

Electronic Commerce

Section N of Stikeman Elliott's *Doing Business in Canada*





Electronic Commerce

Contents

General	2
Jurisdiction.....	2
General	2
Dealing with the Uncertainty.....	4
Electronic Commerce Legislation.....	4
General	4
Content of the Legislation.....	4
On-line Contract Issues.....	4
Electronic Contracts	4
Electronic Signatures	5
General	5
Definition of “Electronic Signature”	5
On-line Consumer Protection Legislation	6
General	6
On-Line Consumer Protection Legislation	6
“Cooling-off” Periods in Electronic Commerce.....	7
Competition Law and On-line Advertising.....	7
Language Issues in Quebec.....	8
Domain Name Registration	8

Electronic Commerce

GENERAL

Canadians have readily embraced the Internet as an instrument to exchange and disseminate information and conduct business transactions. In response to the increasing use of electronic transactions in commerce and government, new laws focusing on electronic commerce issues and expanding the application of general commercial laws to electronic commerce activities have been introduced in Canada.

JURISDICTION

General

The ability to regulate Internet activities is shared by both the federal and provincial legislatures. Regulation of the Internet itself is a federal responsibility, but the Canadian Radio-television and Telecommunications Commission (CRTC), the relevant federal agency, announced in 1999 that it did not intend to regulate Internet content. Nonetheless, Internet activities are regulated by federal and provincial legislation as well as various common law principles.

Canadian courts will generally assert jurisdiction over a proceeding where a real and substantial connection can be made between the forum and either the proceeding or the defendant. However, due to the “borderless” nature of the Internet, Canadian courts have struggled to develop a consistent formula for determining when Internet activities are sufficient to establish a real and substantial connection. As a result, several alternative jurisdictional tests have emerged, including the “passive vs. active” test, the “purposeful direction” test and the “foreseeability” test described below. While the passive vs. active and purposeful direction tests initially found favour in Canada in determining Internet-related jurisdictional issues, recent case law suggests a shift towards the foreseeability test as the leading test on the issue of jurisdiction.

“Passive vs. Active” Test

In applying this test, Canadian courts examine the level of interaction available to individuals in their jurisdiction to determine whether to assert jurisdiction. The web presence is examined to determine whether it was accessible in the jurisdiction in a passive sense only (e.g. content oriented websites), or whether interaction with the website was possible. Where interaction with an Internet presence was possible from their jurisdiction, courts would generally find sufficient connection to assert their jurisdiction. While the “passive vs. active” analysis initially provided a cohesive framework for addressing Internet activities, the growth of interactive

commercial websites and the increasing sophistication of content-only sites to allow interaction with users has made this test practically obsolete.

“Purposeful Direction” Test

More recently, Canadian courts have examined whether an Internet presence is “purposefully directed” towards individuals in a jurisdiction as a factor in establishing a real and substantial connection. In asserting jurisdiction in *Pro-C Ltd. v. Computer City, Inc.*, an Ontario court noted that, although the defendant’s website was passive, when viewed in connection with the defendant’s overall strategy, it was part of a “purposeful commercial activity directed to target Canadian consumers”.

“Foreseeability” Test

The foreseeability test is based on the premise that a party should only be answerable to a foreign court if that eventuality is reasonably foreseeable in the circumstances. The reach of Canadian jurisdiction on the basis of this foreseeability test was extended by the Ontario Superior Court in *Bangoura v. Washington Post* where the plaintiff had brought a suit against *The Washington Post* for defamation in an Ontario court based on several articles featured in the newspaper in 1997, at which time he was living outside Canada. He had since become a resident of Ontario and claimed that the continued availability of the articles through the *Post*’s website had damaged his reputation in Ontario. *The Washington Post* brought a motion to stay the action on the basis that there was no real and substantial connection with Ontario. In dismissing the motion, the trial court held that damage to the plaintiff’s reputation had occurred in Ontario due to the availability of the articles on the Internet. The court held that, by posting the stories on the Internet, the newspaper “should have reasonably foreseen that the story would follow the plaintiff wherever he resided”. This decision was subsequently reversed by the Ontario Court of Appeal on the basis of a shift in emphasis to the question of foreseeability: as the connection between the plaintiff and Ontario was not foreseeable at the time of publication, the courts of Ontario could not assume jurisdiction. In November 2006, the Supreme Court of Canada dismissed an application for leave to appeal from the judgment of the Court of Appeal.

The test was again applied (with a differing result) in the British Columbia case of *Burke v. NYP Holdings Inc.* That case involved a defamation lawsuit launched against the *New York Post* by Burke, a well-known public figure in British Columbia, who objected to a column published in the *Post* and featured on its website. After Burke sued in the British Columbia courts, the *New York Post* moved to dismiss the case on the basis of jurisdiction. The British Columbia judge denied the motion, noting that it was foreseeable at the time of publication that damage might be suffered by Burke in the province and that the British Columbia courts could therefore assert jurisdiction.

While different outcomes were reached on the facts of *Burke* and *Banguora*, the courts' reasoning based on foreseeability is consistent.

Dealing with the Uncertainty

A choice of law and exclusive jurisdiction clause is often used in connection with Internet activities to limit jurisdictional uncertainties involved in Internet operations. However, the effect and enforceability of such clauses is subject to applicable consumer protection legislation and in Quebec, to the *Civil Code*. Consumer protection legislation in some jurisdictions provide that a consumer may not waive his or her rights, including the consumer's right to bring proceedings in his or her home jurisdiction. Under the *Civil Code*, a choice of law clause may not be enforceable if it deprives the consumer of protection under the law of the country where he or she resides and the formation of the contract is in some way connected to that country.

ELECTRONIC COMMERCE LEGISLATION

General

The federal and provincial legislation relating to the electronic transactions and electronic commerce is by and large consistent in its treatment of the enforceability and formation of on-line contracts. Legislation governing electronic transactions and electronic commerce has been enacted in most provinces and territories of Canada. Except for Quebec, the provincial electronic commerce legislation is largely modelled on the Uniform Electronic Commerce Act (the "Uniform Act") adopted by the Uniform Law Conference of Canada. The Uniform Act was designed to provide provinces with consistent legislation that implemented the principles of the United Nations Model Law on Electronic Commerce, adopted by the General Assembly of the United Nations in November 1996.

Content of the Legislation

The provincial electronic commerce legislation provides for the legal recognition of information and documents, including contracts, which are communicated electronically. The legislation imposes a "media neutral" approach, recognizing electronic communications, documents, contracts and signatures as functionally equivalent to their written or printed counterparts.

ON-LINE CONTRACT ISSUES

Electronic Contracts

While the provincial electronic commerce legislation provides for the legal enforceability of electronic contracts, it is necessary to ensure that the electronic offer and acceptance process results in an enforceable contract.

Case law has established that both “click-wrap” agreements and “web-wrap” agreements may create binding contracts in Canada. In *Rudder v. Microsoft*, the court found that where an offer clearly indicates that a certain action will constitute acceptance, acceptance can be communicated through the indicated action, such as clicking on an “I Agree” icon. In *Kanitz v. Rogers Cable Inc.*, the Ontario Superior Court recognized a party’s ability to unilaterally change the terms of a paper agreement by posting the changes on a website in accordance with the terms of the original agreement. However, a different result was reached in a recent Quebec decision with similar facts: in *Aspenser1.com Inc v. Paysystems Corporation*, the Cour du Québec (the Quebec trial court), held that modifying the terms of an agreement by posting them on a website was not enforceable because there was no proof that the subscriber had clearly and unequivocally agreed to the modification.

Therefore, while both the legislative and judicial approach tend to enforce the terms of electronic contracts in general, it should be noted that the actual enforcement of any given electronic contract is ultimately a question of fact that requires careful consideration.

ELECTRONIC SIGNATURES

General

A signature indicates intent to be bound by the terms of an agreement. Although a signature is not necessary to create a binding agreement enforceable against the parties, legislative signature requirements exist for certain prescribed types of agreements. The provincial electronic commerce legislation provides that electronic signatures can have the functional equivalence of their paper counterparts.

Definition of “Electronic Signature”

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) defines “electronic signature” as a signature that consists of one or more letters, characters or other symbols in digital form incorporated in, attached to or associated with an electronic document. Likewise, provincial electronic commerce legislation generally defines an electronic signature as electronic information that a person creates or adopts in order to sign a document and that is in, attached to, or associated with the document. This legislation generally provides that electronic signatures will satisfy statutory signature requirements.¹ Clicking an icon may also meet the definition of an electronic signature, though no Canadian court has yet considered that point.

¹ The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) also provides for the functional equivalence of electronic signatures in connection with certain prescribed federal statutes, provided that the technology used to create the signature satisfies the regulations. Several sections of PIPEDA contemplate the use of a “secure electronic signature”, although the legislation contains no specific definition.

Generally, the provincial electronic commerce legislation provides that an electronic signature can satisfy the signature requirement of any particular law but it does not go so far as to require any particular test of reliability for such a signature. Most of the provincial electronic commerce legislation provides that regulations can be made to impose some degree of reliability should it be necessary. This approach accords with the current state of the common law, under which the method of signature of a document generally does not have to meet any standard of reliability.

ON-LINE CONSUMER PROTECTION LEGISLATION

General

Consumer protection in Canada is governed by an array of federal and provincial laws regulating a wide range of commercial activity. Many industries have specific provincial consumer protection legislation mandating registration or licensing. Many provinces also have consumer practices and trade practices legislation regulating marketing and commercial sales. In addition, provincial sale of goods legislation (except in Quebec) implies certain warranties and conditions in commercial agreements such as the implied conditions that a sold good is fit for its intended purpose and that the good is of merchantable quality. Parties may expressly contract out of these implied warranties and conditions.

On-Line Consumer Protection Legislation

Manitoba and Alberta were the first provinces to enact legislation specifically to provide protections to consumers transacting online. The Internet Agreements Regulation under Manitoba's *Consumer Protection Act* and the Internet Sales Contract Regulation under Alberta's *Fair Trading Act* provided consumers with substantial rights and remedies in respect of retail sale or retail conditional sales agreements formed through Internet communications.

Several other provinces have followed suit and have also extended consumer protection laws to online consumer contracts. These provinces include Ontario, British Columbia, Nova Scotia, and, most recently, Quebec (with amendments to come into force no later than December 15, 2007). Ontario, for example, passed the *Consumer Protection Statute Law Amendment Act, 2002* which amended the Ontario *Consumer Protection Act* to extend consumer protections to consumers participating in online transactions. Each of the provincial regulations follow the Internet Sales Contract Harmonization Template, which sets out significant new disclosure requirements for "Internet agreements" in which the consumer's total potential payment obligation exceeds \$50. Under these regulations, on-line retailers entering into Internet agreements are now required to disclose their names, contact information, a fair and accurate description of the goods and services provided, an itemized list of prices (including taxes

and shipping charges), a description of each additional charge that applies or may apply, the total amount payable by the consumer, the terms and methods of payment, the details of delivery or performance (including date, place and manner of execution) and any specific rights or obligations with respect to cancellations, returns, exchanges and refunds. The on-line retailer must also provide the consumer with an express opportunity to accept, decline, or make corrections to the agreement, and must provide a written copy of the agreement within 15 days depending on the province.

“Cooling-off” Periods in Electronic Commerce

The consumer protection legislation of most provinces permits consumers to repudiate executory contracts for an established “cooling-off” period. Many of the provincial acts also contain provisions for the “functional equivalence” of writing and signatures to satisfy requirements in the context of electronic commerce. Ontario’s *Consumer Protection Act 2002*, for example, gives a consumer the right to cancel an Internet agreement at any time within seven days from receipt of a copy of the Internet agreement in certain circumstances. British Columbia has a similar “cooling-off” regime.

Competition Law and On-line Advertising

General

The *Competition Act*, a federal statute governing business conduct in Canada, aims to promote competition in the marketplace and to prevent anti-competitive practices. It contains both criminal and civil provisions prohibiting false or misleading representations and deceptive marketing practices.

The Bureau’s View

In 2003, the Competition Bureau published a guide describing its regulatory practices in the context of the Internet (“Guide”). Entitled *Application of the Competition Act to Representations on the Internet*, the Guide expresses the Competition Bureau’s view that the *Competition Act* will apply equally to all on-line representations, whether relating to on-line or off-line sales.

Misleading Representations Under the *Competition Act*

To contravene the *Competition Act*, either the general impression or literal meaning of a representation must be false or misleading in a material respect. Materiality is determined on the basis of whether the representation could influence a consumer to buy a product or service. The Competition Bureau will consider whether the representation could induce a person to act in a certain manner. The Competition Bureau is of the view that materiality extends beyond representations that influence buyers when making purchase decisions to those that influence buyers conduct, such as representations that lead consumers to visit one website over another.

On-line Disclaimers

Generally, the Guide requires on-line disclaimers to be presented in a manner where it is highly probable consumers will see it and, if a disclaimer is used to qualify or contradict a representation, it must meet a number of additional criteria.

In particular, the Guide requires the supplier to disclose certain product information to avoid making misleading representations in connection with the sale of a product, including: (i) price information; (ii) other applicable charges; (iii) terms or conditions of payment; (iv) any limitations or conditions applicable to warrants or guarantees; (v) any geographic or time limitations on the sale of the product; (vi) delivery terms; (vii) any material standards regarding the sale of services and (viii) details concerning returns, exchanges, cancellations and refunds.

In addition, the Guide sets out the Competition Bureau's view that individuals outside of Canada who make on-line representations that might reasonably be expected to materially influence the Canadian public should assume that they may be subject to examinations under the *Competition Act*. Steps that can be taken to reduce the likelihood that representations not intended to reach Canada might be viewed by the Competition Bureau as materially influencing purchasers in Canada include: indicating that the representations are intended for an area other than Canada, requiring purchasers to supply a country of origin and supplying a site for the purchaser's use (or barring such purchasers) and avoiding representations that create the impression that the site is intended for use in Canada.

LANGUAGE ISSUES IN QUEBEC

Two Quebec courts have held that the province's language laws apply to Internet activities. In *Procureur Général du Québec v. Hyperinfo Canada Inc.*, the court found that the Quebec language laws apply to a website originating in Quebec despite attempts to block Quebec residents from accessing the site. A similar conclusion was reached by the court in *Procureur Général du Québec v. Reid* in connection with another Quebec based website. Accordingly, Quebec-based businesses or businesses conducting activities in Quebec should ensure that their operations, including their on-line operations, comply with Quebec's language laws.

DOMAIN NAME REGISTRATION

The ".ca" country code top level domain is administered by the Canadian Internet Registration Agency (CIRA). CIRA has established several rules for the registration of .ca top level domains, including "Canadian Presence Requirements" (CPR) which currently restrict registration to individuals and organizations (including corporations) with a real connection to Canada (e.g. Canadian citizenship or permanent resident status (in the case

of individuals), Canadian territorial registration (in the case of corporations, registered trusts, and other similar organizations), or ownership of a trade-mark registered in Canada. A non-resident may gain access to the .ca domain by incorporating a Canadian corporation or through a partnership or trust, provided that the body used meets the CPR requirements.

Canadian Business Law – Worldwide

Stikeman Elliott is recognized nationally and internationally for the sophistication of its business law practice. The firm is a Canadian leader in each of its core practice areas – corporate finance, M&A, securities, banking, corporate-commercial, real estate, tax, insolvency, structured finance, competition, intellectual property, employment and business litigation – and has developed in-depth knowledge of a wide range of industries.



Chambers Global identifies the firm as one of Canada's two top-tier Corporate/M&A practices and it is frequently ranked among Canada's leaders in domestic and cross-border M&A league tables from Thomson Financial, Mergermarket and Mergerstat Review. Stikeman Elliott is also the leading adviser in Canadian securities offerings, ranking first from 2005 to 2009 (inclusive) in Bloomberg league tables in terms of overall volume, as well as receiving top rankings from the *Financial Post*. The firm's National Litigation Group, whose specializations include class actions, securities litigation and restructurings, has been ranked among the top three business litigation practices in Canada by Lexpert. Among Stikeman Elliott's other highly regarded practices are competition/antitrust (named as a leader by the *Global Competition Review*), taxation (highly ranked by Lexpert) and structured finance (widely considered to be Canada's foremost practice in that field).

The firm's clients can expect a consistently high level of service from each of its eight offices who work together on major transactions and litigation files, and regularly collaborate with prominent U.S. and international law firms on cross-border transactions of global significance. The firm has invested heavily in leading-edge knowledge management systems in order to assure our clients of advice of the highest quality, grounded in the accumulated expertise of Stikeman Elliott's national and international practice.

STIKEMAN ELLIOTT

MONTREAL TORONTO OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

www.stikeman.com

This publication is intended to provide general information about developments in the law and does not constitute legal advice.

For further information please contact your Stikeman Elliott representative or any of the Managing Partners or Principals listed below:

MONTRÉAL

1155 René-Lévesque Blvd. West, 40th Floor, Montréal, QC, Canada H3B 3V2
Tel: (514) 397-3000 Fax: (514) 397-3222
Contact: André J. Roy aroy@stikeman.com

TORONTO

5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866
Contact: Roderick F. Barrett rbarrett@stikeman.com

OTTAWA

Suite 1600, 50 O'Connor Street, Ottawa, ON, Canada K1P 6L2
Tel: (613) 234-4555 Fax: (613) 230-8877
Contact: Stuart McCormack smccormack@stikeman.com

CALGARY

4300 Bankers Hall West, 888 - 3rd Street S.W., Calgary, AB, Canada T2P 5C5
Tel: (403) 266-9000 Fax: (403) 266-9034
Contact: G. Frederick Erickson ferickson@stikeman.com

VANCOUVER

Suite 1700, Park Place, 666 Burrard Street, Vancouver, BC, Canada V6C 2X8
Tel: (604) 631-1300 Fax: (604) 681-1825
Contact: Ross A. MacDonald rmacdonald@stikeman.com

NEW YORK

445 Park Avenue, 7th Floor, New York, NY 10022
Tel: (212) 371-8855 Fax: (212) 371-7087
Contact: Kenneth G. Ottenbreit kottenbreit@stikeman.com

LONDON

Dauntsey House, 4B Frederick's Place, London EC2R 8AB England
Tel: 44 20 7367 0150 Fax: 44 20 7367 0160
Contact: Derek N. Linfield dlinfield@stikeman.com

SYDNEY

Level 12, The Chifley Tower, 2 Chifley Square, Sydney N.S.W. 2000 Australia
Tel: (61-2) 9232 7199 Fax: (61-2) 9232 6908
Contact: Brian G. Hansen bhansen@stikeman.com