commerce.

A study entitled *Consumer Protection Rights in Canada in the Context of Electronic*

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[133] *Supra* note 5.

[134] *Supra* note 5; *supra* note 10.

[135] OECD (1997, November 27). *Dismantling the Barriers to Global Electronic Commerce* [WWW document]. URL http://www.oecd.org/news_and_events/release/nw97105a.htm

[136] (1998). *Electronic Commerce Task Force - Consumer Protection, Fact Sheet* [WWW document]. URL http://e-com.ic.gc.ca/english/633.htm.

Commerce was recently completed on behalf of Industry Canada.[137] This study pointed out that most consumer statutes and programs at both the federal and provincial levels were developed in the 1960's and 1970's, based on prevailing government, market, legal and institutional conditions and attitudes and that the advanced technologies of the "new digital" economy often involve hidden features that are challenging traditional legal rules and principles. The report contains 16 specific recommendations to improving the current legislative framework to meet the basic needs of the on-line consumer across Canada.

Privacy

In repeated surveys, Canadians have expressed concerns about privacy in general and about the loss of control over personal information in particular.[138] Using the Internet exposes consumers and businesses to privacy considerations that are not experienced in private, closed network environments. The protection of privacy in electronic commerce transactions has been identified by the Government of Canada, and others, as an essential ingredient to providing trust in the digital economy.[139]

Currently, the federal government and most provinces have legislation governing the collection, use and disclosure of personal information held by governments. The federal *Privacy Act* adopted in 1982 applies to all federal government departments, most federal agencies and some federal crown corporations. To date, only Québec has adopted comprehensive privacy legislation for the private sector.[140]

Other countries have passed comprehensive privacy legislation. For example, such legislation exists in Germany, France and Sweden. In 1980, the Council of Europe adopted a Convention binding a number of countries to create legislation establishing fair information practices. In 1980, the OECD adopted a set of privacy principles. Canada signed these guidelines in 1994. The European Union has also passed a data protection directive protecting personal information and harmonizing privacy laws among its members. This directive requires all member companies to adopt privacy legislation or revise existing laws to comply with the directive. The directive also contains certain provisions requiring member states to block transfers of information

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[137]Roger Tassé and Kathleen LeMieux, (1998, March 19) [WWW document]. URL http://strategis.ic.gc.ca/ssg/ca01028e.html.

[138]Industry Canada and Justice Canada, (1998, January). *The Protection of Personal Information: Building Canada's Information Economy and Society, Task Force on Electronic Commerce* [WWW document]. URL http://strategis.ic.gc.ca./privacy.

[139]*Supra* note 5.

[140]See *Civil Code*, Articles 35, 36 and 37, *Québec Charter of Personal Rights and Freedoms*, Article 5, and *An Act Respecting the Protection of Personal Information in the Private Sector*, S.Q. c. P-39.1.

to non-member states that do not provide an adequate level of protection.

In October of 1998 the federal government introduced the *Personal Information Protection and Electronic Documents Act*, Bill C-54. Part 1 of this bill addresses rights of privacy with respect to personal information that is collected, used or disclosed by an organization in the private sector. The legislation will initially apply to the federally-regulated private sector including telecommunications, broadcasting, banking and interprovincial transportation and to certain federal crown corporations. It will also cover federal entities not covered under the existing *Privacy Act*. Three years after coming into effect, the Act will apply to all personal information, collected, used, or disclosed during the course of commercial activities. The legislation will not apply provincially where a province adopts legislation that is substantially similar to the privacy provision portions of the legislation. The privacy provisions of Bill C-54 are modeled on the Canadian Standards Association's (CSA) Model Code for the Protection of Personal Information, which is recognized as a national standard.

The Uniform Law Conference is working on a *Uniform Data Protection Act*. The Conference proposes the adoption of the CSA Model Code.

Taxation

To allow electronic commerce to develop, it is vital for tax systems to provide legal certainty (so that tax obligations are clear, transparent and predictable), and tax neutrality (so there is no extra burden on these new activities as compared to more traditional forms of electronic commerce). The territorial concepts which underlie tax systems such as "residence", "carrying-on business in Canada", "permanent establishment", "source of income", "supplying of goods or services in Canada", are raising significant taxation issues in inter-provincial and international commerce. Electronic commerce is also raising numerous tax administration challenges. These include difficulties in identifying the parties behind Internet businesses; the ability of businesses to store tax records off-shore or to encrypt them or to alter them without trace; the removal of efficient tax collection points such as middlemen in the distribution chain from producer to consumer, an effect known as disintermediation; and the ability of digitization to change the nature of products, and hence the taxation treatment of the income from the sale of those products.[141]

In April,1997, the Minister of National Revenue established an Advisory Committee on Electronic Commerce to examine the implications of electronic commerce on tax administration. The Minister's Advisory Committee delivered its report in April, 1998. The report contained a total of seventy-two detailed

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[141]Commonwealth of Australia (1997, August). *Tax and the Internet: Discussion Report of the ATO Electronic Commerce Project* [WWW document]. URL www.ato.gov.au/ecp.

recommendations in the area of income taxes, commodity taxes, customs duties, and tariffs and what Revenue Canada should do to be a model user of electronic commerce. Among the issues identified by the Committee are the following:

> Electronic commerce may increase the incidence of non-compliance.
>
> Electronic commerce raises concerns about where businesses transact electronically and what degree of electronic activity constitutes carrying-on business in Canada.
>
> Whether the concept of "permanent establishment" is valid in the electronic environment. If it is not, should "permanent establishment" be replaced with an alternative concept?
>
> Current and proposed reporting rules for transactions involving affiliated companies may not be sufficient to track electronic transactions and allocate income and expenses between competing jurisdictions.
>
> Tax-haven financial institutions are now readily accessible electronically to anyone who wishes to take advantage of secrecy rules to avoid or evade tax.
>
> The incidence of tax may change as goods or services are delivered electronically.
>
> Canadian rules that require the withholding and remittance of tax in respect of amounts paid to non-residents may be difficult to enforce and administer where electronic goods and services are involved.
>
> Electronic commerce may reduce the need for traditional business intermediaries and thereby change the composition of the Canadian tax base.
>
> The increased ability to acquire products directly from non-residents may result in the disappearance of some of the collection points on which commodity tax regimes currently rely to collect and remit tax.
>
> There may be distortions in the GST results as products that are provided electronically are re-characterized from goods to services or intangible property, or from services to intangible property.
>
> It may be difficult to verify compliance with Revenue Canada customs law in the electronic business environment.
>
> The transformation of "tangible goods" to electronic products or transactions may result in reduced customs duties and tariffs levied and collected.
>
> It may be difficult to assess compliance with Canadian tax law when little is known

about the extent of business being conducted electronically by residents and non-residents or who they are.

Existing record keeping standards may not be sufficient to reflect electronic transactions.

Electronic commerce may have an effect on the search and seizure rules and Revenue Canada's ability to locate and access electronic records.

Revenue Canada will have difficulty accessing encrypted information where taxpayers do not provide the decryption key or access to decryption records.

Digital signatures or other similar authentication tools provide a means by which the identity of the documents of the sender can be established. However, digital signatures may not accurately reflect that person's identity unless they are used in combination with identity certificates supplied by a competent certification authority.

Electronic cash may not be subject to sufficient regulation for tax authorities.

In September, 1998, the Minister of National Revenue responded to the Advisory Committee on Electronic Commerce.[142] In the response, the Minister agreed with two of the important recommendations made by the Advisory Committee. First, that electronic and non-electronic transactions that are functionally equivalent should be taxed the same way regardless of their form; and second, governments should avoid placing undue regulation and restrictions on, and should avoid undue taxation of, electronic commerce.

Intellectual Property

Intellectual property laws establish the rules for the ownership and use of machine readable content which are central to the protection of works transmitted or otherwise made available over the Internet. A separate panel of this conference will be addressing intellectual property issues. Accordingly, they are not dealt with here.[143]

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[142]Revenue Canada (1998). *Electronic Commerce and Canada's Tax Administration: A Response by the Minister of National Revenue to his Advisory Committee's Report on Electronic Commerce* [WWW document]. URL www.rc.gc.ca/ecomm.

[143]On the subject of intellectual property protection related to the Internet see, Barry Sookman *Copyright and the Information Superhighway: Some Issues to Think About*, (1997) 11 I.P.J. 123, and 11 I.P.J. 265; Barry Sookman, *Computer Law: Acquiring and Protecting Information Technology*, (Toronto: Carswell, 1997). With respect to protection for databases see, Robert Howell (1998, October). *Database Protection and Canadian Laws* [WWW document]. URL http://strategis.ic.gc.ca/nme.

Constitutional Issues

In Canada, legislative authority is divided between the federal and provincial governments. This divided authority could easily raise issues concerning the jurisdiction to pass legislation to facilitate electronic commerce and to regulate activities pertaining to it.

An area of potential dispute relates to legislation intended to regulate Internet intermediaries such as Internet service providers. Many ISP's operate interprovincially with network infrastructure and points of presence scattered throughout the country. Will such entities fall within the exclusive legislative authority of Parliament?[144] Another question is whether the provinces have the right to enact legislation to regulate or control the Internet. Is this right within the field of federal jurisdiction under its power to make laws in relation to "the regulation of trade and commerce" pursuant to Section 91(2) of the *Constitution Act*, 1867?[145] Consumer protection issues pertaining to the Internet have been identified as serious impediments to building the trust and confidence needed by consumers to purchase goods and services over the Internet.[146] Consumer protection law is open to the provinces under their power to legislate over property and civil rights. However, federal law has also been enacted to protect consumers. In the area of privacy, four provinces have enacted legislation creating statutory torts for the invasion of privacy. The Province of Quebec also has specific legislation addressing privacy. The federal government recently introduced, as part of the *Personal Information Protection and Electronic Documents Act* legislation to protect privacy. This legislation will eventually apply to persons other than regulated federal undertakings. Will this overlapping authority be countenanced by the courts? Charter issues may also arise related to the regulation of content on the Internet.[147]

Regulatory Frameworks

Electronic commerce by its very nature is global. Electronic commerce policies and activities will have limited impact unless they facilitate a global approach. At present, the pioneers of electronic commerce are operating in a fragmented regulatory

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[144]See *CNCP Telecommunications v. Alberta Government Telephones and CRTC*, (1989) 98 N.R. 161 (S.C.C.), *Corporation of the City of Toronto v. Bell Telephone Company of Canada*, [1905] A.C. 52 (P.C.), *In Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.), *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141, and *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333 (P.C.).

[145]A United States district court recently ruled as unconstitutional under the Commerce Clause of the United States Constitution a New York statute seeking to protect children from paedophilia disseminated over the Internet. See *Pataki,, supra* note 14.

[146]*Supra* note 5.

[147]See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) affirmed, U.S. Sup. Ct. June 26, 1997.

environment despite the fact that a number of aspects of electronic commerce are already covered by international agreements such as the World Trade Organization General Agreement on Trade and Services (WTO/GATS) and WIPO. Consequently, new legislation, whether federal or provincial, in diverse areas such as digital signatures, encryption, data protection and privacy, consumer protection, new electronic means of payments, intellectual property or jurisdiction can create trade barriers which will hamper the development of electronic commerce at a global level. Solutions need to be found to provide for a consistent international regulatory framework for electronic commerce.[148]

At the recent OECD Ministerial Conference on Electronic Commerce, the OECD Ministers, the Business and Industry Advisory Committee to the OECD and others including private sector participants concluded, among other things, that:

> Cooperation amongst all players (governments, consumers, business, labour and public institutions), as well as social dialogue, must be encouraged in policy making to facilitate the development of global electronic commerce in all countries and international fora, and that their actions should strive to be internationally compatible wherever possible.
>
> Governments should promote a pro-competitive environment to allow electronic commerce to flourish, work to reduce and eliminate unnecessary barriers to trade, and act where necessary to ensure adequate protection of key public interest objectives in the digital world just as they do in the physical world.
>
> Government intervention, when required, should be proportionate, transparent, consistent and predictable, as well as technologically neutral.
>
> Governments should recognize the importance of continued cooperation among business in standards setting and in enhancing interoperability, within an international, voluntary and consensus-based environment.
>
> Business should continue to play a key role in developing and implementing solutions to a number of the issues essential for the development of electronic commerce, recognizing and taking into account fundamental public interests, economic and social goals, and working closely with government and other players.[149]

The Conference participants also agreed that rapid development and spread of global electronic commerce will require a broad, collaborative approach by governments, the private sector, and international organizations to ensure a stable and

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[148] *Supra* note 10; *Supra* note 5.

[149] OECD Ministerial Conference "*A Borderless World: Realizing the Potential of Global Electronic Commerce*", SG/EC (98) 14 Rev. 6.

predictable environment which facilitates its growth and maximizes social and economic potential across all economies and societies.

The Conference participants concurred that building trust for users and consumers was important in facilitating global economic commerce. They concluded that national regulatory frameworks and safeguards that provide confidence in the physical marketplace must be adjusted, where necessary, to help ensure continued confidence in the digital marketplace. The Conference participants also agreed that effective protection must be provided in the digital marketplace and that unnecessary barriers to electronic commerce must be addressed. However, legal frameworks should be established only where necessary, should promote a competitive environment, and should be clear, consistent and predictable.

The above framework is similar to the framework articulated by the Government of Canada in *The Canadian Electronic Commerce Strategy*.[150]

[150]*Supra* note 5 at 19-20.