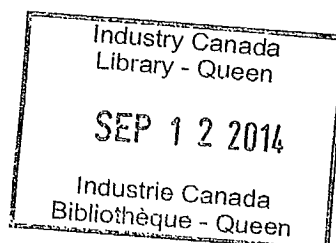


**CONSUMER PROTECTION RIGHTS IN CANADA
IN THE CONTEXT OF ELECTRONIC COMMERCE**

**A Report to the
Office of Consumer Affairs
Industry Canada**

July 31, 1998

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EXECUTIVE SUMMARY

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The growth of electronic commerce to the benefit of both business and consumers is, in important respects, dependent upon the adequacy of the rules and principles of contract law that apply to consumer transactions over the Internet.

Current consumer protection legislation was enacted in the 1960s and 1970s as a response to imbalances in the marketplace at that time. Electronic commerce is changing the way consumers are relating to businesses. Consumers are now provided with more opportunities to access a greater variety of goods and services at lower prices as they discover a borderless virtual marketplace. The reality of open networks and the prospect of widespread electronic commerce as a medium of choice for the consumer begs the question of whether current legislation is adequate to meet the basic needs of the online consumer across Canada.

This report attempts to answer this question and proposes options and recommendations to address the challenges faced by online consumers:

- Part II of the report provides a general overview of contract law principles and rules in both the common law jurisdictions and Quebec, most of which apply to consumer transactions taking place over the Internet.
- Part III provides a summary of current legislation of general application that provides protection to consumers. More particularly, this part canvasses such legislation as the *Sale of Goods Acts*, *Direct Sellers Acts*, *Unfair Business Practices Acts* and *Consumer Protection Acts*, in common law provinces, as well as the *Quebec Civil Code* and *Consumer Protection Act*.
- Part IV highlights gaps, inadequacies and ambiguities of current legislative schemes in the context of consumers purchasing goods or services over the Internet. These gaps, inadequacies and ambiguities are first set out on a legislation-basis. They are then organized along specific themes or issues of particular concern to consumers.
- The themes identified above deal with issues concerning contract formation, formal requirements, jurisdiction, contract contents, misrepresentations, conditions and warranties, contract interpretation, "cooling off" periods, the delivery of goods or services and redress mechanisms. The final part of the report discusses how these issues might best be addressed and offers recommendations to deal with them.

An effort bring consumer protection in line with will need to be global and take into account the rapid pace at which the electronic marketplace is changing. As a first step, the report proposes that the

EXECUTIVE SUMMARY

following recommendations be considered:

1. Contract formation issues should generally be left to the determination of the courts;
 2. Consideration should be given to the enactment of legislative provisions requiring vendors to specifically indicate what would constitute an acceptance on the part of a purchaser in online transactions;
 3. A model acceptance scheme and/or a model transaction confirmation schemes should be developed, as a complement to the legislative provisions referred to above, to guide the private sector;
 4. Consideration should be given to enacting a legislative provision which would define the conditions under which an electronic contract constitutes a contract or document "in writing"; similarly, a definition of what constitutes a signature might also be considered;
 5. Consideration should be given to a legislative provision stipulating that online contracts entered into by consumers are deemed to have been entered into at the address of the consumer;
 6. The private sector should be encouraged to develop best practices in dealing with complaints by online consumers; specifically, guidelines might be established for the informal review and efficient resolution of consumer complaints; vendors would be encouraged to provide information on complaint handling mechanisms to the consumer prior to the formation of the contract;
 7. Consideration should be given to a legislative amendment providing for what minimal information vendors should be required to provide consumers prior to the formation of the contract;
 8. The private sector should be encouraged to develop sector-by-sector guidelines on information to be provided to consumers on the vendor's business, the terms of the contract, payment methods, and informal redress mechanisms;
 9. The list of unfair practices covered in provincial legislation should be updated to address new practices adopted by online vendors and to secure online consumer protection; concurrently, as part of a code of conduct or best practices, vendors should be encouraged to develop industry norms for appropriate behaviour in offering consumer transactions online;
 10. Should mediation be made mandatory in cases of unfair practices;
 11. Conditions and warranties to be implied in online consumer transactions should be streamlined and should apply to both goods and services;
 12. A legislative amendment should be considered to protect consumers against external, ambiguous, illegible, incomprehensible or abusive clauses;
 13. Consideration should be given to the enactment of "cooling-off" periods for online consumer transactions;
 14. Similarly, if within the "cooling-off" period, the consumer exercises his/her right to cancel the contract, s/he may also cancel, without penalty, any accompanying credit arrangement;
 15. Consideration should be given to a legislative amendment or the development by the private sector of a code of conduct or best practices requiring the provision of information on delivery arrangements, including anticipated delays (or time limit for the performance of the contract) to consumers in online transactions;
 16. Consideration should be given to the development by the private sector of codes of conduct or best practices encouraging vendors to provide complaint resolution services, including the appointment of an ombudsperson; vendors would be encouraged to provide any information as to how potential complaints will be addressed and handled by the vendor prior to the formation of the contract;
 17. Consideration should be given to the development of "templates" to guide each and all jurisdictions in their efforts to address the key contract law issues identified in this report in the pursuit of a shared goal.
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THE PURPOSE OF THIS DOCUMENT IS TO ASSIST IN THE ANALYSIS AND DEVELOPMENT OF POLICIES DESIGNED TO ENSURE ADEQUATE PROTECTION TO CONSUMERS WHEN TRANSACTING ON THE INTERNET.

THE REPORT IS MEANT TO PROVIDE A SURVEY OF THE CONTRACT LAW PRINCIPLES THAT ARE CALLED INTO PLAY IN ONLINE CONSUMER TRANSACTIONS AND OFFER OPTIONS FOR ADDRESSING INADEQUACIES AND GAPS THAT ARE IDENTIFIED.

THE READER IS REMINDED THAT THIS REPORT IS NOT MEANT TO BE A LEGAL OPINION. THE ISSUES DISCUSSED IN THE REPORT ARE FRAUGHT WITH UNCERTAINTY. IT WOULD NOT BE PRUDENT TO APPLY THE POINTS MADE IN THIS REPORT TO SPECIFIC CIRCUMSTANCES WITHOUT THE ASSISTANCE OF A LEGAL ADVISOR.

PART I INTRODUCTION

This report is about consumer protection in online commerce, otherwise referred to in this report as electronic commerce, and more particularly the level and adequacy of the protection allowed to consumers purchasing goods or services over the Internet.

Electronic commerce involving consumers is at present, relatively modest in volume. It is projected, however, that "the embryonic electronic commerce mark of today will grow by a factor of 10 by the year 2000"¹.

Consumer to business online commerce will increasingly involve transactions where the purchaser and the vendor are located in different jurisdictions or countries. Traditionally, a consumer would purchase foreign-made goods from a vendor located in the consumer's own country. The international transaction would not be entered into by the consumer but rather the vendor or some other entity in the vendor's chain of supply. In a transaction taking place over the Internet, disintermediation occurs as the consumer purchases the goods or services directly from a vendor located in another jurisdiction/country.

It is in this sense that a global market place for consumers is in the making, in which the Internet serves as the primary enabler. This development has the attraction of making available to consumers a wider range of goods and services at a lower cost as well as allowing consumers the convenience of shopping from their own homes.

In a typical Internet purchase transaction, the consumer browses the World Wide Web and finds an interesting invitation to treat on a web page of a supplier, in another province or in the US, for example. The consumer might have been looking for a particular supplier or may have stumbled upon an interesting advertisement. The Web page itself might be stored on a computer in Canada, the US or Europe or even in Japan, but its actual location may not readily be apparent to the consumer.

¹ Dismantling the Barriers to Global Electronic Commerce, An International Conference and Business-Government Forum Organised by the OECD and the Government of Finland in co-operation with the European Commission, Japan and BIAC, Turku, Finland, 12-21 November 1997, Day 2, Introduction to Session 5, Turkunet.doc, 07.08/1997; According to Heinke and Rafter, "Rough Justice in Cyberspace: Liability on the Electronic Frontier" (1994), 11 Computer Law, 1 in 1994, the Internet boasted an electronic population of about 20 million users, spanning over 135 countries.

The Web page may or may not carry specific information about the supplier and his place of business. For the purchase of tangible objects, such as clothing, CDS or books, the consumer will often respond to the invitation by picking out the items s/he wishes to purchase and placing them in a "shopping cart", in the same way a consumer shops in a supermarket. Once the consumer has chosen the items of interest, s/he will proceed to the "cash register" where s/he will usually be asked to fill out a form on the supplier's site and pay for the items purchased. Payment is usually made by non cash means, e.g., by credit card or electronic cash.^{1,5}

Consumer protection legislation was designed primarily for conventional paper transactions. While many of the provisions of such legislation will continue to be useful for electronic commerce transactions, new issues for sellers and consumers are being raised. It is generally agreed that without a transparent set of rules that ensure commercial predictability and foster consumer confidence, the global online market place will not achieve its potential.²

As pointed out in an interim Report prepared by the Office of Consumer Affairs - Industry Canada in October 1996, most consumer statutes and programs at both the federal and provincial levels were developed in the 1960s and the 1970s, based on prevailing government, market, legal and institutional conditions in the business-consumer relationships and attitudes. The advanced technologies of the new "digital" Economy often involve hidden features and are challenging traditional legal rules and principles.³ This report examines the challenges created by these technological advances, particularly the Internet, to the existing level of legal protection afforded to consumers from the perspective of the law of contract.

This report is meant to provide a general overview of the law of contract in the common law jurisdictions and in Quebec. Its particular focus, however, is on consumer protection legislation in the context of basic online consumer transactions. The report does not discuss federal legislation, such as the *Criminal Code* or the *Competition Act*, which provide an important degree of protection to consumers in their online transactions. The report does not examine the issues that might arise in respect of consumer contracts with service providers or credit transactions either. Issues regarding consumer privacy and confidentiality of data do not come within the scope of this report.

^{1,5} Based on R. Schu's "*The Applicable Law to Consumer Contracts made over the Internet: Consumer Protection through Private International Law*" I.J. L.I.T., Vol. 5, No. 2 page 192 at 195.

² See in that regard *Draft Recommendation of the Council concerning guidelines for consumer protection in online commerce* and Report by John Rothchild of the US Federal Trade Commission, 1997.

³ "*New Approaches to Consumer Law in Canada*", and Interim Report prepared by the Office of Consumer Affairs - Industry Canada, October 1996, page 8.

This report is an attempt at better understanding the basic contract law principles and more particularly rules of consumer protection law as they would apply in a context of an online transaction.

It identifies the inadequacies and *lacunae* of the current laws affording protection to consumers in the context of online transactions and proposes options as to how these laws might be modified or adapted to the new means of purchasing goods and services made available to consumers through the Internet.

More specifically, Part II of the report contains an outline of general contract law principles as they are found both in common law jurisdictions and in Quebec. For example, the rules concerning contract formation, enforceability and jurisdiction, etc., under the common law and the civil law are reviewed.

Part III provides a summary of current legislation of general application affording protection to consumers, based on a jurisdiction-by-jurisdiction review of existing legislation and case law. Drawing on this analysis, the report identifies a number of inadequacies and weaknesses of the current legislation in the context of online consumer contracts.

Part IV of the report discusses a number of options and makes recommendations for dealing with the issues previously identified.

PART II CONTRACT LAW - GENERAL OVERVIEW

A. COMMON LAW

Introduction

I Contract Formation Issues

1. Capacity to enter into contracts
2. Offer and acceptance

II Enforceability Issues

1. General requirements for an enforceable contract
2. Writing requirements for specific types of contracts
3. Termination of a Contract
4. Promissory Estoppel
5. Determining the terms to be enforced - Interpretation of a contract

III Jurisdiction Issues

1. Jurisdiction to decide disputes arising under contracts
2. The proper law of the contract

INTRODUCTION

A contract has been explained as "a legally recognized agreement between two or more persons, giving rise to obligations that may be enforced in the courts."⁴ Contract law addresses issues which arise primarily around three fundamental concepts: **promises**, **agreement**, and **bargain**.⁵ When a contract is alleged to exist, the legal rules which come into play tend to focus on:

- whether the **promises** contained in a purported contract should or should not be

⁴*Interprovincial Concrete Ltd. v. Great West Construction Ltd.* (1987), 23 C.L.R. 123 at 130 (Sask. Q.B.) (citing G.H.L. Fridman, *The Law of Contract in Canada*, (2d ed. 1986) at 3).

⁵*Fridman*, at 2.

- enforced;
- whether an **agreement** was actually reached on the terms of a contract; and
- whether the court's intervention in favour of one party or the other is justified by the circumstances under which promises have been made and agreements reached, *i.e.* the **bargain** between the parties.

The myriad of legal rules which make up the law of contract have developed from these basic concepts. Some of the more significant contract law rules and principles pertaining to the issues of capacity, offer and acceptance, enforceability and jurisdiction are summarized below.

I CONTRACT FORMATION ISSUES

1. CAPACITY TO ENTER INTO CONTRACTS

- a. **MINORS:** A minor has only limited capacity to enter into binding contracts.

Common Law ⁶

- a) A minor is any person under the age of 21 years. Most common law jurisdictions including the provinces of Canada have now lowered the age at which a minor obtains majority to 18 or 19 years.⁷

⁶ In British Columbia, the Common Law has been somewhat modified by 1985 amendments to the *Infants Act*, see Fridman at 157.

⁷

| PROVINCE | AGE OF MAJORITY | STATUTE |
|------------------|-----------------|--|
| Alberta | 18 | <i>Age of Majority Act</i> , R.S.A. 1980, c. A-4, s.1 (for purpose of convenience) |
| British Columbia | 19 | <i>Age of Majority Act</i> , R.S.B.C. 1979, c. 5, s.1 |
| Manitoba | 18 | <i>Age of Majority Act</i> , R.S.M. 1987, c. A7, s.1 |
| New Brunswick | 19 | <i>Age of Majority Act</i> , R.S.N.B. 1973, c. A-4, s.1(1) |
| Newfoundland | N/A | No legislation |
| Nova Scotia | 19 | <i>Age of Majority Act</i> , R.S.N.S. 1989, c. 4 |

- b) Minors are liable to pay according to the terms of the contract under which they have received "necessaries". The problem in applying this rule is determining what goods are in fact necessities.
- c) There may be a very narrow category of contracts which, when entered into by a minor, are absolutely void. This category of contracts is probably limited to contracts which are clearly inconsistent with the best interests of the minor.
- d) The majority of contracts entered into by minors are voidable at the privilege of the minor. Such contracts are binding on the adult who contracts with the minor unless the minor exercises his/her privilege to void the contract. Upon obtaining majority a minor who is a party to a voidable contract can transform the contract into a binding contract. In some circumstances this is done by formally ratifying the contract. In other circumstances previously voidable contracts become absolutely binding merely by the failure to repudiate the contract within a certain period of time after attaining majority.
- e) An adult guarantor may not be liable where the debt owed by the minor as principal debtor is either void or voidable. However, an adult indemnifier will be liable for the non-performance of a minor even where the minor's obligation is void or voidable.

b. INSANE PERSONS

Once a judicial determination has been made that a party is insane, any contract entered into by that party is void. Where a person in fact lacks mental competence but has not yet been found lacking such capacity by a court, contracts entered into by that person appear to be voidable by the insane person. Accordingly, the contract

| | | |
|-----------------------|----|--|
| Ontario | 18 | <i>Age of Majority and Accountability Act</i> , R.S.O. 1990, c. A-7, s.1 |
| Prince Edward Island | 18 | <i>Age of Majority Act</i> , R.S.P.E.I. 1988, c. A-8, s.1 |
| Quebec | 18 | <i>Civil Code</i> , Art. 153 |
| Saskatchewan | 18 | <i>Age of Majority Act</i> , R.S.O. 1978 c. A-6, s. 2(1) |
| Northwest Territories | 19 | <i>Age of Majority Act</i> , R.S.N.W.T. 1988, c. A-2, s.2 |
| Yukon | 19 | <i>Age of Majority</i> , R.S.Y. 1986, c.2, s.1 |

may be enforced by the insane person unless the contract has been invalidated. Whether the contracting party was aware of the other party's insanity, and whether the contract is unfair to the insane party are factors considered by a court deciding whether to invalidate a contract.

c. **AGENTS**

A person who executes a contract is personally liable, unless the other party to the contract is aware that the person who has executed the contract is acting as an agent. Where the other party is aware that the contract has been executed by an agent acting for someone else, the agent is not personally liable and the principal on whose behalf the contract has been executed is only liable if the agent was duly authorized to act on their behalf and the principal is itself capable of entering into a contract.

2. **OFFER AND ACCEPTANCE**

a. **OFFER**

1. **Definition:** An offer includes a statement or conduct by one person which indicates the willingness to enter into a contract on certain terms with another person. Such statement or conduct constitutes an offer, and not merely an invitation to treat, only when it reveals an intention to be contractually bound by the terms of the offer once the offer has been accepted.⁸
2. **Withdrawal:** An offer, unless it is expressed to be irrevocable, can be withdrawn at any time before acceptance by communication of the withdrawal to the person to whom the offer was made.
3. An offer, once it has been accepted, becomes a contract and cannot thereafter be withdrawn.

⁸ As to offers made via facsimile, the Ontario Court of Appeal decided that it was not necessary for the appellant to deliver a signed original offer, and transmission of a copy by fax, though not specifically contemplated in 1974, was sufficient: *Rolling v. Willann Investments Ltd.* (1989), 70 O.R. (2d) 578 (Ont. C.A.)

b. INVITATION TO TREAT**1. General Rule**

An invitation to treat consists of any statement or conduct which is intended to elicit an offer to contract from some other party (e.g. the display of goods for sale in a shop window, in a catalogue, or by some other medium, such as the Internet) is generally not considered an offer to contract. Such displays are normally considered invitations to the public to offer to purchase the goods.⁹

2. Invitations to Tender**(a) General Rule:**

Where a person calls for tenders from competing contractors to provide services, provide goods, or buy property, they are generally held to be merely inviting contractors to submit offers to contract.

(b) *R. v. Ron Engineering & Construction (Eastern) Ltd.* (1981), 119 D.L.R. (3d) 267 (S.C.C.)

In some circumstances a call for irrevocable tenders amounts to a simultaneous offer to contract by the person calling for tenders and an invitation to treat by the person calling for tenders. In such a case, the contractor who submits a tender may be accepting an offer to contract to the extent that they will be liable for loss of their deposit in the event that they attempt to revoke the tender. At the same time, the tender itself will

⁹ An American case, *Corinthian Pharmaceutical Systems v. Leder Laboratories*, 724 F. Supp. 605 (S.D. Ind. 1989) is identified in A.A. Macchione, "Overview of the Law of Commercial Transactions and Information Exchanges in Cyberspace - Canadian Common Law and Civil Law Perspectives", 13 C.I.P.R. 129 at 136 (1996), as "one of the first lawsuits disputing an electronic contract." In this case, the defendant's automated order-taking system allowed customers to place orders by touch-tone telephone. The plaintiff was held to have made an offer when he placed an order using the system. Despite the fact that the defendant's system issued a tracking number to the plaintiff, no contract was formed. The defendant was therefore permitted to reject the plaintiff's offer and raise the price at which the plaintiff could purchase.

constitute an offer from the contractor to the person calling for tenders, in response to the invitation to treat which was made when the call for tenders went out.

c. ACCEPTANCE

1. Definition

- (a) An acceptance is the statement or conduct directed to the offeror by which the person to whom an offer was made signifies that he/she wishes to form a contract on the terms contained in the offer.
- (b) In practice, parties may disagree on the significance of a particular statement or act. For example, in *Corinthian Pharmaceutical Systems v. Leder Laboratories, supra*, the issuance of a tracking number in response to a purchase order placed through an automated system was held not to amount to an acceptance. Consequently, the seller was permitted to demand a higher purchase price despite the buyer's objections.

2. Correspondence with Offer

- (a) An acceptance, to be effective must correspond identically to the terms of the offer without any alterations or qualifications.
- (b) Any alteration or qualification in an attempted acceptance of an offer, creates a counter offer which requires acceptance by the person who made the original offer in order to create a binding contract. Such a counter offer operates as a rejection of the original offer. As a result, the original offer can no longer be accepted in order to create a binding contract unless the party who made the original offer consents to reviving the original offer.

3. Communication of Acceptance

- (a) General Rule

In order to accept an offer and create a binding contract acceptance must be communicated by the party that made the offer to contract in either the mode

required by the terms of the offer, or, if no specific mode of acceptance is required, by any statement or conduct which is reasonable in the circumstances.¹⁰ The rule that acceptance is incomplete until it is received by the offeror has been applied in Canada to methods of instantaneous communication such as the telephone or telex.¹¹

(b) Exceptions

(i) Mailbox Rule

Where an offer permits acceptance by a traditional time delayed form of correspondence, such as mail or telegram, acceptance will be effective to create a binding contract as soon as it is sent by telegram or placed in the mail. Under this exception to the general rule, the acceptance is effective to create a binding contract even if it never arrives at its destination.

(ii) An Electronic Mailbox Rule?

While it is likely that courts will apply the instantaneous communications rule to electronic agreements, some jurists have suggested that it is the mailbox rule which might apply. Professor Waddams, for example, states that instantaneous communication rules should govern two way communications and not one way methods of communications such as fax machines, and potentially the Internet: "in recent times the telex and fax machine are more

¹⁰ "Where contracts are concluded by instantaneous means of communication, modern Canadian cases have also usually held that, at least for jurisdictional purposes, the contract is formed where the acceptance is received": *C. Boyle and D. Percy*, *Contracts: Cases and Commentaries*, Toronto/Calgary/Vancouver, Carswell Company, 1989, p. 62, in *V. Gautrais*, "La formation des contrats par télécopieur" and *La Revue juridique Thémis*", <http://www.droit.umontreal.ca/pub/>, 02/26/98.

¹¹ *Macchione* at 131. See discussion in *Entores v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.) - where the Court held that the contract (via telex) was formed in the place where the acceptance had been received; see also *Brinkibon v. Stahag Stahl and Stahlwarenhandels-gesellschaft m.b.H.*, [1983] 2 A.C. 34 (H.L.) - where the House of Lords found that a telex communication of offer and acceptance was to be treated in the same manner for the purposes of contract formation as an instantaneous communication, such as a telephone conversation.

commonly used as a means of one-way communication, like a telegram. It would seem rash, therefore, to deduce...that an acceptance by telex is only effective when received.”¹²

(iii) Waiver of Communication - Unilateral Contracts

Unilateral contracts are formed in the context of certain offers and there are offers and/or certain relationships which "make it clear that it is the performance of some act by the offeree which concludes the contract and amounts to acceptance, making the contract binding without any requirement of communication of acceptance in advance of the performance of the act. Such contracts have long been designated as ‘unilateral’ contracts”.¹³

II ENFORCEABILITY ISSUES

1. GENERAL REQUIREMENTS FOR AN ENFORCEABLE CONTRACT

a. Privity

a) General Rule

As a general rule a person can only sue to have a contractual provision enforced where that person has executed the contract as a party thereto. Therefore, where one person derives a benefit under a contract, but has not signed the contract, that person may have no right to sue in situations where they have not received the expected benefit.

b) Exceptions

Some exceptions to this requirement exist. They are not relevant for the purpose of on-line contracting.

b. Capacity: In order to have a valid contract, the parties to the contract must have the

¹²*Waddams*, at ¶106, p.73. See also *Macchione*, at 133-134.

¹³*Fridman*, at 70.

legal capacity to make a contract.

- c. **Agreement:** In order to have a valid contract, each party must actually agree to the same contractual terms as the other parties to the contract. (This requirement is referred to in law as *consensus ad idem*).
- d. **Intent:** In order to have a valid contract, the parties must actually intend to create binding legal promises.
- e. **Consideration:** In order to have a valid contract, the bargain for the promise being made must include a commitment to provide some consideration (e.g. payment or a reciprocal promise) in return for receiving the promise.

a) **Definition**

In order to constitute consideration, what is given in return for a promise must "create some benefit to the party promising or some trouble, prejudice or inconvenience to the party to whom the promise is made." *Robertson v. Robertson* (1933), 6 NPR 370 at 389 (NBCA).

b) **Contract modification**

In some cases, a change agreed to by the parties to an existing contract may not be enforceable in the courts because the change in question requires one party to do something new and does not require anything from the other party except what was already required by the contract in the first instance.

- f. **Legality of Performance:** In order to have a valid contract, the performance of acts required in the contract must not be illegal.
- g. **Certainty and Clarity:** In order to have a valid contract, the terms of the agreement and the promises must be sufficiently clear for the court to determine what was required under the contract.

a) **Essential Terms**

Where the parties have failed to agree on an essential term, for example, the price to be paid for the goods, courts may conclude that no contract exists at all.

b) Non-Essential Terms

In cases where some but not all terms of the contract were ambiguous, courts have ignored ambiguous portions of the contract while still enforcing clearer portions of the contract between the parties.

2. WRITING REQUIREMENTS**Definition**

A "writing" is not defined under the Ontario *Statute of Frauds* or *Sale of Goods Act*. Accordingly, in Ontario for example, the Ontario *Interpretation Act* applies and "writing," "written," or any term of like import, includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form".¹⁴

3. TERMINATION OF A CONTRACT**a. General Rule**

Once a contract has terminated it can no longer be enforced.

b. Performance

When each party has performed all of its obligations under a contract the contract is at an end.

c. Rescission

¹⁴ In *Re Beukenkamp et al. v. The Minister of Corporate Affairs* (1974) 43 D.L.R. (3d) 118, the Federal Court ruled that a photocopy of a share purchase note was admissible in evidence upon satisfactory proof of the destruction of the original or loss of the original by showing it could not be found after a diligent search. In *Beatty v. First Exploration Fund 1987 and Company, Limited Partnership* (1988) 25 B.C.L.R. (2d) 377 the B.C. Supreme Court held that the faxed copy of a proxy required to be 'written' and 'signed' pursuant to a partnership agreement was essentially a photocopy of the original and should be considered as both 'written and signed'.

a) **Fraudulent Misrepresentation**

A fraudulent misrepresentation is defined by Professor Fridman as "a representation of fact made without any belief in its truth with the intent that the person to whom it is made shall act upon it and actually causing that person to act upon it". Professor Fridman's definition was cited by the court in *Roussel v. Saunders* (1990), 85 Nfld. & P.E.I.R. 228 at 238 (Nfld. T.D.) "A fraudulent misrepresentation amounts to the tort of deceit for which the injured party will receive damages from the misrepresenter. A contract induced by fraud is voidable at the election of the defrauded party. It is not void *ab initio*; it is liable to be upset. Rescission may be granted. But the equitable remedy of rescission is discretionary. Damages may be awarded as well as rescission. Such damages will be calculated on the basis of loss suffered through the deceit, so as to put the injured party into the position he would have been in had the fraud not occurred."¹⁵

b) **Innocent Misrepresentation**

Where there has been a purely innocent misrepresentation, the party to whom the innocent misrepresentation was made will not be entitled to damages, but may have the contract rescinded if, in the court's opinion, what the party is entitled to under the contract is substantially different from what the party believed he would be entitled to under the contract as a result of the innocent misrepresentation.

c) **Negligent Misrepresentation**

In *Hedley Byrne & Co. v. Heller & Partners* [1964] A.C. 465 (H.L.) it was established as a rule of law that a negligent misrepresentation which is not fraudulent will nevertheless entitle a party to whom the misrepresentation was made to damages in tort. If a contract has resulted from such a negligent misrepresentation, whether or not the contract can be rescinded, will depend on the same rules as applied in the case of innocent misrepresentation.

d. **Breach of Contract**

- a) Where a breach of contract occurs and is so serious and fundamental as to go to the root of the contract, the other party may treat the contract as at an end.

¹⁵Fridman, at 300-301.

- b) If a breach of contract occurs but is not so serious and fundamental as to go to the root of the contract, the other party is entitled only to damages.
- c) Fridman defines a fundamental breach as a breach which would "substantially deprive the innocent party of the whole benefit it was intended he should obtain from the contract".¹⁶

e. Repudiation

Where one party unilaterally acts in a manner which indicates that the party no longer regards itself as being bound by the contract, the non-repudiating party may treat the contract as at an end. However, where the non-repudiating party does not choose to treat the contract as at an end, repudiation will not be effective to terminate the contract.

f. Agreement

The parties to a contract can agree to terminate a contract.

g. Frustration

Where it becomes impossible to fulfill contractual obligations because of a significant factual occurrence or change in the law, performance will no longer be required. Similarly, performance will be frustrated, if some act or event renders it no longer feasible or purposeful to fulfill the contract.

4. PROMISSORY ESTOPPEL

Under the doctrine of promissory estoppel, courts may enforce a promise for which no consideration has been given, if the following conditions are met.

1. A legal relationship existed between the parties at the time the statement was made.
2. The statement made must clearly establish that, at the time of the statement, the party making the statement intended to be bound by the promise or representation.

¹⁶*Fridman*, at 499.

3. The party to whom the statement was made must have relied upon it to his/her detriment.
4. The party to whom the statement was made must have acted equitably.

5. **DETERMINING THE TERMS TO BE ENFORCED - INTERPRETATION OF A CONTRACT**

1. The words of a written contract will be interpreted according to their ordinary and natural sense unless such an interpretation would result in absurdity.
 2. Where the language of a written contract is unclear or ambiguous, evidence other than the written contract itself may be admitted to aid in the interpretation of the words used in the contract.
 3. There are also situations in which evidence other than the words included in the written contract may be admitted to prove the existence of another agreement such as an oral agreement between the parties, which does not contradict the written agreement but modifies or explains it.
 4. Where two written clauses of a contract conflict, they will be interpreted in a way which gives affect to both of them without contradicting the other. If the two clauses cannot be reconciled in this way the clause which is consistent with the general intent of the parties will be retained and the clause that is inconsistent with the general intent of the parties will be ignored. The general intent of the parties is determined according to the contract as a whole.
 5. Where a written contract is ambiguous and open to more than one meaning the meaning which is least favourable to the party that drafted the document governs.
 6. In some limited circumstances, a custom or practice which is common in a certain trade, business, or profession may be taken by the court as impliedly included in the contract.
 7. **Rectification:** A court may alter the terms of a written contract document where there has been a mutual mistake by the parties in setting out the terms of the contract and there is clear and unambiguous evidence of the mistake. Rectification may not be available where the party seeking it has delayed in doing so, affirmed the mistaken
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writing by performing without objection, or caused the mistake through negligence. Rectification may also be unavailable where it would prejudice innocent third parties.

III JURISDICTION ISSUES

1. JURISDICTION TO DECIDE DISPUTES ARISING UNDER CONTRACTS

a. Domestic Rules of Jurisdiction and Procedure

The jurisdiction of a court to hear a law suit brought by a party to a contractual dispute is determined according to that court's local rules of jurisdiction and procedure. The rules of every province/territory allow, to some extent, for persons who are not present in the province/territory or perhaps even in the country to be made parties to a law suit in the province/territory.

For example, Rule 17.02 of the *Ontario Rules of Civil Procedure* allows a party to be served outside Ontario with an originating process, and so become a party to a law suit, in respect of a contract where:

- i) the contract was made in Ontario,
- ii) the contract provides that it is to be governed or interpreted in accordance with the law of Ontario,
- iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
- iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part contract that ought to have been performed in Ontario.

b. *Forum Non Conveniens*

According to Professor Castel, "the court of a common law province or territory has inherent jurisdiction, which is preserved by statute, to stay a local

action if some other forum is more convenient in the sense of more suitable for the ends of justice. Where the stay is refused, the local court is deemed to be *forum conveniens*. Where it is granted the local court is deemed to be *forum non conveniens*....The doctrine of *forum non conveniens* is a doctrine often used in cases in which a problem of conflict of jurisdictions is present.¹⁷ The Supreme Court of Canada has also observed that the rule of *forum non conveniens* is remarkably uniform throughout the common law jurisdictions. However, both Professor Castel and the Canadian Supreme Court have also stated that there is still no consensus in Canada on either the status of this doctrine or the various aspects of this doctrine.¹⁸

c. Foreign Jurisdiction Clauses

Parties to an international contract will often provide that a particular court has exclusive jurisdiction to hear disputes arising under the contract. By such an agreement, the parties consent in advance to the jurisdiction of a specified court to hear the lawsuit. If one of the parties later initiates a lawsuit in a Canadian common law province other than that provided for in the contract, the court has discretion to stay the proceeding. The court need not exercise this discretion and may go ahead and hear the lawsuit if the party initiating the lawsuit satisfies the court that it is just, proper and/or convenient that court go ahead and hear the case.

2. THE PROPER LAW OF THE CONTRACT

a. Proper Law of the Contract

a) Contractual Selection of the Proper Law of the Contract

The parties to a contract may expressly provide that the law of a particular jurisdiction will govern the contract. A contractual selection of the proper law of the contract will

¹⁷J.G. Castel, in Macchione at 136.

¹⁸ J.G. Castel, *ibid*, at 136 and *AMCHEM Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897 at 918, 921-22. See also *Morguard Investments Ltd. v. de Savoye*, [1990] 3 S.C.R. 1077

normally be respected by the courts, as long as the selection of governing law is made in good faith and not simply to avoid application of mandatory laws, such as consumer protection rules, which would otherwise be applicable to the contract.

b) Common Law Approach

Where the parties have not expressly provided that a particular body of law will govern the contract, a court will determine and apply the proper law of the contract.

The law of the jurisdiction which is most closely and really connected to the contract is the proper law of the contract.¹⁹ There is no firm rule for determining what jurisdiction is most closely and really connected to a contract but courts look at the following factors in making the determination:

- i) the place of contractual formation (this determination can be difficult and depends in large part upon whether the contract was formed when and where the acceptance was sent or whether the contract was formed when and where the acceptance was received);
- ii) the place of contractual performance;
- iii) the place of residence or business of the parties; and
- iv) the nature of the contract.

b. Conflicts of Laws Rules

a) Procedural Rules Applicable to a Lawsuit

¹⁹ See *Morguard Investments Ltd.*, *supra* note 15 wherein the Supreme Court of Canada set out the test of real and substantial connection - which will be enforced unless 1) there is not real and substantial connection between the "original" province and the subject matter of the action; 2) the defendant in the action was not a party to the foreign action; 3) the foreign judgment was procured by fraud; 4) there is a failure of natural justice; or 5) enforcing the foreign judgment would be contrary to public policy. See also *Bailey & Co. Inc. v. Laser Medical Technology, Inc.* (1993), 15 O.R. (3d) 212 (Ont. Gen Div.): the contract formed between the Ontario plaintiff and the defendant, a California company, contained neither choice of law nor choice of forum provisions. The defendant terminated the contract and the plaintiff sued for damages. The Court held that the jurisdiction which had the most natural, real and substantial connection with the contract and the things to be done under it was the State of California.

Issues concerning the conduct of litigation that may arise out of a contractual dispute is determined according to the procedural rules of the court where the lawsuit is being heard.

b) Proper Law of the Contract Governs Rights of the Parties

The “proper law of the contract” is not necessarily the law of the jurisdiction where the lawsuit is being heard. The proper law of the contract may actually be the substantive law of another jurisdiction. Examples of issues which are determined according to the proper law of the contract include:

- i) whether a contract has been formed by offer and acceptance;
 - ii) whether any consideration is necessary to enforce a contract;
 - iii) whether a given consideration must be sufficient to enforce a contract;
 - iv) whether there must be privity of contract in order for a particular party to sue or be sued under the contract;
 - v) whether there have been mistakes, misrepresentations or duress, and the effect that these circumstances should have on the contract;
 - v) whether the parties to the contract are legally capable of entering into a contract;
 - vi) whether certain formal requirements must be met and/or have been met in order for the contract to be enforceable;
 - vii) whether the contract has been properly performed and/or whether performance under the contract is excused;
 - viii) interpretation of words and terms used in the contract;
 - ix) whether or not there has been a valid discharge of the obligations under the contract;
 - x) whether certain types of damages are recoverable under the contract;
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and

- xi) whether interest is to be charged and the rate of interest to be charged on any liability under the contract.

Examples of issues which are not decided according to the proper law of the contract but rather are decided according to the law of the forum in which the lawsuit is heard include:

- i) the remedy available to a plaintiff; and
- ii) the measure of damages.

3) Illegality

- i) Where a contract is illegal under the proper law of the contract, the forum where the lawsuit is being heard will not enforce the contract;
- ii) Where a contract requires some performance which is illegal in the place where the act is to be performed, the forum where the lawsuit is being heard may not enforce the contract;
- iii) Where a contract is illegal according to the laws of Canada, a Canadian court will not enforce the contract regardless of its legality under the proper law of the contract.

B. QUEBEC CIVIL LAW

Introduction

I Contract Formation Issues

1. Capacity to enter into contracts
2. Offer and acceptance

II Enforceability Issues

1. General requirements an enforceable contract
2. Writing requirements for specific types of contracts
3. Interpretation of a Contract
4. Termination of a Contract
5. Promise to Contract
6. Determining the terms to be enforced - Interpretation

III Jurisdiction Issues

1. Jurisdiction to decide disputes arising under contracts
- 2 The proper law of the contract

INTRODUCTION

I CONTRACT FORMATION ISSUES

1. CAPACITY TO ENTER INTO CONTRACTS

a. MINORS

As in the case of the common law, a minor has, under the Civil Code, limited capacity to enter into binding contracts. The Civil Code has dedicated a number of chapters to the regulation of a minor's legal actions. These sections apply to all legal acts and are not limited to contractual capacity. According to art. 153 a minor attains majority at the age of eighteen:

153. "Full age or the age of the majority is eighteen years. On attaining full age, a person ceases to be a minor and has the full exercise of his civil rights".

161. “An act performed alone by a minor where the law does not allow him to act alone or through a representative is absolutely null”.

A minor may however, enter into contracts alone to meet his ordinary and usual needs. This capacity will be recognized in certain situations depending on the age of the minor and his/her power of discernment. In the particular context of obligations and commercial transactions, the Code states that the rules relating to the capacity to contract are laid down principally in the Book on Persons. (art. 1409).

Parents will be held liable for injury caused by a minor under their supervision. Art. 1459 states that “a person having parental authority is liable to reparation for injury caused to another by the act or fault of the minor under his authority unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor”.

b. INSANE PERSONS

Protective supervision of a person of full age is established in his interest and is intended to ensure the protection of his person, the administration of his patrimony and, generally, the exercise of his civil rights. Any incapacity resulting from protective supervision is established solely in favour of the person under protection (art. 256).

An act performed alone by a person of full age under curatorship may be declared null or the obligations resulting from it reduced, without any requirement to prove damage (art. 283).

Any person who, as tutor or curator or in any other quality, has custody of a person of full age who is not endowed with reason, is not liable to reparation for injury caused by any act of the person of full age, except where he is himself guilty of a deliberate or gross fault in exercising custody (art. 1461).

c. AGENTS

The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains recourse against them (art. 1463)

See also art. 1459 and 1461, above.

2. OFFER AND ACCEPTANCE**a. OFFER**

1. **Definition:** An offer to contract is a proposal which contains all the essential elements of the proposed contract and in which the offeror signifies his willingness to be bound if it is accepted. An offer to contract derives from the person who initiates the contract or the person who determines its content or even, in certain cases, the person who presents the last essential element of the proposed contract (art. 1388-1389).
2. **Withdrawal:** An offer can be withdrawn at any time before acceptance is received by the offeror: art. 1390. Article 1391 further states that "where the offeree receives a revocation before the offer, the offer lapses, even though a term is attached to it". An offer lapses if no acceptance is received by the offeror before the expiry of the specified term or, where no term is specified, before the expiry of a reasonable time; it also lapses in respect of the offeree if he has rejected it (art. 1392).
3. Once it has been accepted, an offer may not be revoked.

b. INVITATION TO TREAT**General rule**

An offer to contract is a proposal which contains all the essential elements of the proposed contract and in which the offeror signifies his willingness to be bound if it is accepted. An invitation to treat is less than an offer and it is intended to elicit an offer to contract

c. ACCEPTANCE

1. **Definition:** The exchange of consents is accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person (art. 1386). An acceptance is any statement or conduct whereby the offeree signifies his
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willingness to accept the essential elements of the proposed contract.

Silence does not imply acceptance of an offer, subject only to the will of the parties, the law or special circumstances, such as usage or a prior business relationship (art. 1394).

2. Correspondence with Offer

Acceptance which does not correspond substantially to the offer or which is received by the offeror after the offer lapsed does not constitute acceptance. It may, however, constitute a new offer (art. 1393).

3. Communication of Acceptance

(a) General Rule

A contract is formed when and where acceptance is **received** by the offeror, **regardless of the method of communication used**, and even though the parties have agreed to reserve agreement as to secondary terms (art. 1387).

(b) No Exceptions

There are no exceptions to the general rule. A contract will always be deemed to have been formed when acceptance of the offer is received, whether the parties are communicating instantaneously or not.

II. ENFORCEABILITY ISSUES

1. GENERAL REQUIREMENTS FOR AN ENFORCEABLE CONTRACT

A. Effect of contracts with respect to third persons

A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law (art. 1440)²⁰

²⁰ However see art. 1468: re responsibility of the manufacturer of movable property.

B. Capacity:

In order to have a valid contract, the parties to the contract must have the legal capacity to make a contract.

C. Agreement:

In order to have a valid contract, the parties must agree on the essential elements of the proposed contract.

D. Intent:

The parties must be willing to be bound by the contract (the offeree must be willing to accept an offer to contract and the offeror must be willing to be bound by his offer if it is accepted)

E. Obligation:

Civil law does not value the concept of "consideration" in the same way common law does. Instead, it focuses on obligations and prestations. Obligations necessarily arise from contracts.

An obligation arises from a contract or from any act or fact to which the effects of an obligation are attached by law. An obligation may be pure and simple or subject to modalities (art. 1372).

The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing something or not doing something. The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order (art. 1373).

F. Legality of Object:

A contract whose object is prohibited by law or contrary to public order is null (art. 1413).

G. Certainty and Clarity

Any contract which does not meet the necessary conditions of its formation may be annulled (relative nullity) (art. 1416).

2. WRITING REQUIREMENTS FOR SPECIFIC TYPES OF CONTRACTS

A “writing” in the Interpretation Act includes “what is printed, engraved, lithographed or otherwise traced or copied”.

A “signature” is “the affixing by a person on a writing of his name or the distinctive mark which he regularly uses to signify his intention”: art. 2827

In the case of consumer contracts, the *Consumer Protection Act* requires that certain types of contracts be in writing. These include, for example, contracts entered into by itinerant merchants, contracts of credit, contracts which include a conventional option to purchase leased goods and contracts of lease with guaranteed residual value, contracts of sale relating to automobiles and motorcycles, and contracts for the lease of services involving sequential performance.

3. TERMINATION OF CONTRACT

A. General Rule

Once a contract has terminated, it can no longer be enforced. A contract that is null is deemed never to have existed.

B. Extinction of Obligations

Obligations are extinguished not only by the causes of extinction contemplated in other provisions of the Code, such as payment, the expiry of an extinctive term, novation or prescription, but also by compensation, confusion, release, impossibility of performance or discharge of the debtor (art. 1671).

C. Nullity

(a) Consent

Consent may be given only by a person who, at the time of manifesting such consent,

either expressly or tacitly, is capable of binding himself. Consent may be given only in an enlightened manner. It may be vitiated by error, fear or lesion. A person whose consent is vitiated may apply for annulment of the contract, and also claim damages or apply for a reduction of his obligations.

(b) Error

Error vitiates consent of the parties or of one of them where it relates to the nature of the contract, the object of the contract, the prestation or anything that was essential in determining that consent (art. 1400).

(c) Fear

Fear of serious injury to the person or property of one of the parties vitiates consent given by that party where the fear is induced by violence or threats exerted or made by or known to the other party. Apprehended injury may also relate to another person or his property and is appraised according to the circumstances (art. 1402).

Fear induced by the abusive exercise of a right or power or by the threat of such exercise vitiates consent.

(d) Lesion

Except in the cases expressly provided by law, lesion vitiates consent only in respect of minors and persons of full age under protective supervision. Lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation (art. 1405-1406).

D. Breach of Contract

Where the debtor (of the obligation) fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence: 1) force specific performance of the obligation; 2) obtain in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation; or 3) take any other measure provided by law to enforce his right to the performance of the obligation: art. 1590

Under the *Consumer Protection Act*, if the merchant or the manufacturer fails to fulfil an obligation imposed on him by the Act, by the regulations or by a voluntary undertaking made under s. 314 or whose application has been extended by an order under section 315.1, the consumer may demand a) the specific performance of the obligation; b) the authorization to execute it at the merchant's or manufacturer's expense; c) that his obligations be reduced; d) that the contract be rescinded; e) that the contract be set aside; or f) that the contract be annulled, without prejudice to his claim in damages, in all cases. He may also claim exemplary damages (art. 272)

E. Agreement of parties

The parties to a contract can agree to terminate a contract.

F. Impossibility of Performance

A debtor is released where he cannot perform an obligation by reason of a superior force and before he is in default, or where, although he was in default, the creditor could not, in any case, benefit by the performance of the obligation by reason of that superior force, unless in either case, the debtor has expressly assumed the risk of superior force (art. 1593)

4. PROMISE TO CONTRACT

An offer to contract made to a determinate person constitutes a promise to enter into the proposed contract from the moment that the offeree clearly indicates to the offeror that he intends to consider the offer and reply to it within a reasonable time or within the time stated therein. A mere promise is not equivalent to the proposed contract; however, where the beneficiary of the promise accepts the promise, both he and the promisor are bound to enter into the contract, unless the beneficiary decides to enter into the contract immediately (art. 1396).

5. DETERMINING THE TERMS TO BE ENFORCED - INTERPRETATION

1. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract (art. 1425)
 2. In interpreting the contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account (art. 1426)
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3. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole (art. 1427)
 4. A clause is given a meaning that gives it some effect rather than one that gives it no effect (art. 1428)
 5. Words susceptible of two meanings shall be given the meaning that best conforms to the subject matter of the contract (art. 1429)
 6. A clause intended to eliminate doubt as to the application of the contract to a specific situation does not restrict the scope of a contract otherwise expressed in general terms (art. 1430)
 7. The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used (art. 1431)
 8. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer (art. 1432).
 9. An external clause referred to in a contract is binding on the parties. In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew it (art. 1435)
 10. In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party (art. 1436)
 11. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause (art. 1437).
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III JURISDICTION ISSUES**1. General rule**

The form of a juridical act is governed by the law of the place where it is made (art. 3109).

2. Content of juridical acts

A juridical act, whether or not it contains any foreign element, is governed by the law **expressly designated** in the act or the designation of which may be inferred with certainty from the terms of the act... The law of a country may be expressly designated as applicable to the whole or a part only of a juridical act (art. 3111)

If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the **law of the country with which the act is most closely connected**, in view of its nature and the attendant circumstances (art. 3112)

A juridical act is presumed to be most closely connected with the law of the country where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, his establishment (art. 3113).

3. Special Provisions**a) Sales Contract Generally**

If no law is designated by the parties, the sale of a corporeal movable is governed by the law of the country where the seller had his residence or, if the sale is made in the ordinary course of business of an enterprise, his establishment, at the time of formation of the contract.

However, the sale is governed by the law of the country in which the buyer had his residence or his establishment at the time of formation of the contract in any of the following cases:

1) negotiations have taken place and the contract has been formed in that country; 2) the contract provides expressly that delivery shall be made in that country; 3) the contract is formed on terms determined mainly by the buyer, in response to a call for tenders.

If no law is designated by the parties, the sale of immovable property is governed by the law of the country where it is situated (art. 3114)

b) Consumer contract

The choice by the parties of the law applicable to a consumer contract does not result in depriving the consumer of the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the necessary steps for the formation of the contract in that country or if the order was received from the consumer in that country.

The same rule applies where the consumer was induced by the other contracting party to travel to a foreign country for the purpose of forming the contract. **If no law is designated, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract** (art. 3117)

Article 3117 implies that the parties can agree to the choice of law which will govern the transaction. This choice would appear to be inconsistent with s. 19 of the CPA which states that "any stipulation in a contract that such contract is wholly or partly governed by a law other than an act of the Parliament of Canada or of the Legislature of Quebec is prohibited".

c) Civil Liability

The liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victim, 1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or 2) by the law of the country where the movable was acquired (art. 3128)

4. International Jurisdiction of Quebec Authorities**a) General Provisions**

In the absence of any special provisions, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec (art. 3134)

Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required (art. 3136)

The jurisdiction of a foreign authority is not recognized by Quebec authorities in the following cases:

- (1) where, by reason of the subject matter or an agreement between the parties, Quebec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
- (2) where, by reason of the subject matter or an agreement between the parties, Quebec law recognizes the exclusive jurisdiction of another foreign authority; and
- (3) where Quebec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator: art. 3165

PART IV ISSUES

Part III provides a general overview of some of the Canadian laws directly affecting consumers with particular attention to formal requirements for the formation of a valid contract, cancellation rights and remedies available to the consumer in the case where a breach of contract has occurred. Drawing on these summaries, this section attempts to highlight gaps, inadequacies or ambiguities in the laws in the particular context of electronic commerce.

Part A sets out a number of questions pertaining to commerce taking place over the Internet. As explained in more detail in the previous part of this report, most of the schemes already in place apply to online consumer transactions as they are laws of general application. Laws of more specific application, such as those relating to consumer protection, have revealed a greater number of gaps and inadequacies. In part B, the report seeks to gather and redefine these questions as issue-specific problems which consumers may face when forming contracts online.

A. ISSUES BY LEGISLATIVE SCHEME**1. Common General Issues**

- The current definition of 'writing' in the Interpretation Acts of all jurisdictions may not be broad enough to include electronic or online documents. Should there be an amendment to clarify this definition? Should the definition of "writing" include the text and graphics a consumer actually sees on the screen as well as the data stored in the computer memory? Could the print-out of a particular screen be included within the definition?
 - Quebec is the only province that has a definition of 'signature'. Should the other provinces and territories include a similar definition in their respective Interpretation Acts?
 - In the context of electronic commerce, there is an issue as to who is the offeror and who is the offeree. What constitutes an offer as opposed to an invitation to treat? Is the consumer who "surfs" the Internet soliciting offers from suppliers when s/he visits their sites or is the supplier soliciting a purchase from the consumer? In what kind of circumstances will the 'surfer/consumer' be soliciting offers?
 - In the context of electronic commerce, there is a question as to where and when the contract is formed. Which rule should govern the place and time an online contract is formed? Should the theory of 'reception' (instantaneous communications rule) or of 'expedition' (mail box rule) of the acceptance apply?
 - Should the definitions of consumer/buyer and seller/vendor/merchant be broadened to include pre-programmed computers?
 - Should the means of acceptance and what constitutes acceptance be specifically defined?
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Should there be a particular process for accepting an offer?

- Should vendors be allowed to avail themselves of general exclusionary clauses? Under what circumstances should these clauses be allowed? Should vendors be permitted to unilaterally change the terms of contracts already concluded?
- The practice in online contracting is that the buyer pays before the goods are delivered. This practice seems to be contrary to the Quebec CPA. Does this practice raise concerns that need to be clarified by legislative changes?
- Should legislation be amended to account for future methods of payment such as “secure authorization of funds transfer” (SET), electronic cash and stored value cards?
- Cross border transactions raise issues of jurisdiction. Should the courts of the jurisdiction of the residence of the consumer assume jurisdiction over disputes involving consumers? Should there be a provision stating that the imposed jurisdiction cannot be waived? Should the “home province/territory” rule apply to on line consumer contracts? Under what circumstances should or can extra-territorial jurisdiction be asserted?

2. Sale of Goods Acts (SGAs)

- The SGAs in common law jurisdictions apply exclusively to goods. Should the Acts be amended to protect the sale of services in the context of the Internet?
- The SGAs include provisions pertaining to sales by description. Are the current requirements concerning “description of goods sold” and “information on the seller” adequate to protect the consumer in the context of online consumer transactions?
- All SGAs include rules pertaining to the delivery of goods and the right to rescind the contract. Should there be amendments to the Acts to provide for the case where a seller grants a right to cancel within a stated period of time which may well expire before the consumer has taken delivery of the goods? Should there be a provision stating that the time to cancel the contract should start to run when the goods are received and not when the contract is formed (taking shipment delays into account)?
- Should the Acts include a provision stating that in case of ambiguity the contract shall be interpreted in favour of the buyer?
- Should there be a requirement that online vendors disclose their principal place of business, their full address, the type of business conducted and that such a disclosure cannot be waived by either contracting party?

3. Unfair Business Practices Act (UBPAs)

- Nothing prevents this Act from applying to online consumer contracts; but consideration could be given to ensuring types of unfair practices in online contracts are covered by the
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UBPAs. Consideration could also be given to have similar Acts enacted in Nova Scotia, New Brunswick and the Territories.

4. Direct Sellers Act (DSAs)

- Legislation regulating direct sales is inconsistent across Canada. There is no uniformity. Should there be an effort to harmonize legislation pertaining to direct sales?
- Should the DSA provisions apply to door-to-door sales or contracts solicited, negotiated or concluded with face to face contact only? or should they apply to contracts concluded at a distance as well.
- All direct sellers (except for those exempt from the Act/regulations) are required to register with the provincial government. Would an extension of the licensing requirement to sellers using the Internet be practical or enforceable?
- Should the 'cooling off' period provided in all direct sales legislation be incorporated in the CPA or apply to all consumer transactions?
- In Quebec, direct sales are deemed to have been concluded at the residence of the buyer. Should the rule be harmonized across the country?
- In Alberta, the new provisions regulating direct sales apply to 1) contracts in which either the supplier OR the consumer are residents of Alberta and 2) contracts in which the offer or acceptance is made in or is sent from Alberta. Should this rule be implemented in other jurisdictions?

5. Consumer Protection Act (CPAs)

- Consumer Protection legislation lacks uniformity in the protection offered to consumers across the country. In some jurisdictions, the CPA only applies to credit transactions. Should such legislation be harmonized?
 - Should all CPAs include specific conditions/warranties to be implied in every consumer transaction which cannot be waived by either the consumer or the vendor/seller? or should all CPAs include a provision stating that the implied warranties in the SGA are also implied in all consumer transactions and cannot be waived?
 - Should all jurisdictions include a regime for redress within the CPA instead of relying solely on the scheme provided in the SGAs? Alberta's new Fair Trading Act includes a scheme for redress for violations to any part of the act including unfair business practices, direct sales and general consumer protection provisions. Is this a desirable regime in other jurisdictions?
 - Should all jurisdictions include special protection for the consumer involved in a sale by description contract?
-

6. Alberta's New Fair Trading Act (FTA)

- Alberta's new FTA includes a number of provisions which would extend consumer protection to online contracts, including a section on Marketing Through Electronic Media. This section gives the Minister the power to make regulations respecting the marketing of goods and services through forms of electronic media, such as the telephone, television or the Internet. Would a similar provision be desirable in other jurisdictions?
- Alberta has essentially combined into one act provisions contained in its former CPA, DSA and UBPA. As such the same remedies are available in case of breach of any of the provisions pertaining to those former acts which are now included within the new act. Should a similar incorporation be done in other jurisdictions? Other jurisdictions already have already devised their own combination: Quebec for example includes its UBPA provisions in its CPA.

B. CONSUMER ISSUE-SPECIFIC PROBLEMS

- Issues of contract formation.
 - what constitutes an offer and who is the offeror? what constitutes acceptance? Will the consumer know that a contract has been formed?
 - Formal Requirements
 - the requirements that certain contracts be "in writing" and "signed". Are online contracts in writing? What would constitute the signature?
 - Jurisdiction Issues
 - where and when is the contract formed? In which jurisdictions can the consumer seek redress?
 - Contents of the Contract
 - is the information in the contract sufficient for the consumer to make an informed decision (information about the vendor and the products/services offered for sale)? If online purchases/sales are a form of sale by description, what should be required in terms of the description of the goods?
 - Misrepresentations
 - What remedies are available to a consumer where the vendor has made misrepresentations as to the quality or to the terms and conditions of the contract?
 - Conditions and Warranties
 - Are the legislative measures now available sufficient to address the kind of representations made by online vendors? If not, what further conditions/warranties could be deemed to be implied in an online contract to which the consumer is a party?
 - Interpretation of the Contract
 - Only Quebec and Alberta (in its new legislation) have a specific legislative provision
-

stating that a contract is interpreted (in favour of the person who contracted the obligation) against the person who stipulated the contract. Should other common law jurisdictions have a similar provision (in addition to common law principles of interpretation)?

- “Cooling-Off” Period

Currently, only the legislative schemes pertaining to direct sales give the consumer/purchaser the option to cancel the direct sales contract for any reason within a period of time referred to as the “cooling-off” period. Pursuant to harmonization efforts by the Provinces and Territories, a ten day period should be uniformly implemented in the near future. Most jurisdictions also provide for cancellation if the goods/services are not supplied within a certain period of time and the purchaser has not accepted them when they are delivered. Should such a provision be uniformly applied in all jurisdictions for any consumer transaction, including online transactions?

- Delivery of Goods/Services

Under SGA, payment of price and delivery of the goods must be concurrent conditions unless otherwise agreed to by the parties. If no time for delivery is specified within a contract, goods must be delivered within a reasonable time. Stipulations as to time are treated as warranties under the SGA. Accordingly a breach of a stipulation as to time will provide a consumer with remedies available for breach of warranty, namely, a right to claim damages. In such cases, the purchaser is not entitled to reject the goods and treat the contract as repudiated. Are these provisions sufficient to address delivery problems in the case of online transactions where payment is usually made before goods are delivered?

- Redress Mechanisms

Current legislation provides for rescission/cancellation, damages (both general and punitive), specific performance, and injunction in certain circumstances. Are these measures sufficient to address problems faced by online consumers? How much protection do these measures really offer the online consumer when the vendor resides in another province, territory or country?

PART V OPTIONS AND RECOMMENDATIONS

The Interim Report prepared by Staff of the Office of Consumer Affairs, Industry Canada, entitled "New Approaches to Consumer Law" in Canada the Canadian government acknowledged that the system of consumer law and policy in Canada, characterized as a "patchwork" rather than as a framework, actually evolved within the social, economic and political systems which prevailed in Canada 30 years ago. Explicit consumer protection legislation was enacted and institutions emerged to address imbalances in the marketplace which concerned the consumer from the 1960s and 1970s.²⁵

Aside from radically different social, political and economic conditions, the reality of open networks and the prospect of widespread electronic commerce as a medium of choice for consumers poses the question of whether current legislation will be adequate to meet some basic consumer needs. We have seen that in many ways it is not.

Once these inadequacies and issues of impracticality in the law are recognized, provincial and territorial governments will need to consider ways of rectifying the insufficiencies and gaps of consumer laws. Certain considerations or issues which are particular to new technologies and the online environment will also need to be addressed.

The first part of this chapter sets out what protections and remedies are provided by the existing legal framework and how desirable amendments or modifications to these particular legislative schemes are. The second part consists of an analysis of the ten most relevant issues to consumers when transacting on line. The third part proposes an implementation scheme for addressing the issues outlined in part 2.

I. EXISTING LEGAL "FRAMEWORK"**1. Legislation of Broader Application**

Online purchasing is in its essence like any other purchase of goods/services. Only the means of conducting the transaction differs. Consumers transacting online should still be and are still entitled to the same protection as provided by the laws, regulations and practices that apply to existing forms of commerce, especially those laws of general application. However, in the online world, traditional mechanisms to address imbalances in the marketplace fail to provide sufficient protection to

²⁵ Interim Report on New Approaches to Consumer Law in Canada, Industry Canada, October 1996.

consumers. Shortcomings of the SGA and UBPA legislative schemes, for example, include 1) the fact that the SGAs apply only to goods; 2) the provision in most SGAs that rights, liabilities and warranties under the SGA can be waived by agreement between the parties; 3) the possibility that other unfair practices which are directly relevant to transactions formed on the Internet are not specifically mentioned in the UBPA's.

Most provinces and the two territories have enacted consumer protection legislation to address the *lacunae* of this broader legislation with a view to dealing with the particularities of consumer transactions. However, due to the novelty of electronic commerce, many consumers are facing problems which were not anticipated at the time current legislation was enacted. Maintaining the existing focus on court redress mechanisms and merely modifying legislation to include electronic commerce transactions within its ambit of protection, however, may not offer the best or most practical solution.

In the case of DSA, disparity in the protection provided under the provisions of this Act by the different provinces/territories has already been noted. Two provinces and the Yukon require face-to-face encounters between the seller and the buyer in order for the provisions to apply. Further, as mentioned before, the licensing requirements imposed on direct sellers by provincial and territorial legislation would render the application of these provisions to Internet vendors very impractical.

One significant benefit provided to buyers under the DSAs, is the "cooling off" period - the period during which a contract may be cancelled by the buyer, without cause. Under the terms of the 1994 Agreement on Internal Trade, the Provinces agreed to work toward harmonizing their direct sales legislation with respect to rescission rights. In 1996, the provinces agreed to a uniform 10-day "cooling-off" period.²⁶ Some provinces/territories also provide extended "cancellation" periods in the situation where goods and services have not been supplied or delivered. A legislative update of consumer protection law might include the incorporation of similar provisions applying to online consumer transactions.

2. Consumer Protection Legislation

An overview of Canadian consumer protection legislation revealed inconsistent and unequal levels of consumer protection among the different jurisdictions.

The disparities between the jurisdictions are significant and consumers will be protected in varying degrees depending on the law governing a particular transaction. The discrepancy may be further exacerbated by the fact that courts are not required to enforce the judgments of courts in other

²⁶ Canadian Commercial Guide, Vol. I, chap. 12-000, para. 12-770.

provinces/territories.

In some cases, the title of the Act (“CPA”) does not appear to adequately reflect its content. We have seen that in the case of Newfoundland and P.E.I., for example, the CPAs focus exclusively on credit transactions and do not apply to consumer transactions not involving credit. In many cases, consumers involved in non-credit or non-direct sale transactions may only effectively seek relief under the SGAs and the UBPA’s. Similarly, B.C.’s CPA offers most of its protection to purchasers in the case of executory or direct sale contracts. Other consumers do not appear to have the same kind of protection and must resort to protection provided in other Acts.

On the other hand, six provinces and the two territories²⁷ have included in their CPA specific provisions relating to conditions and warranties to be implied in every consumer sale transaction or to every sale of consumer products. In all cases the implied conditions specified in the CPA cannot be waived by the parties. The protection in three provinces, New Brunswick, Saskatchewan and Quebec, and of the two territories are even more extensive than that offered by the other three provinces, given their inclusion of additional implied conditions/warranties, (which also cannot be waived), and the provision of a redress mechanism within the CPA itself.

Online consumers will benefit from the current protection under the SGAs in all provinces/territories where the transaction is for a sale of goods. Online consumers can also benefit (in all provinces save New Brunswick, Nova Scotia and the territories) from UBPA-type legislation for relief against any vendor/seller for misrepresentations (of the type listed) made to the consumer; in most cases the consumer will be able to avail her/himself of redress mechanisms provided in the SGAs. In most jurisdictions online consumers will also be able to avail themselves of whatever protection is offered by the respective CPAs. Alberta has incorporated these provisions in its new *Fair Trading Practices Act*.

Since provincial/territorial laws only operate within the limits of the enacting jurisdiction (except where conflict of laws rules permit otherwise) the difficulty of enforcing applicable remedies may ultimately leave the consumer empty handed and dissatisfied.

Common Issues

Finally, while the common issues raised in Part III are of particular significance in the context of

²⁷ Manitoba, Nova Scotia, New Brunswick, Ontario, Quebec and Saskatchewan; Northwest Territories and Yukon

electronic commerce in general, these issues should perhaps, be addressed in a broader commercial context, accommodating both consumer-to-business transactions as well as business-to-business transactions. We refer in particular to issues relating to the definition of "writing", the desirability of defining 'signature', general issues of contract formation (what constitutes an offer, when and where a contract is formed, the issue of acceptance, etc.)

Most of the common issues will need to be addressed in the broader context of online commercial transactions to account for business transactions as well as consumer transactions

II. IMPORTANT ISSUES IN ONLINE TRANSACTIONS

This part attempts to gather and redefine the questions raised in the second half of the previous part.

1. CONTRACT FORMATION
2. FORMAL REQUIREMENTS
3. JURISDICTION
4. CONTENTS OF THE CONTRACT
5. MISREPRESENTATIONS
6. CONDITIONS AND WARRANTIES
7. INTERPRETATION RULES
8. "COOLING OFF" PERIOD
9. DELIVERY
10. REDRESS MECHANISMS

This part proposes to discuss each of these issues and their importance in online consumer transactions. We will also canvass various options that might be considered to ensure that consumers using the Internet to purchase goods and/or services are adequately protected. As will be seen from our analysis, there are issues which might best be addressed through effecting changes in the law, while others might preferably be left to the private sector to address, through, for example, the development of codes of conduct or "best online practices".

1. CONTRACT FORMATION

Contract formation issues are likely to arise every time a consumer purchases goods/services online. Consumers may question whether a particular advertisement on a vendor's home page constitutes an offer or an invitation to treat; whether the consumer is the offeror or the offeree; when an offer is

deemed to have been accepted; whether the acceptance of an offer will be confirmed or whether the transaction itself will be confirmed.

These questions are not specifically addressed in the legislation and courts are likely to rely on general common law and civil law principles to resolve them. Since an offer stems from a statement or conduct by a person indicating a willingness to enter into a contract on certain terms with another person, one could assume that the vendor is the offeror, offering goods and/or services for sale at a certain price. The consumer would thus be the offeree, accepting to purchase the goods/services under the terms dictated by the vendor. In the case of all online transactions, the contract will be executory in nature, in the sense that the terms of the contract are dictated by one party, the vendor, and the goods/services will be delivered once payment has been effected. Online contracts are also a form of distance selling. Some Canadian jurisdictions have recognized the potential for abuse of consumers where contracts are executory and formed at a distance.

There are also specific issues with respect to acceptance. A contract will be deemed to have been accepted when the offeree signifies that s/he wishes to form a contract on the terms stipulated in the offer. The statements or conduct constituting acceptance are not always obvious when transacting on the Internet. Should amendments be made to legislation to oblige online vendors to indicate within the contract what will constitute acceptance? This indication might then be recognisable by the consumer as an act of purchase²⁸

Perhaps the best way to encourage vendors to resort to this kind of practice would be to develop a model acceptance or transaction confirmation scheme as part of an industry code of conduct, whereby adherents to the code would agree to use such a process.

²⁸ Consumer Protection in Electronic Commerce - Draft Principles and Key Issues - prepared by the Australian National Advisory Council on Consumer Affairs, October 1997 (<http://www.dist.gov.au/consumer/publicat/untangle>) includes a similar principle (Fifth Principle). A triple confirmation process that would ensure that the consumer recognized that s/he is committing her/himself to purchase is proposed.

CONTRACT FORMATION

1. Contract formation issues should generally be left to the determination by the courts;
2. Consideration should be given to the enactment of legislative provisions requiring vendors to specifically indicate what would constitute an acceptance on the part of a purchaser in online transactions;
3. A model acceptance scheme and/or a model transaction confirmation scheme should be developed as a complement to the legislative provisions referred to above, to guide the private sector;

2. Formal Requirements

While a written contract is not required in the case of all “consumer transactions”, executory contracts, direct sales contracts and credit contracts are generally required by law to be in writing and signed by the consumer and/or the vendor. Since most online transactions are credit transactions and are executory in nature, many of these contracts may be in violation of the formal requirements of current legislation. Does such a contract when formed online, constitute a contract “in writing” and under what conditions will it be deemed to have been effectively “signed” by the consumer? Will a computer printout serve as a legally acceptable duplicate original copy of the contract? Current definitions of “writing” in the *Interpretation Act* of each province and territory might be broad enough to include online contracts. If they are not, are online contracts invalid?

The purpose of requiring that a contract be in writing and that the consumer be provided with a copy of the contract is to ensure that the consumer has a discernable record of the transaction. It is arguable that “fully integrating data into a broad database loses that capacity”.²⁹ Quebec has already recognized this evidentiary question and has incorporated in its *Civil Code* provisions dealing with computerized records. Documents reproducing a juridical act which was entered on a computer system make proof of the content of the act if it is intelligible and if its reliability is sufficiently

²⁹ R.T. Nimmer, “Electronic Contracting: Legal Issues”, (1996) *The John Marshall Journal of Computer and Information Law*, Selected Reprints, 3 at 19.

guaranteed.³⁰

These issues go beyond the narrower situation of the online consumer transaction. While provincial governments have already taken steps to address evidentiary issues with respect to electronic documents, laws will generally have to be updated to be consistent and conducive to the realities of electronic commerce.

FORMAL REQUIREMENTS

4. **Consideration should be given to enacting a legislative provision which would define the conditions under which an electronic contract constitutes a contract or document “in writing”; similarly, a definition of what constitutes a “signature” might also be considered;**

3. Jurisdiction Issues

The Quebec *Civil Code* and its CPA addresses the “jurisdiction” issue by expressly adopting the “instantaneous communications” rule for all contracts, regardless of the method of communication used by the parties.³¹ According to this rule, all contracts are deemed to have been formed **when** and **where** acceptance was received by the offeror.

Assuming the vendor is the offeror, the contract is deemed to have been formed in the jurisdiction of the offeror at the time s/he receives the consumer’s acceptance. In the case of contracts formed at a distance, however, the CPA modifies the general principles and the distance sales contract, which may include an online contract in certain circumstances (provided it is not solicited by a consumer), is deemed to be entered into at the address of the consumer.

As a result, under this rule, the contract will, in the context of a consumer transaction, be formed when the vendor receives the consumer’s acceptance and the contract will be subject to the jurisdiction of the province/territory in which the consumer resides. The protection afforded by this provision may, in some cases, be illusive, as the consumer residing in Quebec may be transacting with

³⁰ Article 2837

³¹ Article 1387

a vendor in Europe or Asia. While the consumer may, in that case, bring an action against the foreign vendor in Quebec, the value of a judgment against the vendor is likely to be limited if the vendor does not have assets in Quebec.

Common law jurisdictions have not set out jurisdiction rules as clearly and there is some debate as to whether online transactions should fall under the “instantaneous communication” rule, and be deemed to be formed at the place and time where the acceptance is received, or under the “mail box” rule, according to which the contract is formed when the acceptance is expedited or mailed by the consumer.

Since online transactions are occurring at increasingly greater speeds, it is likely that the “instantaneous communications” rule will apply and online contracts will be deemed to have been formed when and where the acceptance is received, namely, at the address of the vendor.

None of the common law jurisdictions, save for Saskatchewan and Alberta, in its newly enacted *Fair Trading Practices Act*,³² provide an exception in the case of consumer contracts. Accordingly, consumers residing in the common law provinces and territories may often be subject to the laws of the jurisdiction of the vendor, unless the courts determine otherwise. Even if the consumer had a better chance of obtaining and enforcing a judgment against a vendor under the laws of the vendor’s jurisdiction, commencing an action in the foreign vendor’s jurisdiction may not appeal to the consumer who would have to incur travel expenses and the cost of “foreign” legal advice to defend his/her rights.

Jurisdiction issues in the context of online transactions present one of the greatest challenges to the current system’s way of addressing disputes which involves two or more provinces, territories or countries. As mentioned in the Report on New Approaches to Consumer Law in Canada, “beyond the best intentions and good will, there is no formal way for a province whose citizens are allegedly victims of cross-border scams to receive assistance from a second province where alleged

³² Saskatchewan’s CPA states that persons who buy and use consumer products purchased in Saskatchewan, and manufacturers, retail sellers and warrantors who carry on business in Saskatchewan are subject to the provisions of this Part and to the jurisdiction of the courts of Saskatchewan. (s. 69); Alberta’s *Fair Trading Practices Act* includes a provision in Part 2 (Unfair and Negative Option Practices) and Part 3 (Cancellation of Direct Sales Contracts and Time Share Contracts). In both of these cases, the law will apply to contracts where the supplier OR the consumer is a resident of Alberta and where the offer OR acceptances was made in or was sent from Alberta.

perpetrators are located and where the alleged fraudulent conduct is taking place”³³.

Amendments or additions to legislative schemes already in place may be helpful to address these issues more effectively. It may be preferable to address these questions in a private sector code of conduct or best online practices pursuant to which consumers would refer to an appointed ombudsperson for the resolution of their complaints. Such a code or practices might also include an informal complaint mechanism which in turn, would address situations where vendors and consumers are in different jurisdictions.

JURISDICTION ISSUES

5. Consideration should be given to a legislative provision to the effect that online contracts entered into by consumers are deemed to have been entered into at the address of the consumer;
6. The private sector should be encouraged to develop best practices in dealing with complaints by online consumers; specifically, guidelines might be established for the informal review and efficient resolution of consumer complaints; vendors would be encouraged to provide information on complaint handling services prior to the formation of the contract;

4. Contents of the Contract

Specific content and disclosure requirements are now mandatory in direct sales contracts and credit transactions in most jurisdictions. Required information includes the name and address of the seller and/or salesperson, description of the goods/services, price and terms of payment, etc. Most other transactions do not have similar requirements. Consumers are particularly vulnerable when transacting online since in many instances, the only information available to the consumer is the vendor's home page address (URL). The consumer may not know who s/he is dealing with or where the company is located.

Consumers should at the very least be able to clearly identify the vendor and the location of the business they are transacting with. Other relevant information includes a clear statement of the terms of the contract, details on the products/services provided and information on available methods of payment.

³³ Supra, page 62.

Consumers should be provided with all relevant information pertaining to the transaction. The vendor might, for example, be required to provide information on the following:

1. the vendor's identity and place of business (including full address and contact name);
2. the duration of the offer
3. date and place the contract is concluded;
4. a complete description of the goods and services offered;
5. since the transaction consists of a sale by description, there should be an implied condition that the goods are of merchantable quality;
6. the total price of the goods including GST, PST, shipping and handling charges and terms of payment; if additional taxes or duties are to be levied, they should be brought to the consumer's attention;
7. a statement of warranties applying to the goods/services;
8. the currency and the exchange rate should also be clearly stated;
9. as many online transactions are paid for via credit cards, the disclosure requirements set out in current legislation should also appear in online contracts;
10. if a cooling-off period is legislated, information about an appropriate cancellation notice should be provided;
11. a date for the delivery of the goods or the performance of the services should be indicated;
12. information pertaining to the possibility of refunds or exchange and the procedure for doing so;
13. information pertaining to possible complaints and the name, telephone number and address of the person to be contacted;
14. information about any informal redress mechanisms adopted by the vendor in case of disputes.

It is for consideration whether a legislative provision should be adopted making some of this information legally mandatory with no possibility of waiver by either party. A contract formed in violation of these requirements would be deemed to be void or voidable.

There could also be a strengthening of the requirements pertaining to sales by description. Under the SGA, there is an implied condition that goods purchased through a sale by description are of merchantable quality. While this condition cannot be waived, the parties can agree that the sale is not a sale by description. In the case of online transactions, it would appear that all sales are sales by description since they are contracts formed at a distance.

A legislative amendment might include a provision whereby parties cannot provide that an online transaction is not a sale by description; there might also be a provision, as there is in many provinces/territories, that goods and services purchased online will correspond to the description made of them.

A non-legislative option may be to include, as part of a code of conduct or best practices, guidelines on the information to be made available to consumers on the vendor's business, the terms of the contract and payment methods. Specific industry guidelines (sector by sector) would mandate the information to be provided on products and services offered for sale. Vendor Associations organized along industry lines might place a "stamp" or "seal of approval" on a member's Web page certifying that the vendor subscribes to the practices established by the association in question and has provided information on its business which is readily accessible by the consumer.³⁴ The consumer could then access this information by clicking on the seal etc. The Association would reserve the right to remove the seal if the vendor did not comply with disclosure standards.

CONTENTS OF CONTRACT

7. **Consideration should be given to a legislative amendment setting out what minimal information vendors should be required to provide consumers prior to the formation of the online transaction;**
8. **The private sector should be encouraged to develop sector-by-sector guidelines on information to be provided to consumers on the vendor's business, the terms of the contract, the goods and services sold, payment methods and informal redress mechanisms;**

5. Misrepresentations

All provinces except Nova Scotia, New Brunswick and the territories currently have legislation governing unfair business practices.

Online consumers can already avail themselves of the provisions set out in legislation governing unfair business practices. Examples of unfair practices which might arise in the context of electronic transactions and which are already part of current legislation include:

1. misrepresenting the price or charging a price that is grossly above that being offered for similar products;
2. entering into a transaction in which the consumer is not likely to either receive the

³⁴ Proposed solutions include a labelling system where a certificate, displayed on the Website, guarantees that the online business has met certain consumer protection requirements and good business standards: E. Lynch in "Protecting Consumers in the Cybermarket" in the OECD Observer No. 208 - October/November 1997, at p. 11

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3. goods/services or receive any substantial benefit from the subject matter of the transaction; entering into a transaction which stipulates such harsh and adverse terms as to be inequitable to the consumer;
 4. representations that the goods or services have special advantages that they do not have;
 5. using misleading or deceptive advertisement;
 6. holding out that goods have particular characteristics in appearance, quality or performance which they do not;
 7. representing that goods are new or reconditioned when they are not.

Practices which are not currently covered by the UBPA's might include misrepresentations as to the identity or address of the vendor, misrepresentations as to the currency and exchange rates; misrepresentations as to refund policies, misrepresentations as to the time for delivery of goods, etc.

In all provinces which have enacted UBPA's or similar provisions, the Lieutenant Governor in Council or the Minister has some authority to make regulations. In the case of Ontario, British Columbia, Alberta (in its new *Fair Trading Practices Act*) and P.E.I., the Minister or Lieutenant Governor in Council may prescribe or specify practices which are unfair or deceptive. In the case of Manitoba, Saskatchewan and Newfoundland, the Lieutenant Governor in Council may make regulations respecting other matters necessary for carrying out the purpose and intent of the Act or to give effect to the purpose of the Act. Given the fairly broad wording of the UBPA's, this power to make regulations may or may not include the specification of additional unfair practices to which the UBPA would apply. As consumer involvement in the electronic environment increases and more exchanges between consumers and vendors occur online, unfair practices which are particular to the online environment and to a specific industry are likely to become more apparent. Consideration should be given to updating or clarifying current UBPA's to ensure that new unfair practices are included.

Under current legislative schemes where a vendor is suspected of deceptive practices the Director of Trade Practices has powers of investigation and in some provinces has the power to order the cessation of an unfair practice without the requirement of court approval.³⁵ Saskatchewan is the only province which makes a mediation attempt mandatory. A similar provision might be considered in all jurisdictions.

³⁵ Canadian Commercial Law Guide, CCH Canadian Limited, North York, Ontario, Chapter 12-000, page 13-055.

MISREPRESENTATION

9. The list of unfair practices covered in provincial legislation should be updated to address new practices adopted by online vendors and to secure online consumer protection; concurrently as part of a code of conduct or best practices, private sector vendors should be encouraged to develop industry norms for appropriate behaviour in offering consumer transactions online;
10. It is for consideration whether mediation should be made mandatory in case of unfair practices;

6. Conditions and Warranties

SGAs provide for basic conditions or warranties to be implied in every contract for the sale of goods. These include 1) condition as to title; 2) warranty as to freedom from encumbrance; 3) warranty as to quiet possession. Some provincial and territorial CPAs have added further warranties in addition to the SGA conditions/warranties which are to be implied in every consumer transaction or to every consumer sale. They include, for example:

- a) a warranty that goods purchased by description will correspond with the description;
- b) a condition that the goods are of merchantable quality except for any described defects; c) a condition that the goods are new and unused unless otherwise described;
- d) a condition that the goods will be durable for a reasonable period of time;
- e) a warranty that services will be performed in a skilful and workmanlike manner;
- f) that the product is of such quality, state or condition as to be fit for the purpose for which products of that kind are normally used;
- g) a warranty as to quality (i.e., latent defects).

Consideration should be given to streamlining the conditions or warranties to be implied in a consumer transaction occurring online. In some provinces/territories, the conditions and/or warranties are to be applied to consumer sales of goods³⁶; in other provinces, the conditions and/or

³⁶ Manitoba, Nova Scotia, Ontario, Northwest Territories and the Yukon

warranties are to be applied to sales of consumer products³⁷ and/or services³⁸.

As a large number of electronic transactions involve the sale of services, it is for consideration whether current legislation should be amended to harmonize protection across Canada and create greater consistency in levels of protection by having the same conditions and warranties implied in contracts for the sale of both goods and services. It has been noted that some provinces do not have additional warranties/conditions within their CPA legislation (P.E.I., Alberta and B.C.). Ontario includes only minimal conditions/warranties (those applying to sales of goods under the SGA). Amendments might be considered to provide for similar conditions/warranties to be implied in every consumer transaction.

WARRANTIES AND CONDITIONS

11. **Conditions and warranties to be implied in online consumer transactions should be streamlined and should apply to both goods and services;**

7. Interpretation of the Contract

Rules of interpretation in common law jurisdictions are fairly general and broad in scope. While few provinces/territories (Alberta is the only common law province to have recently done so in its *Fair Trading Practices Act*) have enacted specific rules for the interpretation of consumer contracts, the common law rule in cases where a contract is ambiguous and open to more than one meaning is that the meaning which is least favourable to the party that drafted the document governs. Quebec has specific legislative provisions which gives the consumer the benefit of the more advantageous interpretation in certain situations. The consumer is protected where there is doubt or where clauses in a consumer contract are external, ambiguous, illegible, incomprehensible or abusive. Consideration should be given to a legislative provision, perhaps similar to that recently enacted in Alberta, protecting the consumer against external, ambiguous, illegible, incomprehensible or abusive clauses.

³⁷ New Brunswick, Saskatchewan and Quebec

³⁸ New Brunswick (in which a consumer product is supplied), Manitoba (retail sale of services) and Quebec

INTERPRETATION

12. A legislative provision should be considered to protect consumers against external, ambiguous, illegible, incomprehensible or abusive clauses.

8. “Cooling-Off” Period

Currently, only the legislative schemes pertaining to direct sales give the consumer/purchaser the option to cancel a direct sales contract for any reason within a period of time referred to as the “cooling-off” period. Pursuant to harmonization efforts by the provinces/territories, it is expected that a ten-day period will soon be uniformly implemented. Most provinces/territories also provide for cancellation if the goods/services are not supplied within a certain period of time and provided that the purchaser does not accept them when they are delivered. There is no similar provision for non-direct sales contracts.

As consumers purchasing online are expected to purchase immediately, they will not, in most cases, have an opportunity to carefully consider the offer before purchasing the good or service in question. Online consumers should be provided with a reasonable period of time to cancel the contract without cause. The European Commission’s Directive on Distance Selling³⁹ recommends a period of at least seven working days during which the consumer can withdraw from the contract without penalty and without giving any reason(s). The only charge to be born by the consumer would be the cost of returning the goods.

Also for consideration is the enactment in conjunction with a cooling off period, of a provision similar to s. 22 of Quebec’s CPA which states that “no merchant may, when soliciting a consumer for the purpose of making a remote-parties contract or when making such a contract, demand total or partial payment by the consumer or propose to collect such payment before performing his principal obligation”, namely the delivery of goods. Alternatively, jurisdictions may consider enacting provisions ensuring that if the price of the goods/services are fully or partly covered by credit, the credit agreement can be cancelled without penalty, if the consumer exercises his/her right to cancel

³⁹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance selling contracts, <http://zeus.bna.com/docs/ecdistance.html>

the contract.⁴⁰

COOLING-OFF

13. Consideration should be given to the enactment of "cooling-off" periods for online consumer transactions;
14. Similarly, if within the "cooling-off" period, the consumer exercises his/her right to cancel the contract, s/he may also cancel, without penalty, any accompanying credit arrangement;

9. Delivery of Goods/Services

Under SGAs, the payment of the price stipulated in the contract and the delivery of the goods must be concurrent conditions unless agreed to otherwise by the parties. If no time for delivery is specified in a contract, the goods must be delivered within a reasonable time. What is 'reasonable' is a question of fact and under the SGAs, stipulations as to time will be treated as warranties. Accordingly, a breach of a stipulation as to time will be determined on a case by case basis and will provide a consumer with the remedies generally available for breach of warranty. In such cases, the purchaser is generally not entitled to reject the goods and treat the contract as repudiated.

A recent OECD report has recognized the physical delivery infrastructure in online transactions as one of the "weakest links in any consumer-oriented Electronic Commerce system involving tangible goods"⁴¹; consumers have no assurance that they will receive the products they have purchased electronically.

Amendments to the legislation may not provide an adequate or satisfactory answer to the question of delivery or prompt delivery of goods or services purchased online.

Codes of conduct along industry lines might offer a more practical approach. They might include a provision stipulating that information pertaining to delivery, including the anticipated delay for the delivery of goods or the supply of services, must be provided in every online consumer transaction

⁴⁰ Ibid.

⁴¹ Electronic Commerce: Opportunities and Challenges for Government, (the "Sacher Report") at page 44.

prior to its conclusion.⁴²

DELIVERY OF GOODS AND SERVICES

15. Consideration should be given to a legislative amendment or the development by the private sector of codes of conduct or best practices requiring the provision of information on delivery arrangements, including anticipated delays (or a time limit for the performance of the contract) to consumers in online transactions;

10. Redress Mechanisms

Current legislation provides a number of options for consumers who seek redress: they include rescission/cancellation, damages (both general and punitive), specific performance, and injunction depending on the circumstances. While these measures are available to the consumer transacting online, the difficulty or impracticality of enforcing court redress mechanisms significantly limits, in most instances, the value of any of these remedies.

In other words, legal remedies in the context of online transactions are not the most effective means of redress because of the nature of distance selling, and jurisdiction problems.

An option might include the development of codes of conduct or best practices encouraging vendors to provide informal complaint handling services, including the provision of information on the manner in which complaints will be handled. The Australian Report on "Consumer Protection in Electronic Commerce - Draft Principles and Key issues" recommends that vendors commit themselves to effective complaints handling services. Pursuant to the recommendations of this report, vendors would:

1. demonstrate commitment to handling complaints;
2. provide adequate resources for handling customer complaints;

⁴² Article 7 of The European Community Directive on Distance Selling, *supra*, states that "Unless the parties have agreed otherwise, the supplier must execute the order within a maximum of 30 days following that on which the consumer forwarded his/her order to the supplier".

3. publicise online the existence of their customer complaints services;
4. ensure no costs or charges are levied for the handling of a complaint;
5. handle complaints fairly;
6. deal with complaints quickly and thoroughly;
7. deal with complaints in a manner which would assist any further examination which may be necessary such as referral to a dispute resolution mechanism; and
8. promptly inform the complainant of the outcome.

A system incorporating such guidelines might empower an ombudsperson, some other provincial authority or an impartial Industry-specific authority to hear and resolve consumer complaints. Under such non-legal arrangements, mediation or arbitration would be encouraged and costly legal battles, avoided.

REDRESS MECHANISMS

16. Consideration should be given to the development by the private sector of codes of conduct or best practices encouraging vendors to provide complaint resolution services, including the appointment of an ombudsperson; vendors would be encouraged to provide prior to the formation of the contract, any information as to how potential complaints will be addressed and handled by the vendor;

3. IMPLEMENTATION

We have made a number of recommendations in the previous chapter designed to update Canadian legislation with a view to better protecting consumers when purchasing goods or services over the Internet. The changes recommended would, if they are implemented across Canada, provide Canadian consumers with greater protection than they currently enjoy in on-line transactions. Such changes would contribute to raising consumer confidence and comfort when purchasing goods or services over the Internet and bring forward many benefits of electronic commerce to both vendors and consumers.

Given the nature of electronic commerce, changes made by only a few jurisdictions would not be sufficient to derive all of the potential benefits meant to be provided to Canadian consumers. Indeed,

because on-line consumer transactions are likely, and increasingly so, to involve consumers and vendors in different jurisdictions, the full benefit of these changes require that the protection they would provide be made available to all consumers wherever they happen to live in Canada. These changes are necessary components of a broader policy framework which seeks to create a climate of confidence and reliability for all Canadian consumers transacting over the Internet. This requires a concerted effort by all concerned jurisdictions working towards basically the same objective.

There are, in our view, a number of options touching on basic contract rules and principles which would achieve greater protection for all Canadian consumers in their purchases of goods and services over the Internet.

The first option would include an update of all consumer protection legislation in light of recent developments, including transactions over the Internet. Given the significant disparities in provincial and territorial consumer protection legislation that have been identified in this report, this would constitute a massive, complex and time consuming undertaking.

Another option, more limited in scope, would focus exclusively on consumer transactions over the Internet. Such an approach would require that consumer protection legislation be updated to ensure that Canadian consumers, wherever they live in the country and regardless of where the on-line vendor is located in Canada, would receive the same basic level of protection. The recommendations we have made in this report could provide an initial basis for reviewing those key legal issues that must be addressed by all jurisdictions, in a concerted manner, to advance the protection of consumers dealing over the Internet.

To assist in the development of a common approach to the critical issues required to be addressed it is recommended that specific proposals be drafted in the form of "templates". These templates would serve as guidelines for all jurisdictions. The purpose of this approach would not be to achieve a perfect degree of harmonization among the legislative provisions that need to be enacted in each province and territory, but rather to assist each jurisdiction in fashioning legislative provisions that will fit their respective legislative schemes while also taking into account a common spirit in the pursuit of a shared goal.

All things considered, it is believed that the most appropriate way to move ahead would be for all concerned jurisdictions to work towards the development of "templates" to serve as a guide in their efforts towards advancing the protection of consumers transacting over the Internet.

IMPLEMENTATION

- 17. Consideration should be given to the development of “templates” to guide each and all jurisdictions in their efforts to address the key contract law issues identified in this report in the pursuit of a shared goal.**

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Alberta

Sales of Goods Act, R.S.A. 1980, c. S-2

- Contract of sale: is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.
- Capacity: s. 4
- Contract of sale may be in **writing or by word of mouth** or partly both or may be **implied** by conduct of parties
- Enforcement of contract over \$50.00 is NOT enforceable by action unless the buyer accepts part of the goods so sold and actually receives that part or gives something in earnest to bind ... OR unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
- Price may be fixed or determined; must be reasonable: s. 11
- Implied conditions: s. 15 (include quiet possession, that the goods are free of charge, free of encumbrance)
- Sale by description: s. 16
- Duty of seller to deliver goods; duty of buyer to accept and pay for goods: s. 28
- Rules re delivery: s. 29
- Remedies of buyer: s. 51 (includes damages for non delivery; specific performance; damages for breach of warranty)
- Provisions of Act may be negated or varied by agreement between parties: s. 55

Unfair Trade Practices Act, R.S.A., 1980, c. U-3

- Consumer transaction is 1) a sale or lease of goods or any other disposition of goods for a consideration, whether or not the sale, lease or disposition includes any agreement or arrangement under which services are provided; 2) an agreement or arrangement under which services are provided for a consideration, or 3) an award by chance of goods or services or both;
 - The Act applies to all consumer transactions arising on or after January 1, 1977: s. 2
 - Unfair practices include subjection of consumer to undue pressure, consumer not able to understand...; supplier took unfair advantage; ...
 - Action by a consumer against supplier ...: s. 11
 - Action by director against supplier: s. 12, s. 14
 - Action by consumer organization: s. 15
-

- No waiver: s. 21

Direct Sales Cancellation Act, R.S.A., 1980, c. D-35 as amended

- “Sales contract” is “an agreement for the sale of goods or services or both ...; an agreement under which the buyer at some future time, on the happening of an event or the payment of the price or compliance with a condition, will become the owner of goods or entitled to the performance of services or both; an agreement under which the buyer may, at his option, become the owner of goods or be entitled to buy goods or be entitled to the performance of services;(deals with door to door sales)
Does not apply to contracts negotiated or concluded at the seller’s place of business, a marketplace, auction, trade fair, agricultural fair or exhibition
- For the purposes of this Act, a sales contract is concluded when it is **signed** by the buyer: s. 1(2)
- Application of the Act: s. 2 - applies where a sales contract is negotiated **in person** or concluded **in person** on or after the coming into force of this subsection at a place other than a) the seller’s or the salesperson’s normal business premises, or b) a market place, auction, trade fair, agricultural fair or exhibition
- Salesperson’s **oral or written** representations, statements or undertaking: s. 4
- Absolute cancellation right of buyer: may cancel without reason a sales contract at any time from the date the sales contract is concluded until 10 days after the buyer receives a copy of the **written** sales contract: s. 6
- Other circumstances under which contract may be cancelled: s. 6.1(2) within one year of the date the sales contract is concluded
- Notice of cancellation can be expressed in any way: s. 6.2 (2)(3)
- Contents of a **written** sales contract: s. 11.1 : a) buyer’s name and address; b) the seller’s names and address...; c) salesperson’s name if applicable; d) date and place at which contract is concluded; e) description of goods and services; f) statement of cancellation rights; g) itemized price; h) total amount of sales contract; i) terms of payment; j) delivery date for future goods/services; l) where credit is extended statement of security taken and disclosure statement; m) description of trade-in arrangement; n) the signatures of the buyer and seller.
- It is not required that the seller give buyer a copy of the contract **immediately after the contract is signed** (as opposed to all other provinces except for B.C.)
- Any waiver or release of rights, benefits or protection under Act is void: s. 12
- This Act does not state that the direct sales contract **MUST** be in writing but requires signatures

Direct Sales Cancellation (Ministerial) Regulation (198/96)

- Statement of cancellation rights - must be **printed**

Consumer Credit Transactions Act, S.A. 1985, c. C-22.5

- "Agreement to sell" means a contract of sale **in writing** under which an interest in goods may be transferred to a purchaser OR services are provided to a purchaser
- Applies exclusively to credit transactions
- The Act does not apply to the provision of services by certain professionals
- Any release or waiver of any rights, benefits or requirements of the Act is void: s. 7
- Disclosure requirements
- Administration by the Director of consumer credit: Part VII
- Offences: s. 46

Interpretation Act, R.S.A. 1980, c. I-7

"Writing", "written" or any similar term includes words represented or reproduced by any mode of representing or reproducing words in a visible form.

Unconscionable Transactions Act, R.S.A. 1980, c. S-2

Fair Trading Act S.A. 1998 c. F-1.05 (Assented to April 30, 1998)

- **Definitions**
 - "Consumer" means an individual who i) receives or has the right to receive goods or services from a supplier as a result of a purchase, lease, gift, contest or other arrangement, but does not include an individual who intends to sell the goods after receiving them; ...
 - "Consumer transaction": subject to regulations means the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement...
 - **General Principles: Part I**
 - Any waiver or release by a person of the person's rights, benefits or protections under this Act or the regulations is void: s.2
 - Ambiguous provision in agreement between consumer and supplier must be interpreted against the supplier
 - **Unfair and Negative Option Practices: Part II**
-

- **Unfair Practices: Division I**
 - Unfair practices includes 1) an unfair practice in which the supplier or consumer is a resident of Alberta; 2) an unfair practice involving a consumer transaction in which the offer or acceptance is made in or is sent from Alberta; 3) an unfair practice made or received in Alberta involving a supplier's representative; 4) an unfair practice specified in the regulations: s. 5
 - It is an unfair practice for a supplier in a **consumer transaction** to a) exert undue pressure of influence; b) take advantage of consumer; c) use exaggeration and innuendo or ambiguity; d) to charge price that grossly exceeds price of similar goods; e) charge a price for goods/services that is materially higher than estimate;... Also includes a supplier's doing or saying anything that might reasonably deceive or mislead a consumer: s. 6(4)
 - No supplier may commit an unfair practice: s. 7
 - No advertising if advertisement contains an unfair practice: s. 9
 - The Minister may make regulations a) specifying unfair practices to which this Part applies; b) specifying any activities or things to be unfair practices; c)...; d) prescribing information that must be given in a representation made by a supplier or class of supplier in respect of any consumer transaction or class of consumer transaction
 - **Civil Remedies Against Suppliers: Division 2**
 - Court action by consumer: s. 13. Remedies include: a) declaration that practice is unfair; b) damages; c) punitive or exemplary damages; d) specific performance, restitution, rescission; e) injunction; f) make any direction and grant any other relief the Court considers proper: s. 13
 - Actions by the Director on behalf of consumers: s. 15
 - Court action by consumer organizations: s. 17
 - Advertisement of judicial decision: s. 19
 - **Negative Option Practices: Division 3**
 - **Cancellation of Direct Sales Contracts and Time Share Contracts: Part 3**
 - Direct sales means a consumer transaction (including an offer to buy) that is a contract in which 1) the consideration for the goods/services exceeds an amount specified in the regulations; and 2) the contract is negotiated or concluded **in person** at a place other than the supplier's place of business or at a place other than a market place, auction, trade fair, agricultural fair or exhibition: s. 24
 - This part applies to contract in which supplier or consumer is a resident of Alberta; a contract in which the offer or acceptance is made in or is sent from Alberta; a contract specified in the regulations: s. 25
 - **Direct Sales Contracts: Division I**
 - Absolute cancellation right by consumer until 10 days after consumer receives copy of written sales contract: s. 27
-

- Extended cancellation in certain circumstances: s. 28 Reasons include 1) supplier not licensed; 2) contract does not include all information required by s. 35; 3) supplier does not deliver goods within 30 days of date stipulated in contract; 4) supplier does not begin performance of services within 30 days specified in contract: s. 28
- Cancellation by giving notice, which may be expressed in any way as long as it indicates the intention of the consumer to cancel the direct sales contract: s. 29
- Contents of direct sales contract: **A written direct sales contract** must include a) the consumer's name and address; b) the supplier's name, business address, ...; c) salesperson's name; d) date and place where direct sales contract is entered into; e) description of goods or services sufficient to identify them; f) statement of cancellation rights; g) itemized price of goods/services; h) total amount of direct sales contract; i) terms of payment; j) ...: s. 35
- Minister may make regulations respecting the form and content of the statement of cancellation rights ...
- **Time Share Contracts: Division 2**
- **Marketing through Electronic Media: Part 4**
- The Minister may make regulations respecting the marketing of goods and services through forms of electronic media, such as telephone, television, or the Internet that are specified in the regulations: s. 42(1)
- **Cost of Credit Disclosure: Part 9**
- **Licensing: Part 13**
- **Remedies and Enforcements: Part 14**
- **Administration and Appeals: Part 15**
- **Transitional Provisions: Part 16**
- Former Acts include *inter alia* Consumer Credit Transactions Act, Direct Sales Cancellation Act, Unfair Trade Practices Act: s. 184
- **This Act applies to consumer transactions and unfair practices that occur after September 1999:** s. 187(1)
- The former *Unfair Trade Practices Act* continues to apply to consumer transactions and unfair practices that occur before September 1, 1999: s. 187(2)
- **Repeals:** *inter alia* Consumer Credit Transaction Act, Direct Sales Cancellation Act, Unfair Trade Practices Act: s. 197
- **Coming into force: September 1, 1999**

Case Law

Lake Placid Construction Ltd. v. Buckland [1992] A.J. No. 1186 (Alta Prov. Ct.) [DSCA]

The court held that a cancellation of a direct sales contract by telephone was a proper notice of cancellation under the DSCA. The court found that subsection 6(3) of the Act which states that "notice of cancellation may be given by delivering or

PROVINCIAL LEGISLATION
Alberta

sending it by mail" was permissive only and did not rule out verbal communication of a notice of cancellation.

British Columbia

Sale of Goods Act, R.S.B.C. 1996, c. 410

- “Contract of sale” includes an agreement to sell as well as a sale
- A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price.
- Capacity: s. 7
- A contract of sale may be made in **writing, oral, or both, or implied**
- Implied undertaking as to title, implied warranty of quiet possession: s. 16
- Sale by description: s. 17
- No waiver of warranties or conditions in the case of a retail sale or lease of goods other than used goods : s. 20
- Duties of seller and buyer: s. 31
- Rules as to delivery: s. 33
- Buyer’s right to examine goods (if goods are delivered to buyer that buyer has or previously examined, buyer is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract).
- Actions for breach of contract: ss. 52-57
- Any right, duty, liability may be negated or varied by express agreement.....: s. 69

Trade Practice Act, R.S.B.C. 1996, c. 457

- For the purposes of this Act, a deceptive act or practice includes a) **an oral, written, visual, descriptive or other representation**, including a failure to disclose and b) any conduct having the capability, tendency or effect of deceiving or misleading a person: s. 3(1).
- Deceptive acts or practices: s. 3
- Unconscionable acts or practices: s. 4
- An unconscionable act or practice by a supplier in relation to a consumer transaction may occur before, during or after the consumer transaction: s. 4(1)
- Damages for transaction involving a deceptive or unconscionable act or practice by a supplier: s. 22
- Substitute action of Director on behalf of consumer: s. 24
- Act applies despite an agreement to the contrary and does not restrict, limit or derogate from rights of a consumer under any other law: s. 31

Consumer Protection Act, R.S.B.C. 1996, c. 69

- “Buyer” is an individual who leases or purchases goods or services under an **executory contract**, and includes the individual’s agent
- “Direct sale” includes a contract for the sale of goods/services or both made by a seller a) in the ordinary course of business; b) at a place other than the seller’s permanent place of business; and c) either without the purchaser having requested the seller to attend at the place where the contract is made OR in response to the purchaser’s request that the seller attend at the place where the contract is made, if that request is solicited by or on behalf of the seller **BUT does not include a contract where a sale, offering for sale or soliciting of orders is made by telephone, mail, fax or any other method that does not involve face to face contact with the intended purchaser.**
- “Executory contract” is a contract between a buyer and a seller for the purchase and sale or the lease of goods or services, or of goods and services, for which delivery of the goods or performance of the services or payment in full of the consideration is not made at the time the contract is made, including a contract that is partly executed, but does not include an executory contract for the sale, ...if less than the amount set by regulation (50\$)
- No waiver: s. 2
- Salesperson’s representation, statement or undertaking (**oral or written**) is deemed to have been made by salesperson as agent of the seller: s.8
- Disclosure requirements of executory contract: s. 10(1)
- A contract **for future services or an executory contract that a direct seller** other than one referred to in s. 11(3) solicits, negotiates or concludes at a place other than his or her business address, is not binding on buyer unless b) it is **signed** by the buyer, and the guarantor if applicable and c) copy to buyer within 7 days after the day contract was signed by buyer: s. 10(2)
- Buyer’s right of cancellation in the context of a direct sale (within 7 days after the date on which the copy of the contract was received by the buyer): s. 11 - appears to **apply to direct sellers only** except for (7), (8), (9) (applies to **future services only**) and (10)
- s. 11(2) If a direct seller solicits, negotiates or concludes a contract at a place other than his own address, the buyer may cancel the contract a) if it is an executory contract, by giving notice of cancellation no later than 7 days after date at which copy of the contract was received by the buyer ... ; b) if it is not an executory contract, by giving notice of cancellation not later than 7 days after the date the contract was made; ...
- s. 11(7) states that a **buyer** may cancel a contract for **future services** by giving notice of cancellation not later than 7 days after the date on which the copy of the contract was

received.

- Notice of cancellation may be expressed in any way as long as it indicates intention of buyer: s. 11(10) **Notice may be given by personal delivery or by registered mail.**
- A direct seller **must** use a **written contract** for a direct sale if the buyer's purchase price, excluding the cost of borrowing equals or exceeds the amount set by regulation: s. 13
- Direct sales **written** contract must include a) a notice of cancellation rights; b) detailed statement of the terms of payment including interest c) any other matter required by regulation: s. 14
- No provision requiring that seller give buyer a copy of sales contract **immediately after signing the contract** (similar to Alberta)
- Credit transactions: Part III
- Disclosure of cost of borrowing in credit transactions: s. 41
- No negative options schemes: s. 54
- s. 56(2) a seller must ensure that any disclosure notice provided by the seller meets requirements: a) written in at least 12 point type; b) visually clear ..; c) must not contain or be mailed with promotional materials
- Administration by Director

Regulation under the Consumer Protection Act, B.C. Reg. 62/87 as amended

- Executory contract does not include a contract in which the total consideration excluding the cost of borrowing is less than \$50.00: s. 1
- "A seller shall, **in every executory contract** that he enters into, provide the following information **in writing and in a manner that is clear and easily understood**: a) the name and address of the seller and buyer; b) a description that is sufficient to identify with certainty the goods or services or both that the seller is providing in the contract; c) the price; d) a detail statement of the terms of payment; e) where credit is extended, a statement of any security for payment under the contract; f) where credit is extended, information required by s. 4; g) where contract is subject to cancellation, notice: s. 13(1)(a)CPA.
- Requirement that notices be displayed in contract with at least as much prominence as the balance of the contract: s. 2(2)
- Re credit advertising: s. 8
- Notice must be located in contract directly above the space provided for buyer's signature
- Non executory contract right of cancellation: s. 13(3) CPA
- Cost of borrowing disclosure must be in **writing**

Direct Seller Regulation under the Consumer Protection Act, B.C. Reg. 419/93 as amended

- form and wording of **written direct sales contract**

Interpretation Act, R.S.B.C. 1996, c. 238

- “Writing” or “written” or a term of similar import includes words printed, typewritten, painted, engraved, lithographed or represented or reproduced by any mode of representing or reproducing words in visible form.

Credit Reporting Act, R.S.B.C., 1979, c. 78

Case Law

Director of Trade Practices v. Ideal Credit Referral Services Ltd. (1997), 145 D.L.R. (4th) 20 (B.C.C.A.) [TPA]

The Court held that the TPA should be given a liberal interpretation. The door was left open for the application of the Act to out-of province consumers.

Stubbe et al. v. P.F. Collier and Son Ltd. [1977] 3 W.W.E. 493 (B.C.S.C.) [TPA]

The TPA was held to apply to representations in a door-to-door sales pitch.

Manitoba

Sale of Goods Act, R.S.M. 1987, c. S10

- A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
- Capacity: s. 4
- Form of contract: s. 5 (**in writing, oral or both or implied by conduct of parties**)
- Implied warranties: s. 14
- Sale by description: s. 15
- Duties of the seller and the buyer: s. 29
- Rules as to delivery: s. 31
- Exclusion of implied terms and conditions by express agreement, or by course of dealing between the parties or by usage ...: s. 56

The Business Practices Act, L.M. 1990-91, c. 6

- “Consumer transaction” means a transaction between a consumer and a supplier for the retail sale or lease or other retail commercial disposition, by the supplier to the consumer, of any goods in the ordinary course of business of the supplier and primarily for the consumer’s personal, family or household use;
- Examples of unfair business practice including - a) to do or say anything or to fail to do or say anything if, as a result, a consumer might reasonably be deceived or misled; or b) to make a false claim, etc.: s. 2(3)
- Re privity of contract: s. 4
- Director may attempt to resolve complaints by mediation: s. 14(1)
- Action by consumer: s. 23(1)
- Action by director on consumer’s behalf: s. 24

Consumer Protection Act, R.L.M. 1987, c. C200

- Definition of “retail sale” of goods or of services or of both
 - Definitions of sale, sale of goods and sale of services
 - **Disclosure of Cost of Borrowing: Part I**
 - This Part (I) applies to every retail sale of goods or services or goods and services on credit
-

in which there is any cost of borrowing payable by the buyer except a) a sale made on variable credit; and b) a sale in which the cost of borrowing does not exceed \$10.00: s. 4

- s. 4(2) - every sale to which this section applies shall be evidenced in **writing, signed** by the buyer or his agent prior to, or at the time of delivery of the goods or performance of the services which **shall contain a description of the goods or services** and shall state: a) cash price; b) amount of any additional charges; c) insurance charges; d) registration fee; e) total amount of contract; f) down payment; g) balance of the total cash price; h) ...
 - **True copy of the agreement in writing to buyer as soon as possible after the writing required in s. 4: s. 6(1)**
 - If writing required by ss. 4 or 5 is signed prior to the delivery of the goods or performance of services seller shall deliver goods or perform services not later than seven days after the delivery date which is 1) the date for delivery or performance fixed in the writing; 2) if none is so fixed, the date on which the writing is received by the seller or his agent.
 - **Prepayment privileges: Part II**
 - **Relief against acceleration and forfeiture: Part III**
 - **Statutory warranties on retail sales: Part VI**
 - Implied warranties in every retail sale of goods: s. 58(1). Includes the three warranties implied in the Sale of Goods Act and 1) condition that the goods are new and unused; 2) a condition that the goods are of merchantable quality, except for the defects described; 3) a condition that the goods are reasonably fit for the purpose specified by the buyer to the seller
 - Conditions as to services: condition that the services sold shall be performed in a skilful and workmanlike manner: s. 58(6)
 - Every oral or **written** statement made by a seller or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is a) contained in an advertisement; or b) made to a buyer; shall be deemed to be an express warranty respecting those goods or services: s. 58(8)
 - Personal liability of seller for all duties, liabilities... in every retail sale
 - **Direct Sellers: - Part VII (see also Part X)**
 - Applies to all retail sales or retail hire purchases of goods or services or both entered into by the buyer, elsewhere than at the vendors usual place of business and which result from any offer, solicitation, proposal or approach made, by or on behalf of the vendor, a) without any prior request by the buyer; or b) in response to a request made by the buyer if the request was itself solicited by or on behalf of the vendor. s. 59(1) (Could include telemarketing sales and sales made via electronic commerce)
 - Although a retail sale is concluded in vendor's usual place of business, if the buyer receives any personal communication from the vendor or a direct seller representing the vendor elsewhere than at the vendor's usual place of business prior to conclusion of the sale, the sale shall nevertheless be subject to this Part: s. 59(3)
-

PROVINCIAL LEGISLATION
Manitoba

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- Place of conclusion of the sale: s. 59(3)
 - Requirements of a **written** agreement if agreement for retail sale to which this part applies is in writing - includes signature by vendor and buyer and information required by regulations: s. 61(1)
 - Vendor to provide copy of contract at the time the agreement is entered into: s. 61(2)
 - If agreement for retail sale is not in writing (presumption that it is oral if not in writing) the vendor shall provide buyer with a **written** statement of cancellation rights.
 - Cancellation of retail sales to which this part applies and which are not in writing within ten days after buyer has received a statement of cancellation rights: s. 62
 - Notice of cancellation by registered mail, fax or personal delivery of **any other method by which buyer can provide evidence of the date of cancellation**: s. 63(2)
 - Licensing of direct sellers: s. 75(2)
 - Licence can be refused as vendor, direct seller if person has been convicted of an offence under this Act: s. 78
 - Credit cards: Part XIII
 - Limited liability where credit card lost and loss reported: s. 116

Consumer Protection Regulation under the Consumer Protection Act, Man. Reg. 384/87R as amended

- Part VII of Act does not apply to sales at a price of 50\$ or less made in or from a shopping mall, and any sale at a price exceeding \$50.00 made in or from a long term or permanent location in a shopping mall.

Interpretation Act, R.S.M. 1987, c. I

- "Writing" includes printed, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in a visible form.

Frustrated Contracts Act, R.S.M. 1987, c. F190

The International Sale of Goods Act, S.M. 1989-90, c. 18

The Trade Practices Inquiry Act, R.S.M. 1987, c. T110

The Unconscionable Transactions Relief Act, R.S.M. 1987, c. U20

Case Law

Re Harrower and Minister of Finance for Manitoba (1977), 72 D.L.R. (3d) 144 (Man. C.A.) [SGA]

Dealer knew or ought to have known that the vehicle sold to the buyer was stolen. As good title was not passed, there was

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Manitoba

a breach of implied condition of title and the buyer was entitled to rescind the contract.

Rahtjen v. Stern GMC Trucks (1969) Ltd., (1976), 66 D.L.R. (3d) 566 (Man. C.A.) [CPA]

A consumer was not able to rely on the SGA for a breach of the condition of merchantability because the vendor did not sell the subject good, a trailer, in his/her normal course of business. The consumer was, however, able to avail himself of the CPA which implies a condition of merchantability (implied and not waivable)

New Brunswick

Sale of Goods Act, R.S.N.B. 1973, c. S-1

- The Sale of Goods Act will apply to consumer sales as well as private sales or purchases of goods that do not meet the definition of **"consumer product"**.
- "Contract of sale" includes an agreement to sell as well as a sale
- Capacity: s. 3
- Contract of sale may be in **writing, oral, both or implied** from conduct of parties: s. 4
- Price may be fixed or determined- must be reasonable: s. 9
- Conditions and warranties: ss. 11-13
- Sale by description: s. 14
- Transfer of property as between seller and buyer: ss. 17-21
- Duty of seller to deliver; duty of buyer to accept and pay for goods
- Remedies of buyer: ss. 48-51 (include damages for non-delivery, damages for breach of warranty)
- Duty, right, liability may be waived by agreement...: s. 52

Consumer Product Warranty, S.N.B. 1978, c. C-18.1

- "Contract" is a contract for the sale or supply of a consumer product
- "Contract for the sale or supply of a consumer product" is 1) a contract of sale of a consumer product including a conditional sale agreement; 2) a contract of barter or exchange of a consumer product; 3) a contract of lease or hire of a consumer product whether or not there is an option to purchase it; or 4) a contract for services or for labour and materials if a consumer product is supplied along with the services or labour.
- "consumer loss" means (a) loss that a person does not suffer in a business capacity; or (b) a loss that a person suffers in a business capacity to the extent that it consists of liability that he or another person incurs for a loss that is not suffered in a business capacity (form of privity)
- Applies to both goods and services
- This Act does NOT apply to the sale or supply of a consumer product by a seller or supplier a) who is not a distributor of consumer products of that kind and does not hold himself out as such; or b) who is acting as a trustee in bankruptcy ...: s. 2(2)
- This Act applies notwithstanding any agreement, notice, disclaimer, waiver acknowledgement or other thing to the contrary: s. 2(3)

- Where conflict, this Act prevails: s. 2
- Statements constituting express warranties include any **oral** statement (unless buyer does not rely), **written** statement (whether or not buyer relies) or any statement seller makes to the public or portion thereof **however made** that the seller makes whether or not buyer relies: s. 4(1)
- “Statement” means a promise or representation of fact or intention that is made before or at the time of the contract: s. 4(4)(b)
- Implied warranties: s. 8 - includes the three warranties implied in the Sale of Goods Act and 1) warranty that the product is unused; 2) warranty that the product is of such quality and as fit for the purposes for which products of that kind are normally used ... having regard to the description of the product 3) warranty that the product complies with all mandatory federal and provincial standards re health, safety and quality
- No warranty as regards any defects known to buyer or disclosed by seller;
- Implied warranty that product is fit for purpose where buyer makes known to seller the particular purpose for which the product is to be used: s. 11
- In every contract for the sale or supply of consumer product, implied warranty of durability
- Remedies for breach of warranties: ss. 13-22 (remedies include damages, rejection of goods)
- No provisions on formality of contract. The Act assumes that it may be written or oral or both or implied from conduct of parties....
- Remedies where no privity of contract: where the seller is in breach of a warranty provided by this Act, any person who is not a party to the contract but who suffers a consumer loss because of the breach may recover damages against the seller for the loss if it was reasonably foreseeable at the time of the contract as liable to result from the breach: s.23
- No exclusions of warranties or remedies where contract is for sale or supply of a consumer product - except as provided in ss. 25 and 26: s. 24
- In the case of a sale by description, no exclusions of remedy for breach of express warranty forming part of description of product: s. 25(4)
- Product liability: s. 27
- The rights and remedies of this Act are in addition to any other rights ... under any other law in force in the Province...: s. 28

Direct Sellers Act, R.S.N.B. 1973, c. D-10

- “Direct sales contract” is a **written or oral** agreement for the direct sale of goods/services.
 - “Direct selling” is the **house-to-house** selling, offering for sale or soliciting of orders for the sale of goods/services; the Act applies to the purchase of products or services from a door-to-door salesperson valued at \$100.00
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New Brunswick

- This Act does NOT apply to direct sales contract solicited, negotiated or concluded at the direct seller's, vendor's or salesman's normal business premises OR a market place, auction, trade fair agricultural fair or exhibition OR ... solicited, negotiated and concluded without any dealings **in person** between the purchaser and the direct seller or between the purchaser and the vendor or salesman: s. 3
- Licence required: s. 4
- Immediately upon execution of the contract by a purchaser, the seller shall deliver true copy of the contract to the purchaser. The contract must contain display of purchaser's rights b) address for service c) vendor's address: s. 9
- Suspension or cancellation of license possible if direct seller violates any provision of this Act ...: s. 13
- Rescission: s. 17; the purchaser must serve a **written** notice of rescission on the direct seller within five clear days after the day on which the purchaser enters into the direct sales contract
- Any agreement **written or oral**, express or implied that provisions do not apply is void: s. 21

General Regulation under the Direct Sellers Act, N.B. Reg. 84-151 as amended

- Information contained in the direct sales contract: s. 9

Interpretation Act, S.N.B. 1973 c. 74

- "Writing", "written" or any term of like import includes words printed, painted, engraved, lithographed, photographed or represented, or reproduced by any mode of representing or reproducing words in a visible form.

Unconscionable Transactions Relief Act, R.S.N.B., 1973, c. W-1

Case Law

Conary v. Harvey Hooper Lobsters Ltd. (1982), 38 N.B.R. (2d) 670 [SGA]

The Court held that the buyer who examined a shipment of goods delivered by the seller was relying on his own observations for the quality and fitness of the goods (and not on the seller's skill/judgment).

Witherell v. Buchanan Estate (1995), 169 N.B.R. (2d) 13 (C.A.) [CPWLA]

The Consumer Product Warranty and Liability Act does not apply to a sale where "the seller is not a distributor of consumer

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New Brunswick

products of that kind and does not hold himself out as such". As the sale was a private sale, and the seller sold the vehicle on an "as is" basis the buyer could not rely on the CPWLA for relief.

Audet v. Central Motors Ltd. (1981), 35 N.B.R. (2d) 143 (N.B.Q.B.) [CPWLA]

Before a buyer is entitled to reject a product under s. 16(1) or to recover any payments or damages under s. 17(1) of the Act s/he must give the seller a reasonable opportunity to rectify the breach. The consumer/plaintiff refused to allow the defendant to remedy the defect and thus deprived herself of the benefit of the statute. See similar decision in White v. Shea et al. (1986), 74 N.B.R. (2d) 15 (N.B.Q.B.)

Newfoundland

Sale of Goods Act, R.S. Nfld 1990, c. S-6

- Contract of sale is a contract whereby seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price: s. 3
- Capacity: s. 4
- Contract may be **written** or by **parole** or **implied**: s. 5
- Price may be fixed or determined - must be reasonable: s. 10
- Implied conditions and warranties: s. 14
- Sale by description: s. 15
- Effect of the contract - rules re transfer of property from seller to buyer: s. 27
- Duties of buyer and seller: s. 29
- Delivery: s. 31-35
- Right of examination: s. 36
- Actions for breach of contract: s. 52 (non delivery); s. 53 (specific performance); s. 54 (breach of warranty); s. 55 (right to interest or special damages)
- Right, duty, liability may be negated by agreement: s. 56

Trade Practices Act, R.S.N. 1990, c. T-7

- Consumer transaction is 1) a sale, lease or other disposition of goods for a consideration whether or not such a disposition of goods includes a contract under which services are provided; 2) a contract for the provision of services for a consideration; or 3) an award by chance of goods or services: s. 2
- No waiver: s. 3
- Unfair trade practices: include the usual provisions re representations
- An unfair trade practice may occur before, during or after a consumer transaction: s. 5(2)
- Unconscionable acts: s. 6
- Power of director to mediate disputes: s. 8
- Remedies of consumer: s. 14
- Action by Director on behalf of consumer: s. 16

An Act Respecting the Direct Sale of Goods and Services in the Province

- "Direct sale" is sale by a direct seller acting in the course of his/her business as a direct seller

- "Direct sales contract" is agreement, either **oral or in writing** for direct sale for goods or services whether for cash or credit
- "Direct seller" is person who 1) goes from **house to house**; 2) contacts occupants of houses by **telephone** 3) through advertising **or otherwise** carried out by him/her or by or for the relevant vendor requests occupants of the house to contact the direct seller by telephone or present themselves at hotel room or other non business premises ...
- License required: s. 5
- Act does not apply to merchant having a recognized retail store in the province and selling goods or services of a sort or class ordinarily sold at that store (retail store does not include a dwelling, mail order office, display room, office, ...): s. 5
- Registrar may suspend or cancel licence if licensee has violated this Act ...: s. 17
- Rescission of contracts: 1) within 10 days after contract entered into, for no reason 2) where vendor was not licensed; 3) goods/services not supplied within 120 days; 4) vendor failed to comply with one or more terms **AND written** notice served
- **Copy of contract** to purchaser immediately upon execution by the purchaser of a form of contract: s. 26(1)
- Upon entering into direct sales contract, vendor to **furnish** vendor's address, salesperson's address, **in writing**: s. 26(2)
- Vendor upon receiving payment to deliver **written** receipt: s. 26(4)
- No waiver: s. 31
- Act to prevail: s. 36

Act to Provide for the Protection of Buyers of Consumer goods and for the Fair Disclosure of the Cost of Credit, R.S.Nfld 1990, c. C-31

- **"Buyer" is person who purchases goods or services on credit** and includes his/her agent
- **"Seller" is person who is in business of selling goods and services to buyers and includes his/her agent**
- Registration of lenders mandatory: s. 9
- Registrar may suspend or cancel licence if 1) breach of term or condition upon which registration was granted; 2) Registrar has reason to believe that person has violated or failed to comply with this Act or regulations...: s. 13
- No false advertising relating to credit: s. 15
- Disclosure of cost of borrowing - a clear statement in **writing**: s. 16
- Limitation of liability of borrower: s. 17
- No waiver: s. 25
- **Rights of buyer or borrower under this Act are in addition to rights of buyer or borrower under another Act ...: s. 26**

- This Act to prevail if conflicts with another Act

Regulation 773/96 under the Consumer Protection Act, Cons. Nfld Reg. 773/96

- Disclosure

Interpretation Act, R.S.N. 1990, c. I-19

- “Writing”, “written”, or a term of like import includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by a mode of representing or reproducing words in a visible form

Consumer Reporting Agencies Act, R.S.N. 1990, c. C-32

Unconscionable Transactions Relief Act, R.S.N., 1990, c. U-1

Unsolicited Goods and Credit Cards Act, R.S.N. 1990, c. U-6

Nova Scotia

Sale of Goods Act, R.S.N.S. 1989, c. 408

- Contract of sale is a contract whereby seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price: s. 4
- Capacity: s. 5
- Contract may be **written or by parole or implied**: s. 6
- Price may be fixed or determined - must be reasonable: s. 11
- Implied condition and warranties: s. 15
- Sale of goods by description: s. 16
- Effect of the contract - rules re transfer of property from seller to buyer: s. 19-23
- Duties of buyer and seller: s. 29
- Delivery: s. 30-39
- Actions for breach of contract: 50
- Remedies of the buyer for non delivery, breach of warranty, ...: s. 52-54
- Any right, duty, liability may be varied under agreement: s. 56

Consumer Protection Act, R.S.N.S. 1989, c. 92

- "Buyer" is a person who purchases goods or services on **credit** and includes his agent...;
- No discrimination against a borrower or buyer, solely because the borrower or buyer is a woman
- Registrar may suspend or cancel registration b) where he has reason to believe that the person has violated or failed to comply with any provision of the Act or the regulations or an order or direction given under this Act or the regulation; s. 13(b)
- Credit/cost of borrowing disclosure is **writing**: s. 17
- No waiver: s. 21
- Rights under this Act are in addition to any rights of buyer under any other Act: s. 22
- Unsolicited credit cards or goods: s. 23(4), 23(5)
- No negative option strategy: s. 24A
- "Consumer sale" means contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use: s. 26
- Applies to both goods and services
- Implied conditions and warranties in every consumer sale: s. 26(3). Include the three

warranties implied in a sale of goods and 1) in sale of goods by description, a condition that the goods shall correspond with the description; 2) where purchaser makes known to seller the particular purpose for which goods are required, a condition that goods shall be reasonably fit for such purpose; 3) a condition that goods bought by description are of merchantable quality; 4) a condition that the goods are of merchantable quality except for defects described; 5) condition that goods are new and unused; 6) condition that goods shall be durable

- implied condition in every consumer sale of services that the services sold shall be performed in a skilful and workmanlike manner: s. 26(5)
- No waiver of conditions or warranties: s. 28(1)

Consumer Protection Regulations under the Consumer Protection Act, N.S. Reg. 206/91 as amended

- Credit disclosure - clear statement in writing: s. 2C

Consumer Services Act, R.S.N.S. 1989, c. 94

- Establishes Consumer Services Bureau

Direct Seller's Licensing and Regulation Act, R.S.N.S. 1989, c. 129

- "Direct sale" is a sale by a direct seller acting in the course of business as such
- "Direct sales contract" is an agreement whether **verbal** or in **writing** for the direct sale of goods or services
- "Direct seller" is a person who sells or offers for sale or solicits orders for the future delivery of goods or services by direct selling
- "Direct selling" is selling or offering for sale or soliciting orders for the future delivery of goods/services from **door to door, from a hotel or motel, by written solicitation, by telephone or by any means other than by a merchant from a recognized retail store and means the sale or offering for sale or the soliciting of an order for the future delivery of a hearing aid regardless of the circumstances.**
- Merchant does not include a person who has a recognized retail store if more than fifty percent of the goods/services sold by him in the Province are sold by direct sale;
- Recognized retail store does not include a dwelling, mail order office,...
- Licence required: s. 8
- Registrar may suspend or cancel licence if licensee has violated any provision of this Act or

regulations or has failed to comply with any of the terms, condition, restrictions to which his license is subject...

- Every direct sales contract shall be **in writing and include:** name/address of seller and buyer, description of goods, price of goods, ..., notice of cancellation; s. 20(1)
- Salesman shall **sign** the direct sales contract at the time of the sale and shall cause his name to be typewritten or printed below his signature: s. 20(2)
- Statement of cancellation right shall be a term of every agreement
- Where agreement in writing does not contain cancellation right statement, purchaser may cancel within 30 days after the first goods are delivered ...
- Cancellation of sale permitted: 1) if seller does not have license at time contract entered into; 2) goods/services not supplied to purchaser within 90 days; 3) seller failed to comply with any of the terms...: s. 22
- Copy of contract to buyer immediately upon the execution of a direct sales contract:
s. 24
- No waiver: s. 34

General regulations under the Direct Seller's Licensing and Regulation Act, N.S. Reg. 93/76 as amended

- Restriction on application ... to direct sales contracts where the consideration to be provided by the purchaser is of a value of 50\$ or less save and except for direct sales contracts respecting hearing aids.
- Every person licensed as a direct seller shall maintain a permanent place of business in Nova Scotia: s. 6
- No person shall be licensed as a salesperson unless he is a permanent resident of Nova Scotia: s. 7

Interpretation Act, R.S.N.S. 1989, c. 235, as amended

- 7(ac) "Writing", "written" or any term of like import includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in a visible form

An Act Respecting Future Services, S.N.S. 1990, c. 12

Consumer Credits Conduct Act, R.S.N.S. 1989, c. 91

Consumer Reporting Act, R.S.N.S. 1989, c. 93

Consumer Services Act, R.S.N.S. 1989, c. 94

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Nova Scotia

Future Services Act, S.N.S., 1990, c. 12

Instalment Payment Contracts Act, R.S.N.S. 1989, c. 230

Unconscionable Transactions Relief Act, R.S.N.S. 1989, c. 481

Ontario

Sale of Goods Act, R.S.O. 1990 c. S.1.

- A “contract for sale” is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.
- Capacity: s. 3
- Contract for sale may be made in **writing, either with or without seal, or by word of mouth or partly in writing and partly by word of mouth, or may be implied** from the conduct of the parties: s. 4
- Price may be fixed or determined; must be reasonable: s. 9
- Implied conditions and warranties: s. 13
 - (a) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass;
 - (b) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and
 - (c) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.
- Sale by description: s. 14
- Duties of seller and buyer: s. 26
- Actions for breach of contract: ss. 47 - 52
- Action for non delivery (s. 49(1)); action for specific performance (s. 50); action for breach of warranty: s. 51
- Right, duty liability may be varied by agreement: s. 53
- Section 57(1) of the Act provides that the rules of the common continue to apply, except where the application of such a rule is inconsistent with this Act.

Business Practices Act, R.S.O. 1990, c. B.18.

- “Consumer” means a natural person but does not include a natural person, partnership or association of individuals acting in the course of carrying on business;
- Unfair practices: s. 2: includes representations and unconscionable representations
- No person shall engage in an unfair practice s. 3(1)
- Any agreement, whether **written, oral or implied**, entered into by a consumer after a

consumer representation that is an unfair practice ... : may be (a) rescinded by the consumer and consumer entitled to any remedy at law or (b) if rescission is not possible, the consumer is entitled to recover the amount by under which the agreement exceeds the fair market value of the goods: s. 4

- Unfair practices and unconscionable acts

Consumer Protection Act, R.S.O. 1990 c. C.31.

- “Buyer” is person who purchases goods for consumption or services **under an executory contract** and includes his/her agent ...
- “Executory contract” is contract between buyer and seller for the purchase and sale of goods or services in respect of which delivery of the goods or performance of the services or payment in full of the consideration is not made at the time the contract is entered into.
- “Itinerant seller” means seller whose business includes soliciting, negotiating or arranging for the **signing** by a buyer at a place other than the seller’s permanent place of business of an executory contract for the sale of goods or services, whether personally or by an agent of the employee
- “seller” means a person who is in the business of selling goods or services to buyers and includes an agent of seller
- Registration of itinerant sellers required: s. 4
- **Part II (Executory Contracts)**
- Part II applies to executory contracts for the sale of goods or services where the purchase price, excluding the cost of borrowing, exceed 50\$
- Every executory contract shall be in **writing** and contain name and address of seller and buyer; description of goods; itemized price; statement of security for payment; s. 24 statement (disclosure of cost of borrowing); warranty or guarantee; ...: s. 19(1)
- An executory contract is not binding unless the contract is made in accordance with this part, and is **signed by the parties** and a duplicate original copy is in possession of each of the parties: s. 19(2)
- Where a seller solicits, negotiates or arranges for the signing of an executory contract at a place other than the seller’s permanent place of business, the buyer may rescind the contract by delivering a notice of rescission **in writing** within two days after duplicate copy of contract comes into possession of buyer: s. 21(1)
- **Credit Transactions : ss. 24-32**
- **Disclosure of cost of borrowing:** a clear statement **in writing**: s. 24
- This Act applies despite any agreement or waiver to the contrary: s. 33
- “Consumer sale” means contract for the sale of goods made in the ordinary course of business

to a purchaser for his/her consumption or use but does not include sale to a purchaser for resale : s. 34(1)

- Implied warranties: s. 34(2) include implied warranties under the Sale of Goods Act only.
- Any **written** term or acknowledgement purporting to negative or vary any of such implied conditions and warranties is void.
- The rights of a buyer or borrower under this Act are in addition to any rights of the buyer or borrower under any other Act or by the operation of law, and nothing in this Act shall be construed to derogate from such rights: s. 35
- Unsolicited goods
- No referral selling: s. 37(2)
- False advertising : s. 38

Regulations under the Consumer Protection Act, O.Reg. 691/91

- Credit disclosure: ss. 18-25

Interpretation Act, R.S.O. 1990, c. I-11

- “Writing”, “written” or any term of like import, includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in visible form

Consumer Protection Bureau Act, R.S.O. 1990, c. C-32

Consumer Reporting Act, R.S.O., 1990, c. C-33

Discriminatory Business Practices Act, R.S.O. 1990, c. D-12

Prepaid Services Act, R.S.O. 1990, c. P-22

Unconscionable Transactions Relief Act, R.S.O. 1990, c. U-2

Statute of Frauds, R.S.O. 1990, c. s.19

Prepaid Services Act, R.S.O. 1990, c. P.22.

Case Law

Zuker v. Paul (1982), 135 D.L.R. (3d) 481 (Ont. C.A.) [SGA]

A vehicle, subject to a security agreement (unknownst to the buyer) was sold by the seller to the buyer. The Court held that the sale breached the implied warranty of freedom from encumbrances. It was held in another case that since the buyer was aware of the security interest against the good, there was no breach of the implied warranty: Wynowsky v. Butler (1982), 2 P.P.S.A.C. 177 (Ont. Co. Ct.).

In the context of an on-line transaction, it is arguable that if the buyer is unaware of a lien or an encumbrance on a good purchased, the buyer will be entitled to rescind the contract on the basis of that this constitutes a fundamental breach of the warranty of freedom from encumbrances.

Waterloo Public Utilities Commission v. Burroughs Business Machines Ltd. (1974), 6 O.R. (2d) 257 C.A. [SGA]

The sale of a computer systems which is not reasonably fit for the purpose for which it was intended constitutes a breach of the fitness condition and is treated as a fundamental breach, entitling the buyer to rescind the contract.

Nordic Aero Services v. Air Canada (1995), 29 B.L.R. (2d) 251 (Ont. Ct. Gen. Div) [SGA]

Where the buyer accepts the goods, the contract cannot be rescinded for any breach of condition. Once the goods have been accepted, the breach of any condition by the seller can only be treated as a breach of warranty for which the buyer can only claim damages.

Prince Edward Island

Sale of Goods Act, R.S.P.E.I. 1988, c. S-1

- Contract of sale: is contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price, there may be a contract of sale between one part owner and another: s. 3(1)
- Capacity: s. 4
- Contract may be **in writing, word of mouth, both or implied from conduct of parties**: s. 5
- Price may be fixed or determined; must be reasonable: s. 10
- Implied conditions in contract of sale: s. 14
- Sale of goods by description: s. 15
- Duty of seller and buyer: s. 27
- Delivery of goods: s. 28-33
- Examination of goods before acceptance: s. 34(1)
- Actions for breach of contract: remedies of buyer: ss. 52 (non delivery) and 53 (breach of warranty)
- Waiver possible by agreement: s. 55

Business Practices Act, R.S.P.E.I 1988, c. B-7

- Applies to the provision of both goods and services
- Includes the usual unfair practices: s. 2
- Rescission of any agreement entered into by a consumer after a consumer representation that is an unfair practice and that induced consumer to enter into agreement: s. 4
- Where rescission not possible, damages: s. 4
- Exemplary damages: s. 4(2)
- Duties of Director: s. 5
- Offences: s. 18

Consumer Protection Act, R.S.B.C. 1988, c. C-19

- “Buyer” is a person who **purchases goods or services on credit**
 - Applies only to credit transactions
 - License required to carry on business as a lender: s. 9
-

PROVINCIAL LEGISLATION
Prince Edward Island

- Registrar may suspend or cancel registration of any person a) for the breach of a term or condition upon which the registration was granted: b) where he has reason to believe that the person has violated or failed to comply with any provision of this Act or regulation...
- Effect of using false statement relating to the extension of credit in any advertisement, circular ... :s. 14
- Disclosures in contract for sale of goods on credit: contract must be **in writing and contain** a) the name/address of seller and buyer; b) description of goods; c) price of goods; d) statement of security for payment; e) warranty or guarantee by vendor; f) any other matter in regulations: s. 15
- Delivery of true copy of contract to buyer immediately upon execution of a contract: s. 15(2)
- No unsolicited credit cards: s. 17
- No waiver: s. 21
- Rights under this Act are in addition to any other rights: s. 23

Direct Seller's Act, R.S. P.E.I. 1988, c. D-11

- "Direct sale" is a sale by a vendor or salesman in the course of his business
 - "Direct sales contract" (recently amended by deleting oral or writing) is defined as **agreement for the direct sale of goods or services whether for cash or on credit**
 - "Direct selling" is selling, offering for sale or soliciting of orders for the sale of goods or services by i) going from **house to house** ii) **telephone** communication or iii) by **mail**
 - Licence required: s. 5
 - Act does not apply a) where contract solicited, negotiated and concluded **without any dealings in person between purchaser and vendor**; b) where consideration to be provided by purchaser is 100\$ or less: s. 5(3) ...
 - Direct sales contract shall be in **writing** and shall be i) **signed** by the vendor or a salesman of the vendor and by the purchaser; ii) contain information required by regulations iii) include statement of cancellation; etc ...: s. 9
 - Copy of direct sales contract to purchaser at time contract is made: s. 10(1)
 - Absolute right of cancellation within 10 days after the purchase is provided with a copy of the contract: s. 10.1
 - Cancellation within 1 year in certain circumstances: s. 10.1(2) including because vendor not licensed; vendor has failed to comply with terms, conditions; vendor does not provide purchaser with statement of cancellation; ... 30 days
 - Purchaser who accepts delivery of goods under direct sales contract after 30 day period referred to in s. (2)(d) cannot cancel direct sale under that clause
 - Methods of giving cancellation notice: personal delivery, mail, courier, fax, or **any other**
-

method that permits the purchaser to provide evidence of cancellation

- No waiver: s. 14
- Act to prevail where conflict with another Act: s. 19

Interpretation Act, R.S.P.E.I 1988, c. I-8,

- “Words” includes figures, punctuation marks, and typographical, monetary and mathematical symbols
- “Writing” includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form.

Cost of Borrowing Disclosure Regulations under the Consumer Protection Act, R.R.P.E.I., c. C-19

Consumer Report Act, R.S.P.E.I. 1989, c. C-20 as amended

Unconscionable Transactions Relief Act, R.S.P.E.I. 1988, c. U-2

Case Law

Arsenault v. Richman (1980), 28 Nfld & PEIR 259 (PEI.S.C.)

The SGA does not apply to purely private sales but only to sales performed by the seller in the course of the seller’s business.

Quebec

Civil Code, S.Q. 1991, c. 64

- The Civil Code codifies general provisions with respect to obligations and contract law generally, and sale and service contracts specifically. The Code includes provisions which are akin to the SGAs of the common law provinces. It contains at least the same protection as that provided in SGAs. Generally, however, the Code is broader in scope and requires more from the seller than is the case in the SGAs
- Relevant sections in the Code apply to both goods and services.
- Capacity is regulated in the Code's Title on the capacity of persons: see in particular s. 153
- **Obligations in General: art. 1371-1376**
- **Contracts: art. 1377-1456**
- Contract of adhesion are mentioned specifically. It is defined as a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable: art. 1379. See also art. 1432 and 1435-1437.
- "consumer contract" is contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner for personal, family or domestic purposes, property or services from the other party who offers such property and services as part of an enterprise which he carries on: art. 1384.
- Contract is formed when and where acceptance is received regardless of method of communication used: art. 1387
- **In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer: art. 1432**
- Re external clauses, illegible or incomprehensible clauses and abusive clauses in consumer contracts or contracts of adhesion: art. 1435-1437
- **Civil Liability: art. 1457-1481**
- In case of non performance of a person's duty, the rules governing contractual liability apply: art. 1458
- **Modalities of Obligations: art. 1497-1552**
- **Performance of Obligations: art. 1553-1636**
- **Extinction of Obligations: art. 1671-1698**
- **Contract of Sale: art. 1708-1805**
- "contract of sale" is contract by which a person, the seller, transfers ownership of property to another person, the buyer, for a price in money which the latter obligates himself to pay

- Obligations of seller: seller is bound to deliver the property (art. 1717-1722) and to warrant the ownership (art. 1723-1725) and quality of the property (art. 1726-1731)
- The seller is bound to warrant to the buyer that the property and its accessories are free of latent defects: art. 1726.
- Conventional warranties: art. 1732-1735.
- The parties may add to the obligations of legal warranty, diminish its effects or exclude it altogether, but in no case may the seller exempt himself from his personal fault: art. 1732
- Rights of buyer: art. 1736-1739
- **General Provisions**
- **Signature:** is the affixing by a person, on a writing, of his name or the distinctive mark which he regularly uses to signify his intention: art. 2827
- **Evidence:** Where the data respecting a juridical act are entered on a computer system, the document reproducing them makes proof of the content of the act if it is intelligible and if its reliability is sufficiently guaranteed: art. 2837
- The reliability of the entry of the data of a juridical act on a computer system is presumed to be sufficiently guaranteed where it is carried out systematically and without gaps and the computerized data are protected against alterations: art. 2838
- **Jurisdiction:** The choice by the parties of the law applicable to a consumer contract does not result in depriving the consumer of the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the necessary steps for the formation of the contract in that country or if the order was received from the consumer in that country. Same rule applies where the consumer was induced by the other contracting party to travel to a foreign country for the purpose of forming the contract. **If no law is designated, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract:** art. 3117
- In the absence of any special provisions, the Quebec Courts have jurisdiction when the defendant is domiciled in Quebec
- Even though a Quebec Court has no jurisdiction to hear a dispute, it may hear it if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required: art. 3136
- Jurisdiction of a foreign authority: art. 3165

Consumer Protection Act, R.S.Q. 1980, c. P-40.1 as amended

- “consumer” is a natural person, except a merchant who obtains goods or services for the purposes of his business
- “merchant” not specifically defined but includes any person doing business or extending credit in the course of his business: s. 1
- Application of the Act to every contract for goods or services entered into between a consumer and a merchant in the course of his business: s. 2
- **General Provision re contracts regarding goods and services: art. 8-22.1**
- The consumer may demand the nullity of a contract or a deduction in his obligation where the disproportion between the respective obligations of the parties is so great as to amount to exploitation, or where obligation of consumer is excessive, harsh or unconscionable: s. 8
- No waiver. Any stipulation whereby merchant is liberated from consequences of his own act OR that merchant has unilateral right to decide that consumer has failed to satisfy an obligation or that a fact or circumstance has occurred is prohibited: s. 10 and 11
- Obligation of merchant to deliver: s. 16
- **In case of doubt or ambiguity, the contract must be interpreted in favour of the consumer: s. 17**
- **Stipulation that law other than law of Quebec or Canada governs is prohibited: s. 19**
- “Remote parties contract” is contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer nor at the time of acceptance, provided that the offer has not been solicited by a consumer: s. 20
- **The remote parties contract is deemed to be entered into at the address of the consumer: s. 21⁴³**
- Subject to 309 (payment of duties) no merchant may when soliciting a consumer for the purpose of making a remote parties contract or when making such a contract demand total or partial payment by the consumer or propose to collect such payment before performing his principal obligation: s. 22
- An election of domicile with a view to the execution of a juridical act or the exercise of rights arising therefrom may not be set up against the consumer, except if it is made by notarial act: s. 22.1.
- **Rules re Contracts in Writing: art. 23-33**
- **In case where contracts are required to be in writing (s. 58 itinerant merchant contract or contract of credit for e.g.), they must be in French (s. 26), copy to consumer (s. 32), signed by merchant and by consumer (s. 27-28)**
- Contract is concluded when parties have signed it: art. 30
- Warranties: ss. 34-54

⁴³ See AT & T Capital Canada Inc. c. Lahaie, [1997] A.Q. no. 2610 (Cour du Quebec, Chambre civile).

- Warranties includes 1) freedom from encumbrances/charges; 2) fitness for purpose (art. 37) 3) durability (art. 38); 4) conformity to description; 5) conformity to statements or advertisements regarding them made by merchant
- Merchant can offer more advantageous warranty: s. 35
- In a conventional warranty, exclusions are prohibited unless they are clearly indicated in separate and successive clauses: s. 44
- Every **writing** evidencing a warranty must be clearly drawn up and state: name and address of warrantor, description of goods, ...
- Action by consumer directly against merchant re latent defect or breach of warranties (art. 37 and 38): art. 53 and 54

Itinerant Merchants (or direct sellers): ss. 55-65

- Itinerant merchant is merchant, who, personally or through a representative, elsewhere than at his address, solicits a particular consumer for the purpose of making a contract; or makes a contract with a consumer: s. 55
- This part does not apply to remote parties contract: s. 8(c) of Regulations
- This part applies only to contracts for goods/services exceeding \$25.00: s. 56.
- The contract must be evidenced in **writing** and indicate: a) permit number; b) name/address of consumer and itinerant merchant; c) date of contract and address where **signed**; d) description of goods; e) price; f) chargeable duties; g) total amount consumer must pay; h) cancellation rights; i) any other information under regulations: s. 58
- Merchant must attach a form **in writing** (cancellation rights statement) to duplicate of contract: s. 58
- Cancellation of itinerant seller contract at discretion of consumer within 10 days of receipt by each party of duplicate: s. 59⁴⁴
- Itinerant seller cannot receive a partial payment or payment in full from consumer before the expiry of the delay for cancellation for as long as the consumer has not received the goods forming the object of the contract: s. 60
- Itinerant sellers assumes risk of loss or dissolution: s. 64

Contracts of Credit: ss. 66-150

⁴⁴ In *Systèmes Techno-Pompes Inc. v. La Manna*, [1993] A.Q. no. 2262, the consumer rescinded a contract with an itinerant seller six days after its execution and asked the seller to remove the goods (a heatpump). Because of the seller's refusal, the consumer had the system assembled. The seller attempted to argue that the CPA did not apply as the contract related to the construction of a building and that it was impossible to restore the goods to their former state. The Court held that the CPA did apply and that the consumer exercised his right to rescind the contract. The system was carefully removed without negligence on the part of the consumer.

- Contracts of credit, except contracts for the loan of money payable on demand, must be evidenced in **writing**: s. 80
- “Instalment sale”: is a contract involving credit whereby the transfer of ownership of the goods sold by a merchant to a consumer is deferred until the consumer’s performance of all or part of his obligation: s. 132
- The contract must include disclosure: s. 134

Business Practices: ss. 215-253

- The fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made: s. 217
- Prohibited practices: s.220-222, 224, 225-230 include provisions contained in the Unfair Business Practice Acts or the equivalent. This part provides for additional business practices which are deemed unfair.
- **Merchant must indicate the sale price clearly and legibly on all the goods or, if the goods are wrapped, on the wrapping of all the goods offered for sale in his establishment, subject to the regulations: s. 223**
- No unsolicited goods or services: s. 230
- Pyramid sales or other similar multiple level sales are prohibited: s. 235-236
- No merchant may fail to mention his identity and the fact that he is merchant in any advertisement OR fail to mention his address (poste office box will not suffice): s. 242
- No commercial advertising directed at persons under 13 years of age: s. 248

Proof, Procedure and Penalties: art. 261-290.1

- No derogation from this Act by private agreement: s. 261
- Consumer cannot waive rights granted by Act: s. 262
- Provision of this Act are in addition to any provision of another Act granting a right or recourse to consumer: s. 270
- Civil recourse: ss. 271-276

Administration: art. 291-351

- Office de la Protection du Consommateur: ss. 291-320
- Licenses required ..for itinerant merchants...: s. 321

Regulations Under the Consumer Protection Act, R.R.Q. 1981, c. P-40.1, r.1 as amended

- Notwithstanding s. 57 of the Act, a contract entered into at the address of the consumer upon the consumer's express request, where that express request follows initial contact by the merchant with the consumer, by telephone or otherwise, for the purpose of obtaining authorization or an invitation to call on the consumer in order to present a product or give an estimate, or for any other reason, constitutes a contract entered into by an itinerant merchant: s. 7.1
- Sections 58-65 (itinerant sellers) do not apply to remote-parties contracts: s. 8
- Contract governed by ss. 58, 150.4, 158, 164, 190, 199, 207 or 208 of the Act may be **handwritten, typed or printed**: s. 26
- Re compulsory clauses - they must appear under a single title **CLAUSES REQUIRED UNDER THE CONSUMER PROTECTION ACT**: s. 29
- Re contracts entered into by itinerant merchants: s. 30 (refers to rescission right of buyer 10 days following that on which he comes into possession of his duplicate of the contract).
- Re contracts of credit: s. 32-42
- Re remote parties contracts: ss. 129-145 (must furnish security)

Charter of the French Language, R.S., c. C-11 as amended

- Every inscription on a product must be in French.
- Catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French: s. 52
- All computer software must be available in French unless no French version exists. Software can also be available in languages other than French, provided that the French version can be obtained on terms, (except price) that are no less favourable and that it has technical characteristics that are at least equivalent: s. 52.1
- **Contracts pre-determined by one party, contracts containing printed standard classes and the related documents, must be drawn up in French. They may be drawn up in another language as well at the express wish of the parties: s. 55**

Interpretation Act, R.S.Q., c. I-16

- In any statute, unless otherwise specially provided -
(21) the words 'writing', 'manuscript' and the like include what is printed, painted, engraved, lithographed, or otherwise traced or copied

Caselaw

PROVINCIAL LEGISLATION
Quebec

Lajoie v. Bonaventure Ford Sales Ltd. [1974] C.S. 53 (Que. S.C.) [CPA]

A contract drawn up only in English and not signed by the vendor was voidable by the purchaser. It was not void from the outset and the purchaser was not entitled to be reimbursed for instalments he had paid.

Saskatchewan

Sale of Goods Act, R.S.S. 1978, c. S-1, as amended

- “Contract of sale of goods” is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price”.
- Capacity: s. 4
- Contract of sale may be in **writing or by word of mouth or implied by conduct of parties**: s. 5
- Price may be fixed or determined; must be reasonable
- Conditions and warranties: ss. 12-17
- Sale by description regulated by s. 15: implied condition that the goods shall correspond with the description
- Duty of the seller to deliver the goods; duty of buyer to accept goods and pay for them in accordance with the terms of the contract of sale: s. 27
- Rules as to delivery: s. 29
- Actions for breach of contract: ss.48-53 (includes damages for non delivery, specific performance; damages for breach of warranty)
- Exclusion of implied terms and conditions by express agreement or by the course of dealing between the parties: s. 54

Consumer Protection Act, S.S. 1996, c. C-30.1

- Act defines the consumer as “an individual that participates or may participate in a transaction involving goods or services”;
 - **Marketplace practices: Part II**
 - This Part applies to any transaction involving goods or services
 - List of specific unfair practices: s. 6
 - Consumer may commence action: s. 14
 - Director may commence a court action against the supplier on behalf of the consumer: s. 15
 - Offences and Penalties: ss. 23-27
 - Director shall make every attempt to mediate dispute: s. 27
 - Director may take any action authorized by this Part against a supplier in Saskatchewan on behalf of a consumer where the unfair practice occurred outside Saskatchewan: s. 29
 - Provisions of this part apply notwithstanding any agreement to the contrary: s. 32
 - **Consumer products warranties: Part III**
-

- “Consumer” is defined as “a person who buys a consumer product from a retail seller and includes a non-profit organization, whether incorporated or not, that has objects of a benevolent, charitable, educational, cultural or recreational nature and that acquires a consumer product from a retail seller; excludes ...
- No waiver of provisions of this Part: s. 44
- Express warranties: s. 45
- Specific, statutory warranties: s. 48. Include the three warranties implied in the Sale of Goods Act and 1) warranty that the product corresponds to description in sale of goods by description; 2) acceptable quality of product; 3) that product supplied is reasonably fit for a specific purpose where consumer makes known to seller the purpose for which product is being bought; 4) durability
- Additional written warranties: s. 53-55
- Section 55 states that in an action brought pursuant to this Part against a manufacturer, retail seller or warrantor for breach of statutory, express or additional written warranty, lack of privity of contract between the person bringing the action and the retail seller.... is not a defence ...
- Remedies for breach of statutory or express warranties includes damages or rejection of goods: s. 57
- **Subject to any regulations made by the Lieutenant Governor in Council pursuant to s. 71, consumers, persons mentioned in subsection 41(1) and persons mentioned in s. 63 who buy or use consumer products purchased in Saskatchewan, and manufacturers, retail sellers or warrantors who carry on business in Saskatchewan, are subject to the provisions of this Part and to the jurisdiction of the courts of Saskatchewan: s. 69(1).**
- For the purposes of s. 69(1), a manufacturer ... is deemed to carry on business in Saskatchewan if the manufacturer, retail seller or warrantor a) holds title to land in Saskatchewan for the purposes of carrying on business in Saskatchewan; b) maintains office, warehouse or place of business in Saskatchewan; c) is licensed to do business; d) has its name and telephone number (in Saskatchewan for doing business) in current telephone directory...; e) an agent, salesman, representative or other person conducts business in Saskatchewan ...; f) directly or indirectly markets consumer products in Saskatchewan; g) otherwise carries on business in Saskatchewan.
- Effect of breach of mandatory health or safety standards or quality standards: s. 70
- **Unsolicited goods and credit cards: Part IV**

Direct Sellers Act, R.S.A. 1978, c. D-28 as amended

- This Act applies to direct sales contracts. The Act defines a “direct seller” as “a person who

i) goes from **house to house** selling or offering for sale, or soliciting orders for the future delivery of goods or services; ii) by **telephone offers** for sale or solicits orders for the further delivery of goods or services; of iii) does **both**.

- Section 4 requires that a direct seller hold a **licence** to carry on the business of direct selling.
- Right of rescission 10 days after day contract was entered into: s. 22
- **Written** notice required for rescission: s. 22
- True copy of contract to purchaser immediately upon the execution by purchaser of a form of contract: s. 26
- Agreements waiving provisions of Act null and void: s. 34
- Where conflict with any other Act, provisions of this Act prevail

Regulations under the Direct Sellers Act, R.R.S. c. D-28, Reg. 2

- A direct sales contract is to be in **writing** where the direct sale exceeds \$100.00: s. 7
- Contents of direct sales contract: s. 8 (includes **signature** and statement of cancellation right). If contract is not in writing, seller must still provide purchaser with copy of "statement of cancellation right".)

Interpretation Act, S.A. 1995, c. I-11.2

- "Writing" or a similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form: s. 27(4)

Cost of Credit Disclosure Act, R.S.S. 1978, c. C-41

Unconscionable Transactions Relief Act, R.S.S. 1978, c. U-1

Case Law

Dyky v. Silvester Glass and Aluminum Products Ltd. (1997), 69 A.C.W.S. (3d) 838 (Sask. Prov. Ct) [CPA]

In order for the consumer to be able to obtain relief under the CPA for breach of statutory warranties of acceptable quality and durability, the consumer must give the seller a reasonable opportunity to make repairs to the good. S/he cannot simply take to goods to a third party for repair.

Northwest Territories

Sale of Goods Act, R.S.N.W.T. 1988, c.S-2

- A contract of sale means a contract by which means the seller transfers or agrees to transfer the property in goods to the buyer at a price and includes an agreement to sell and a sale.
- Any right, duty or liability arising under contract by implication of law may be negated or varied by agreement or course of dealing between the parties, or usage that binds both parties: s.3.
- Capacity (age of majority is 19): s.7(2).
- Form of contract: s.8(1) (**in writing, oral or both, or implied by the conduct of parties**)
- A contract for sale of goods of the value of \$50.00 is not enforceable by action unless 1) buyer accepts and receives part of goods; 2) **written note or memorandum of the contract is made and signed by the party to be charged**
- Price may be fixed or determined; must be reasonable: s. 12
- Conditions and warranties: ss. 14-20
- Sale by description: s. 17
- Transfer of property: ss.20 -24.
- Duty of seller to deliver and duty of buyer to pay
- Actions for breach of the contract: ss. 55 - 63.

Consumer Protection Act, R.S.N.W.T. 1988, c.C-17

- Definition of "goods" and "services".
- Definitions of "retail sale" includes the sale of goods or services or both
- Definitions of "sale of goods" and "sale of services".
- **Disclosure of Cost of Borrowing: Part I**
- Part I applies to every retail sale of goods or services or goods and services on credit in which there is any cost of borrowing payable by the buyer except a) a sale made on variable credit; and b) a sale in which the cost of borrowing does not exceed \$10.00: s. 5
- Every sale to which this section applies shall be evidenced **in writing, signed by the buyer or his agent** before or at the time of delivery of the goods or performance of the services, that contains a description of the goods or services and also states: a) cash price; b) amount applicable to delivery or installation charge; c) cash price of services included in the sale; d) registration fee; e) total cash price; f) amount of down payment; g) balance of total cash price; h) total cost of borrowing; i) balance owing; j) details in which the balance owing is to be

paid; k) aggregate cost to the buyer; l) true annual rate of the cost of borrowing; m) total additional charge: s. 5(2)

- **True copy of the agreement in writing to buyer as soon as possible after writing required in s. 5 is received by seller, and in any event not later than the time of delivery of the goods or performance of the services:** s. 7
- If writing signed before delivery of goods or performance of services, seller shall deliver the goods or perform the services not later than 7 days after the delivery date: s. 9
- **Prepayment Privileges: Part II**
- **Relief Against Acceleration and Forfeiture: Part III**
- **Statutory Warranties on Retail Sales: Part VI**
- Implied warranties in every retail sale of goods: s. 70. Includes the three warranties implied in the Sale of Goods Act and 1) condition that the goods are new and unused; 2) a condition that the goods are of merchantable quality, except where the defects are described; 3) condition that the goods are reasonably fit for the purpose specified by the buyer to the seller
- Condition as to services - condition that the services shall be performed in a skilful and workmanlike manner: s. 71
- **Direct Sellers: Part VII**
- Definition of "direct seller": person who, on behalf of a vendor, makes any offer, solicitation, proposal or approach that is intended to result in a sale to which Part VII applies
- Applies to all retail sales of goods or services or both entered into by the buyer elsewhere than the usual place of business of the seller and that result from any offer, solicitation, proposal or approach made by or on behalf of the seller **by word of mouth or by telephone** to the buyer **at his/her place of residence** either a) without any prior request by the buyer; or b) in response to a request made by the buyer if the request was itself solicited by or on behalf of the seller by any correspondence or circular: s. 73
- All retail sales to which this part applies that are not **in writing** may be cancelled by notice in writing within four days after the buyer has entered into the contract by sending the notice by registered mail or personal delivery to the seller: s. 75
- Cancellation of agreement possible where statement (rights of cancellation) omitted: s. 76(3)
- A **duplicate** of every agreement made **in writing** to which this Part applies shall be delivered to the buyer at the time of signing of the agreement: s. 76(7)
- Cancellation by the buyer for other reasons within six months after the day on which the purchase was made or the contract **signed**: s. 77(1)
- **Assignees and Guarantors: Part VIII**
- **Licensing: Part IX**
- License required for direct sellers: s. 84
- Director may refuse to issue or reinstate a license as a direct seller to a person who has been convicted under the Criminal Code or this Act ... : s. 87

PROVINCIAL LEGISLATION
Northwest Territories

- **Miscellaneous: Part X**
- Provisions or benefits of this Act or the regulations may not be waived (agreement will be void): s. 106

Consumer Protection Regulations, R.R.N.W.T. 1988, c.C-16

- The Consumer Protection Act does not apply to the sale of insurance or securities: s.4.

International Sale of Goods Act, R.S.N.W.T. 1988, c.I-7

Interpretation Act, R.S.N.W.T. 1988, c.I-8

- "Writing", "written" or any term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form: section 28(1).

Yukon

Sale of Goods Act, R.S.Y.T. 1986, c.154

- “Contract of sale” includes an agreement to sell as well as the sale.
- A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price: s. 2(1).
- Capacity: s. 3.
- Form of contract (**contract may be in writing, oral or partly in writing and partly oral, or may be implied by the conduct of the parties**): s. 4.
- Criterion for enforceability by action of a contract of sale for goods of the value of \$1000.00 or more: s.5
- Price may be fixed or determined; must be reasonable: s. 9
- Conditions and warranties: ss.11 - 15.
- Sale by description: s. 14
- Transfer of property: ss. 17 - 21.
- Duty of seller to deliver and of the buyer to accept and pay
- Rules as to delivery: ss. 27-35
- Actions for breach of the contract: ss. 46 - 51
- Rights, duties, or liability arising under contract by implication of law may be negated or varied by express agreement, course of dealing, or usage such as to bind both parties: s. 52.
- The rules of common law are preserved except to the extent of inconsistencies with this Act: s. 57(1).

Consumer Protection Act, R.S.Y.T. 1986, c.31 as amended

- Definition of “goods” and “services”
- Definitions of “retail sale” includes the sale of goods or services or both
- Definitions of “sale”. “sale of goods” and “sale of services”.
- **Disclosure of Cost of Borrowing: Part I**
- Part I applies to every retail sale of goods or services or goods and services on credit in which there is any cost of borrowing payable by the buyer except a) a sale made on variable credit; and b) a sale in which the cost of borrowing does not exceed \$10.00: s. 4
- Every sale to which this section applies shall be evidenced **in writing, signed by the buyer or his agent** before or at the time of delivery of the goods or performance of the services, that contains a description of the goods or services and also states: a) cash price; b) amount applicable to delivery or installation charge; c) insurance charges; d) registration fee; e) total cash price; f) amount of down payment; g) balance of total cash price; h) total cost of

borrowing; i) balance owing; j) details in which the balance owing is to be paid; k) aggregate cost to the buyer; l) true annual rate of the cost of borrowing; m) total additional charge: s. 4(2)

- **True copy of the agreement in writing to buyer as soon as possible after writing required in s. 4 is received by seller, and in any event not later than the time of delivery of the goods or performance of the services: s. 6**
- If writing signed before delivery of goods or performance of services, seller shall deliver the goods or perform the services not later than 7 days after the delivery date: s. 8
- **Prepayment Privileges: Part II**
- **Relief Against Acceleration and Forfeiture: Part III**
- **Statutory Warranties on Retail Sales: Part VI**
- Implied warranties in every retail sale of goods: s. 68. Includes the three warranties implied in the Sale of Goods Act and 1) condition that the goods are new and unused; 2) a condition that the goods are of merchantable quality, except where the defects are described; 3) condition that the goods are reasonably fit for the purpose specified by the buyer to the seller
- Condition as to services - condition that the services shall be performed in a skilful manner: s. 58(6)
- **Direct Sellers: Part VII**
- Definition of "direct seller": seller whose business includes making direct sales, soliciting orders for direct sales, or both, whether personally or through sales person
- Definition of direct sale: includes a contract for the sale of goods or services or both made by seller a) in ordinary course of business; b) at a place other than the seller's permanent place of business and c) without purchaser having requested seller to attend at place where contract made OR in response to purchaser's request that seller attend at the place where the contract is made, if request is solicited by or on behalf of seller ... **but does not include a contract where the sale, offering for sale or soliciting of orders is made by telephone, mail, fax or any other method that does not involve face to face contact with the intended purchaser;**
- Applies to all retail sales of goods or services or both entered into by the buyer elsewhere than the direct seller's usual place of business and which result from any offer, solicitation, proposal or approach made by or on behalf of the direct seller a) without any prior request by the buyer; or b) in response to a request made by the buyer if the request was itself solicited by or on behalf of the direct seller: s. 59
- Right to cancellation by purchaser within 10 days following day on which direct seller gives purchaser 1) a copy of the written contract; or 2) a statement of cancellation rights where contract not in writing
- Extended cancellation rights: s. 62
- Method of cancellation by a method whereby the purchaser can provide evidence that he or

she cancelled the contract and the date on which cancellation occurred. Suitable method may include but is not limited to registered mail, courier, fax or personal delivery: s. 63(2)

- Deemed to be cancelled when notice is sent: s. 63.(3)
- Contents of written direct sales contract: s. 63.1
- Statement of cancellation rights: s. 63.2
- **General Provisions: Part IX**
- Provisions or benefits of this act or the regulations may not be waived (agreement will be void): s. 86

Regulations Respecting the Protection of Consumers, C.O. 1972/400

- The Consumer Protection Act does not apply to the sales regulated under the Insurance Act or the Securities Act: s.5.

Business Licence Act, R.S.Y. 1986, c. 17

- No person shall carry on within the Yukon any business, calling, trade or occupation without having first obtained a licence for the purpose and paid the prescribed fee: s. 4(1)
- Every application for a Yukon trade licence shall be in writing: s.9

Municipal Act, R.S.Y. 1986, c. 119

- Subject to any other Act or regulations made thereunder, council may by bylaw control and regulate all businesses carried on within the municipality including the manner of operation, the nature of operation and the location thereof, and may license any or all such businesses... : s. 276
- Council may by bylaw prohibit the carrying on of any business without a licence: s. 277
- The council may refuse to grant or may revoke or suspend a licence: s. 279

Interpretation Act, R.S.Y.T. 1986, c.93

- "Writing", "written" or any term of like import includes words printed, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in a visible form: section 21(1).

SCHEDULE 2

LEGISLATION

SCHEDULE 2 LEGISLATION - TABLE

SCHEDULE 2

LEGISLATION

SUMMARY TABLE

| | Alta new FTPA | B.C. | Man. | N.B. | Nfld | N.S. | Ontario | P.E.I. | Quebec | Sask. | N.W.T. | Yukon |
|---|---------------------|----------|----------|------|----------|-----------|----------|----------|-------------------|----------|----------|------------|
| <u>LVO</u> | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ (Civil Code) | ✓ | ✓ | ✓ |
| contract in writing | >\$50.00 | | | | >\$50.00 | >\$100.00 | | >\$30.00 | | >\$50.00 | >\$50.00 | >\$1000.00 |
| <u>UBPA.</u> | ✓ FTPA | ✓ | ✓ | | ✓ | | ✓ CPA | ✓ | ✓ | ✓ CPA | | |
| Right of rescission where contravention to Act | | | | | | | ✓ | ✓ | | | | |
| Right of action for any damage or los suffered as a result of breach and other orders | ✓ | ✓ | ✓ | | ✓ | | | | ✓ | ✓ | | |
| <u>Direct Sellers</u> | ✓ within FTPA | ✓ LPC | ✓ LPC | ✓ | ✓ | ✓ | ✓ LPC | ✓ | ✓ LPC | ✓ | ✓ LPC | ✓ LPC |
| person to person only | ✓ | ✓ | ✓ | | | | | | | | | ✓ |

SCHEDULE 2

LEGISLATION

| | Alta new FTPA | B.C. | Man. | N.B. | Nfld | N.S. | Ontario | P.E.I. | Quebec | Sask. | N.W.T. | Yukon |
|---|---------------------|---------------|------------------------|------------------------|---------------------|-------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| en person to person and others | | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| signatures | buyer and seller | buyer only | buyer and seller | buyer and seller | buyer and seller | seller only | buyer and seller | buyer and seller | buyer and seller | buyer and seller | buyer and seller | buyer and seller |
| rescission within cooling off period of 10 days (harmonized) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| cooling off period may be extended | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | | ✓ | | ✓ | ✓ | ✓ |
| executory contracts | | ✓ | | | | | ✓ | | ✓ | | | |
| <u>CPA</u> | ✓ FTPA | | | | | | | | | | | |
| credit transactions only | | | | | ✓ | | | ✓ | | | | |
| includes Part on consumer sales warranties | | | ✓ | | | ✓ | ✓ (SGA) | | | | ✓ | ✓ |

SCHEDULE 2
LEGISLATION

| | Alta new FTPA | B.C. | Man. | N.B.. | Nfld | N.S. | Ontario | P.E.I. | Quebec | Sask. | N.W.T. | Yukon |
|--|---------------------|------|------|---------------------------------|------|------|---------|--------|------------------------|-------|--------|-------|
| includes Part on consumer product warranties (roader than consumer sales warranties) | | | | ✓ | | | | | ✓ | ✓ | | |
| credit disclosure | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| remedies for breach - procedure under SGA | | | ✓ | | | ✓ | ✓ | | | | | |
| remedies included in CPA | ✓ FTPA | | | ✓ scheme can be waived | | | | | ✓ and Civil Code | ✓ | ✓ | ✓ |
| unsolicited goods prohibited | | | | | | | | ✓ | | | | |
| unsolicited foods - no action against recipient bénéficiaire | | ✓ | | | ✓ | ✓ | ✓ | | | ✓ | | |
| unsolicited credit cards forbidden | ✓ | | ✓ | ✓ | | | | ✓ | ✓ | | | |

SCHEDULE 2

LEGISLATION

| | Alta new FTPA | B.C. | Man. | N.B.. | Nfld | N.S. | Ontario | P.E.I. | Quebec | Sask. | N.W.T. | Yukon |
|----------------------------|---------------------|------------------------|------|-------|------|---------------|---------|--------|-------------------------|-------|--------|-------|
| negative option schemes | ✓ | ✓ goods services | | | | ✓ services | | | ✓ goods/ services | | ✓ | ✓ |
| Others | | | | | | | | | | | | |
| writing | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| signature | | | | | | | | | ✓ | | | |
| jurisdiction | ✓ FTPA | | | | | | | | ✓ | ✓ | | |

PART VI REFERENCES

K. Benyekhlef et V. Gautrais, "Echange de documents informatisés Contrat type commenté", <http://www.droit.umontreal.ca/crdp/fr/text/contrat.html>, 02/26/98

Better Business Bureau Resource Library, List of Publications, <http://www.bbb.org/library/searchBySubject.html#Computer>, 03/03/98

Consumer Assistance Directory, http://www.lcs.gov.bc.ca/cob/cad.htm#Direct_Mail_Marketing, 02/20/98

S. F. DiPaolo, "Notes and Comments - The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce", (1993) 13 Journal of Law and Commerce, 143

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, <http://zeus.bna.com/e-Law/docs/ecdistance.html>, 03/29/98

M. Erdle, "Legal Issues in Electronic Mail", (1996) 12 Canadian Intellectual Property Review, 251.

S.J. Forte, "Use Tax Collection on Internet Purchases: Should The Mail Order Industry Serve As A Model?", (1997) 15 The John Marshall Journal of Computer & Information Law, 203.

Federal Bureau of Consumer Affairs of Australia, "Untangling the Web, Electronic Commerce and the Consumer" <http://www.dist.gov.au/consumer/publicat/untangle/introd.html>, 03/04/98

V. Gautrais, "La formation des contrats par télécopieur", Revue juridique THEMIS <http://www.droit.umontreal.ca/pub/...teur&language=fr&range=9&numdoc=16>, 02/26/98

J. Goldring, "Consumer Protection, the Nation-State, Law, Globalization and Democracy", in <http://www.ascusc.org/jcmc/vol2/issue2/goldring.html#protection>, 02/24/98

Industry Canada, Office of Consumer Affairs, "New Approaches to Consumer Law in Canada, An Interim Report, Prepared for and Revised Based on the University of Toronto Roundtable on New Approaches to Consumer Law, Held on June 20, 1996

E. Katsh, "Law in a Digital World - Computer Networks and Cyberspace", (1993) 38 Villanova Law Review, 403.

M.E. Katsh, Law In A Digital World, London: New, Oxford University Press, 1995

N. L'Heureux, Droit de la Consommation, Cowansville, Les Editions Yvons Blais Inc., 4ème Edition, 1993

A.A. Macchione, "Overview of the Law of Commercial Transactions and Information Exchanges in Cyberspace - Canadian Common Law and Civil Law Perspectives", (1997) 13 C.I.P.R. 129.

Ministry of Consumer Affairs of New Zealand, "Electronic Commerce and The New Zealand Consumer, Issues and Strategies for the Future, Discussion Paper", August 1997, ISBN:0-478-00016-2, Ministry of Consumer Affairs, Wellington, New Zealand, <<http://www.moc.govt.nz>>

B. Moore, "A la recherche d'une règle générale régissant les clauses abusives en droit québécois", La revue juridique Thémis, <<http://www.droit.umontreal.ca/pub/>, 02/26/98

The National Advisory Council on Consumer Affairs, "Consumer Protection in Electronic Commerce: Draft Principles and Key Issues", <<http://www.dist.gov.au/consumer/elecomm/draft/html/foreword.htm>>, 03/04/98

NNFR Family Economic, "Web Resources Related to Consumer Protection", <<http://www.hec.ohio-state.edu/cts/osue/conprt.htm>>, 02/26/98

OECD Materials On Electronic Commerce, <http://www.oecd.org/subject/electronic_commerce/documents/emergence.htm>, 03/04/98

J. R. Reidenberg, "Une perspective franco-américaine sur la législation du commerce électronique", Revue Telecom, 45-47 (No. 111, Printemps, 1997), <<http://home.sprynet.com/sprynet/reidenberg/ecom.htm>>, 02/26/98

R.B. Roscoe III and L.M. Rozell, "The Federal Trade Commission's Commitment to On-Line Consumer Protection", (1997) 15 The John Marshall Journal of Computer & Information Law, 679.

R. Schu, "The Applicable Law to Consumer Contracts Made over the Internet: Consumer Protection Through Private International Law", 5 International Journal of Law and Information Technology, 192

G. Smith Ed., Internet Law and Regulation Special Report, (1996) London: Bird & Bird, chap. 8

Pierre Trudel et France Abran, Karim Benyekhlef, Sophie Hein, Droit du cyberspace, Universite de Montreal, 1997.

D. L. Stott, "Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site", (1997) 15 The John Marshall Journal of Computer & Information Law, 819.

C. A. Varney, Prepared remarks on the Topic of "Setting Federal Consumer Protection Policy for the 21st Century", <<http://www.webcom/lewrose/speech/varney1.html>>, 02/26/98

D. L. Wilkerson, "Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: are Electronic Messages Enforceable?", (1992), 41 The University of Kansas Law Review, 403.

B. Wright, "Eggs In Baskets: Distributing The Risks of Electronic Signatures", (1997) 15 The John Marshall Journal of Computer & Information Law, 189.

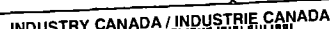
KE 1599 .T3 1998 c.2

Consumer protection rights in Canada in the context of electronic commerce a report to the Office of Consumer Affairs,

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