

***Principles in Practice:***

**The Canadian Response to  
Consumer Protection Issues in  
Electronic Commerce**

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## ***Principles in Practice: The Canadian Response to Consumer Protection Issues In Electronic Commerce***

Electronic Commerce offers the online consumer considerable advantages over conventional retail and wholesale trade, a fact evinced by the impressive growth it has displayed in recent years. However, the very factors that distinguish the electronic marketplace and give rise to these benefits also create significant risks that undermine consumer confidence in the medium. Indeed, evidence suggests that concerns over security of online payments, control over personal information, and means of ensuring the identity of merchants, reliable delivery of goods and services, and consumer redress mechanisms inhibit the widespread adoption and ultimate growth of e-commerce. Furthermore, the current regime of consumer protection legislation in Canada appears ill-equipped to handle many of these issues, rendering many traditional protection measures unavailable to consumers in the electronic context. In response, a series of *Principles of Consumer Protection for Electronic Commerce* were developed to assist governments and businesses in devising effective measures for consumer protection. Thus far, several provinces have introduced initiatives based on these principles, and in May 2001, a template designed to guide jurisdictions in drafting electronic sales legislation and harmonize consumer protection in e-commerce was approved for adoption.

This paper proposes to explore the main issues perceived to undermine consumer confidence in the online marketplace, and evaluate the legislative measures adopted to resolve these concerns in the Canadian context. Part I will discuss the potential of electronic commerce, explaining the impetus underlying the government's desire to encourage consumer confidence in the online marketplace. In Part II, the concerns themselves will be explored, along with the general failure of existing consumer protection legislation to properly address them, highlighting the need for positive measures to protect the online consumers. Part III will examine and evaluate solutions adopted thus far, while Part IV discusses the most recent measure, the *Internet Sales Contract Harmonization Template*, and briefly examines the likelihood of adoption.

## 1) *The Potential of E-Commerce*

Electronic Commerce over the Internet is often conceived as an entirely new way of conducting business, with the potential to “radically alter economic activities and the social environment.”<sup>1</sup> By eliminating constraints imposed by physical distance, it gives the promise of extending the market reach of firms to a global scale. It can vastly increase interactivity among market participants and replace traditional intermediary functions, thereby lowering transaction costs. By removing traditional barriers to market entry, it allows access to the marketplace by smaller, more specialized vendors, promoting competition and decreasing price while increasing the diversity of available products and services. In short, it has the power to transform the marketplace, empowering both business and the consumer by granting unprecedented access to information, choice and convenience, and promises significant economic growth for all participants.<sup>2</sup>

Indeed, the growth of e-commerce<sup>3</sup> over the past decade has been remarkable. Starting from essentially zero in 1995, global e-commerce grew to \$26 billion by 1997, and is expected to achieve

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<sup>1</sup> OECD, *The Economic and Social Impact of Electronic Commerce* (Paris: OECD, 1999) (online: OECD <<http://www1.oecd.org/dsti/sti/it/ec/index.htm>> [hereinafter *Impact of E-Commerce*] at 9.

<sup>2</sup> For in-depth discussion of the potential for e-commerce, see, *inter alia*, *Impact of E-Commerce, ibid.*; C. Heckman, “Background Note” in *Gateways to the Global Market: Consumers and Electronic Commerce* (Paris: OECD 1998) 27 [hereinafter *Gateways*].

<sup>3</sup> In order to properly assess the growth of e-commerce, it is essential to first define the term. Until recently there has been little consensus on which definition is appropriate, with some adopting a broader definition that includes all financial and commercial transactions that occur electronically, while others restricted the definition to retail sales where both transaction and payment occur over an open network like the Internet. After substantial research, the Organization for Economic Cooperation and Development (‘OECD’) settled on a middle-ground definition that includes “all business conducted over networks that use non-proprietary protocols through open standard setting process such as the Internet.” This refers to all activity that generates value internally (within a firm) or externally (with suppliers and customers), and hence includes orders placed regardless if payment or delivery was made online or offline. Statistics Canada has adopted this definition (differentiating these ‘Internet transactions’ from the broader ‘electronic transactions’ that refers to all transactions conducted over any computer-mediated network), but others (*i.e.* IT market research firms) have yet to, rendering comparative analysis of e-commerce statistics difficult at best. See *Impact of E-Commerce, supra* note 1 at 28-29; OECD, *Defining and Measuring Electronic Commerce: A Provisional Framework and A Follow-up Strategy*, Doc. No. DSTI/ICCP/IE/IIS/(2000) (August 2000); OECD, *Consumers in the Online Marketplace: OECD Workshop on the Guidelines – One Year Later*, Doc. No. DSTI/CP(2001)5 (April 2001), online: OECD <<http://www1.oecd.org/dsti/sti/it/consumer/index.htm>> [hereinafter *Consumers in the Online Marketplace*]; G. Peterson, *E-Commerce and Technology Use* (Ottawa: Statistics Canada, 2001) at 4, online: Statistics Canada <<http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE01005.pdf>> (date accessed: 21 November 2001) [hereinafter *E-Commerce & Tech Use Survey*].

\$330 billion by 2001-02 and \$1 trillion in 2003-05.<sup>4</sup> The United States and Canada account for the vast majority of this total,<sup>5</sup> although recent reports indicate that this is changing as the rest of the world gains increasing level of access to the Internet.<sup>6</sup> While the burst of the dot com bubble and subsequent economic downturn have deflated some of the exuberance expressed in the late 1990s, growth has continued at an impressive rate. In Canada alone, the value of orders placed over the Internet expanded 73% to \$7.2 billion between 1999 and 2000 as the number of businesses and consumers placing orders over the Internet increased, with Manufacturing, Wholesale trade, Transportation and Retail trade accounting for over 50% of these sales.<sup>7</sup> However, the changing economic climate has by no means left e-commerce unscathed; over the same period the proportion of businesses selling over the Internet declined from 10% in 1999 to only 6% in 2000 as online sales became more concentrated in fewer, larger firms, with enterprises with more than 500 employees responsible for 43% of online sales.<sup>8</sup> This suggests that many of the small-to-medium-sized enterprises ('SMEs') who stand to benefit the most from electronic commerce are withdrawing from the online marketplace due to concerns over prevailing economic conditions,<sup>9</sup> a fact which may undermine many of the benefits e-commerce promises the consumer.

Electronic Commerce is generally considered to encompass three distinct types of transactions: Business-to-business ('B2B') transactions; Business-to-Consumer ('B2C') transactions;

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<sup>4</sup> *Impact of E-Commerce*, *supra* note 1 at 28. Even with more current information, the range of available estimates about current and future growth varies in the extreme. International Data Corp. ('IDC'), Forrester Research and Goldman Sachs have all estimated global e-commerce will achieve over \$1 trillion by 2001, while ActiveMedia Research indicates only \$283 billion. By 2003, Forrester Research and Goldman Sachs estimate global e-commerce at just under \$4 trillion, while IDC indicates \$2.8 trillion, and ActiveMedia at \$963 billion. See eMarketer, *The eGlobal Report* (August 2001), online: eMarketer <<http://www.emarketer.com/ereports/eglobal/>> (date accessed: 28 November 2001).

<sup>5</sup> North America accounted for approximately 80% of total global e-commerce, a fact not surprising as the US and Canada also account for the largest proportion of online users. See *Impact of E-Commerce*, *supra* note 1 at 32.

<sup>6</sup> See U.S. Department of Commerce, *Digital Economy 2000* (June 2000), online: ESA <<http://www.esa.doc.gov/de2k.htm>> (date accessed: 1 December 2001).

<sup>7</sup> *E-Commerce and Tech Use*, *supra* note 3 at 5.

<sup>8</sup> In 2000, 31% of all these large-scale enterprises engaged in e-commerce, while only 6% of businesses with less than 20 employees sold online. *Ibid.* at 5-6.

<sup>9</sup> Furthermore, a cursory analysis of the data available does not reveal any positive relationship between online sales or purchases and operating margins. Consequently, despite claims, e-commerce does not appear to offer business any great reduction in costs or expansion in markets. See *ibid* at 9.

and Government Services.<sup>10</sup> B2B e-commerce accounts for 80% of all e-commerce, and accordingly dominates the total value of e-commerce activity.<sup>11</sup> Hence, while much of the attention and speculation surrounding e-commerce has, until recently, been lavished on B2C transactions, they only account for 20% of private sector online sales, or \$1.4 billion in 2000. To put this figure in perspective, this is roughly 0.5% of Canada's \$277.1 billion in total retail sales,<sup>12</sup> and an even smaller fraction of the \$591 billion in total personal expenditure over the same period.<sup>13</sup> Consequently, public attention has largely shifted to the better performing and more economically significant B2B sphere.

However, B2C e-commerce has evinced significant growth in recent years, which officials insist should not be overlooked by policy makers or the public.<sup>14</sup> In 2000, household Internet penetration increased from 41.8% to 51.3%, enabling over 1.1 million more Canadian households to participate in e-commerce from the previous year. A total of 21.9% of households used the Internet for shopping, as opposed to 15.3% in 1999, which represents an increase from 1.7 million to 2.5 million households.<sup>15</sup> Of these, 12.3% of households made online purchases, up from 6.9% the previous year, and the value of purchases made jumped from \$417 million in 1999 to \$1.1 billion in 2000, representing an outstanding increase of 247%.<sup>16</sup> The remaining 9.6% of Internet shoppers were window-shoppers – that is, they used the Internet to narrow their purchasing decisions, but did not commit to ordering or purchasing on-line – a figure up from 8.3% the previous year.<sup>17</sup>

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<sup>10</sup> Industry Canada, *The Canadian Electronic Commerce Strategy*, online: Electronic Commerce Task Force <[http://e-com.ic.gc.ca/english/ecom\\_eng.pdf](http://e-com.ic.gc.ca/english/ecom_eng.pdf)> (date accessed: 21 November 2001) at 4.

<sup>11</sup> *E-Commerce & Tech Use Survey*, *supra* note 3 at 6-7.

<sup>12</sup> Statistics Canada, *Canadian Statistics: Retail Trade*, online: Statistics Canada, <<http://www.statcan.ca/english/Pgdb/Economy/Communications/trade15.htm>> (date accessed: 1 December 2001).

<sup>13</sup> Statistics Canada, *E-Commerce: Household Shopping on the Internet*, online: *The Daily* <<http://www.statcan.ca/Daily/English/011023/d011023b.htm>> (date accessed: 23 November 2001) [hereinafter *Household Shopping*].

<sup>14</sup> *Consumers in the Online Marketplace*, *supra* note 3 at 61.

<sup>15</sup> Statistics Canada, *Internet Use in Canada*, online: Statistics Canada <<http://www.statcan.ca/english/freepub/56F0003XIE/tables.htm>> (date accessed: 23 November 2001) [hereinafter *Internet Use Survey 2000*].

<sup>16</sup> *Ibid.* Although Business-to-Household e-commerce accounts for the vast majority of B2C transactions, they do not account for all of them. Hence the discrepancy of \$3 million between the total B2C and total B2H transactions.

<sup>17</sup> *Ibid.*

These figures indicate that Canadian e-commerce consumer market is experiencing an annual growth rate of 80%,<sup>18</sup> supporting the prediction that the proportion of consumers participating in e-commerce will surpass 30% by 2003.<sup>19</sup> If the market continues to expand at this impressive rate, then it would seem that B2C e-commerce will eventually account for a much greater proportion of overall trade than at present, and the economic growth it promised from the outset may well be realized. However, survey results also reveal that Internet users, and in particular window-shoppers, continue to be plagued with concerns over the security of online financial transactions, the privacy of their personal information, and the availability of consumer protection measures.<sup>20</sup> This suggests that these issues continue to undermine consumer confidence in the online marketplace and function as barriers to the growth of B2C e-commerce. In light of the recent economic downturn, and general decline in sales across all sectors, these barriers must be dismantled and consumer confidence bolstered by effective protection mechanisms if negative economic effects are to be minimized and growth sustained at current levels. Unless this occurs, the combination of general economic

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<sup>18</sup> The recent economic downturn, and the events of September 11, makes the growth of B2C e-commerce over the near term difficult to predict. Preliminary surveys in the U.S. indicate that while consumer confidence in American economy has been on a steady decline since June 2001, confidence levels in the Internet are on rise. See The Conference Board, *Consumer Confidence Index Dives 11.5 Points* (30 October 2001), online: The Conference Board <<http://www.conference-board.org/economics/news/press.cfm?PressID=4670>> (date accessed: 24 November 2001); Yahoo!/ACNielsen, *Yahoo!/ACNielsen Internet Confidence Index Rises Five Points Indicating Consumer Attitudes and Confidence in E-commerce Services Strengthening* (24 September 2001), online: ACNielsen <<http://www.acnielsen.com/news/corp/2001/20010924.htm>> (date accessed: 21 November 2001). Interestingly, 9/11 appears to have simply exaggerated this pattern; consumer confidence plunged, while confidence levels in Internet spiked dramatically, with more users indicating they plan to shop online. The vast majority rejected notion that they are doing so in fear of public places, but rather cite increased levels of comfort with the online medium as after the tragedy they used Internet as never before for news updates and communication services. See J. Cooper and K. Madigan, *U.S.: Markets Measure Risk All the Time. This Is Much Worse* (8 October 2001), online: BusinessWeek Online <[http://www.businessweek.com/magazine/content/01\\_41/b3752030.htm](http://www.businessweek.com/magazine/content/01_41/b3752030.htm)> (date accessed: 21 November 2001); Yahoo!/ACNielsen, *Special Report of Yahoo!/ACNielsen: Internet Confidence Index Surges Nine Points Following September 11 Attacks* (29 October 2001), online: ACNielsen <<http://www.acnielsen.com/news/corp/2001/20011029.htm>> (date accessed: 21 November 2001). Conversely, traditional retail sales jumped sharply in October (although some doubt the reliability of these statistics), while online sales declined. See The Dismal Scientist, *October Retail Sales* (14 November 2001), online: The Dismal Scientist <[http://www.dismal.com/dismal/dsp/release.asp?r=usa\\_retail](http://www.dismal.com/dismal/dsp/release.asp?r=usa_retail)> (date accessed: 21 November 2001); Forrester Research, *Offline Deals Results in Lower Online Sales in October, According to the Forrester Research Online Retail Sales Index* (19 November 2001), online: <<http://www.forrester.com/ER/Press/Release/0.1769.655.00.html>> (date accessed: 1 December 2001). It thus appears likely that B2C e-commerce growth will slow down, just as growth across all sectors has, but to what extent remains rather uncertain.

<sup>19</sup> Industry Canada, *Household Internet Use Survey, Electronic Commerce Release*, online: *Electronic Commerce Task Force* <[http://e-com.ic.gc.ca/english/documents/research/backgounder\\_oct23\\_01.pdf](http://e-com.ic.gc.ca/english/documents/research/backgounder_oct23_01.pdf)> (date accessed: 20 November 2001) at 2 [hereinafter *HIUS Backgounder*].

<sup>20</sup> *Internet Use Survey 2000*, *supra* note 15.

uncertainty and specific apprehensions over the electronic medium may well result in a decline more serious than those suffered in conventional commerce.

## *II) The Barriers: Consumer Protection Issues in E-Commerce and the Failings of the Existing Regime*

Over past 30 years, most legal systems have developed legislation to protect consumers in commercial transactions. In Canada, constitutional considerations and a general absence of uniformity render the current regime of consumer protection law a complex patchwork of federal and provincial statutes. The primary Federal instrument is the *Competition Act*,<sup>21</sup> which prohibits practices deemed offensive to fair competition and the interests of consumers, such as misleading advertising and deceptive marketing. Individually, the provinces have also enacted a wide range of legislation such as Sales of Goods Acts ('SGAs'), Consumer Protection Acts ('CPAs'), and Unfair Business Practices or Fair Trading Acts ('FTAs'), which generally contain prohibitions for inappropriate business practices, and grant the consumer certain private law rights and remedies.<sup>22</sup>

However, disparities between legislation are significant, and consumers in different provinces are often afforded inconsistent and unequal degrees of protection. While this can create complications in the offline world, the borderless nature of e-commerce only exaggerates this as consumers can readily make purchases from vendors residing in a different jurisdiction. When this occurs, as it often does, it becomes difficult to determine what laws apply, leaving e-commerce consumers potentially devoid of legal protections normally governing their transactions, and unsure of what protections or redress mechanisms are available in the event of a dispute. Consequently, consumer advocates argue that, as the weaker party, the consumer should be able to rely on the application of the law of their own jurisdiction, considering the requirement that vendors comply with the local law a reasonable cost of doing business there.<sup>23</sup> While this is consistent with purposes

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<sup>21</sup> R.S.C. 1985, c. C-34.

<sup>22</sup> See R. Tassé and K. Lemieux, *Consumer Protection Rights in the Context of Electronic Commerce* (Ottawa: Industry Canada, 1998), online: Consumer Connection <<http://strategis.ic.gc.ca/SSG/ca01031e.html>> (date accessed: 16 November 2001) [hereinafter *Consumer Protection in E-Commerce*] for an in-depth treatment of provincial consumer protection statutes and their application to e-commerce.

<sup>23</sup> D. Waite, "Consumer Protection Issues in Internet Commerce" (1999) 32 Can. Bus. L. J. 132 at 140. See also R. Tassé and M. Faille, *Online Consumer Protection: A Study on Regulatory Jurisdiction in Canada* (Ottawa: Industry

underlying consumer protection law, and appears to be the prevailing trend, it subjects the online vendor to a complex array of uncoordinated, haphazard regulations, and essentially requires compliance with the strictest in order to safely operate in all jurisdictions.<sup>24</sup>

Even assuming the legislation is applicable, it still remains unclear if existing protections are sufficient for the e-commerce consumer. Most online contracts are executory and non-negotiable in nature; the terms are dictated by one party (the vendor) and the goods and/or services delivered once payment has been effected.<sup>25</sup> These are generally enforceable,<sup>26</sup> meaning the consumer can enter into sales agreement by the click of mouse without the requisite intention. This is a circumstance the legislation simply does not provide for, serves to defeat the underlying purpose of mandatory writing and signature requirements.<sup>27</sup> These contracts also often contain terms that are disadvantageous to consumers, such as limitations on warranties and remedies, and while many CPAs and SGAs impose certain information disclosure requirements and compulsory warranties and conditions onto commercial transactions,<sup>28</sup> the legislation is generally silent on unfair terms.<sup>29</sup> ‘Cooling off’ provisions, which grant consumers the option to cancel a contract for any reason within specified period of time,<sup>30</sup> are one means to address this, but presently these are only available for direct sales, and do not apply to online contracts.

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Canada, 2001), online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4n>> (date accessed: 19 November 2001) [hereinafter *Online Consumer Protection*] for a detailed treatment of the jurisdiction issue in the context of consumer protection.

<sup>24</sup> See B. Sookman, “Electronic Commerce, Internet and the Law: A Survey of the Legal Issues” (1999) 48 U.N.B.L.J. 119.

<sup>25</sup> See Tassé, *Consumer Protection in E-Commerce*, *supra* note 22 at 55. See also *Ont. CPA*, *supra* note 28 at s. 2 for a statutory definition of executory contract.

<sup>26</sup> See *Rudder v. Microsoft Corporation*, [1999] O.J. No. 3778, online: QL (OJ), which held an online contract, or ‘clickwrap’ agreement, to be enforceable.

<sup>27</sup> Much of this legislation requires certain contracts to be written and signed by the parties to ensure the buyer has assented to the terms and can retain a record of the transaction. See J. Gregory, “Solving Legal Issues in Electronic Commerce” (1999) 32 Can. Bus. L. J. 84 [hereinafter *Solving Legal Issues*] at 118. Most Electronic Commerce Acts deem that these requirements can be satisfied by electronic means. See J. Gregory, “The UETA and the UECA – Canadian Reflections” (2001) 37 Idaho L. Rev 441 [hereinafter *UETA & UECA*].

<sup>28</sup> Most Sales of Goods Acts prescribe these into all contracts for the sale of goods. However, rights, liabilities and warranties can be often be waived by agreement between parties. See Ontario’s *Sales of Goods Act*, R.S.O. c. S-1 [hereinafter *Ont. SGA*] at s. 13, s. 53. Consumer Protection Acts often import these provisions into consumer transactions, and render them unwaivable. See Ontario’s *Consumer Protection Act*, R.S.O. 1990, c. 31 [hereinafter *Ont. CPA*] at s. 34(2).

<sup>29</sup> Tassé, *Consumer Protection in E-Commerce*, *supra* note 22 at 64.

<sup>30</sup> Ontario recently extended this period to ten days. See *Ont. CPA*, *supra* note 28 at s. 21, s.23.3(1).

Moreover, most of these provisions apply exclusively to goods, excluding services from coverage and leaving it unclear if intangibles such as software qualify for protection, particularly if transmitted over the Internet.<sup>31</sup> Considering that online services and intangible products constitute the vast majority of B2C e-commerce purchases,<sup>32</sup> this deficiency is a severe one.

The e-commerce consumer also has little assurance that the products or services purchased electronically will in fact be delivered, and that they will meet expectations. Under most SGAs, if no time for delivery is specified in the agreement, goods must be delivered within a 'reasonable time',<sup>33</sup> but the precise meaning of this is determined on a case-by-case basis, providing negligible guidance to the consumer. This is less of an issue in the case of intangibles, which are generally delivered immediately, but communications disruptions can interfere with transmission and prohibit the consumer from receiving the product intact. Further, challenges in adequately describing products and services over the electronic medium means that there is a greater likelihood that they may fail to satisfy expectations. According to most SGAs, in a sale by description there is an implied condition that goods correspond with the description,<sup>34</sup> and be of merchantable quality,<sup>35</sup> but even assuming applicability of the legislation to the transaction, this fails to address circumstances of misunderstanding more likely to arise in the e-commerce context (*i.e.* due to inherent limitations in quality of the display, etc.).

A right is also only as good as its remedy. While current legislation provides consumers a number of options for redress, including rescission and cancellation, damages, specific performance and injunction, the difficulty and impracticality of enforcing court redress mechanisms significantly limits their value and renders them largely ineffective.<sup>36</sup> Consumers thus require a practical means to enforce their rights and ensure vendor compliance. To this effect, third-party intermediaries such as

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<sup>31</sup> In *St. Albans City and District Council v. International Computers Ltd* [1996] 4 All E.R. 481, [1997] F.S.R. 251 (C.A.) Glidewell LJ concluded that software contained on a disk qualified as a good, while the program, of itself, did not, suggesting that software transmitted electronically is not a good as it has no tangible component.

<sup>32</sup> *Internet Use Survey 2000*, *supra* note 15.

<sup>33</sup> See *Ont. SGA*, *supra* note 28 at s. 28(2).

<sup>34</sup> *Ibid.* at s. 14.

<sup>35</sup> *Ibid.* at s. 15.

<sup>36</sup> Tassé, *Consumers in E-Commerce*, *supra* note 29 at 67.

credit card companies may emerge as a viable mechanism, as some already intervene on behalf of consumers to convince suppliers to resolve legitimate consumer complaints.<sup>37</sup>

E-commerce consumers have also expressed substantial concerns over issues that fall outside the scope of most of the existing provincial legislation. Online fraud, which has increased in frequency with the growth of electronic commerce,<sup>38</sup> is one as many indicators of reliability in other forms of commerce not exist in electronic marketplace, and online consumers often lack the means to readily authenticate a vendor's identity. Hence, consumers experience difficulties in distinguishing reliable sellers from fraudulent ones, heightening concerns that they will fall victim to a scam, or products or services purchased will not be delivered. Privacy is another concern, as consumers are sensitive to the fact that personal information "can be segmented and collated and compared and reassembled and distributed, all to users and for uses far from those originally contemplated when the information was originally collected,"<sup>39</sup> and that they may have little control over this information once given.<sup>40</sup> Similarly, concerns over the security of personal information, particularly financial information, weigh heavily on e-commerce consumers, who fear interception and abuse of credit card information submitted over the Internet.<sup>41</sup>

Hence, it is apparent that B2C e-commerce is fraught with complex issues that the current regime of Canadian consumer protection law fails to adequately address, undermining consumer confidence in the online marketplace and inhibiting the growth potential of B2C e-commerce. Conventional wisdom dictates that unless active measures are taken to reduce or eliminate these barriers and encourage consumer confidence, Internet users may refuse to shop online, stalling if not diminishing the impressive growth B2C e-commerce has experienced. Considering the prevailing

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<sup>37</sup> Heckman, *supra* note 2 at 59.

<sup>38</sup> M. Geist, *Internet Law in Canada Law* (Toronto: Captus Press, 2000) at 557. For a detailed treatment of the problems of online fraud, see J. Rothchild, "Protecting the Digital Consumer: The Limits of Cyberspace Utopianism" (1999) 74 *Indiana L. J.* 893; N. Ladouceur, "Calibrating the Electronic Scales: Tipping the Balance in Favour of a Vigorous and Competitive Electronic Market for Consumers" (1999) 25 *Can.-U.S. L. J.* 295.

<sup>39</sup> Gregory, *Solving Legal Issues*, *supra* note 27 at 127.

<sup>40</sup> See *inter alia* M. Budnitz, "Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate" (1998) 49 *S. C. L. Rev.* 847 for a detailed treatment of Privacy issues in e-commerce. It should be noted that the privacy of personal information and the security of personal and financial information, which this paper treats as distinct issues, are often combined under the rubric of privacy.

<sup>41</sup> See *ibid.*; Heckman, *supra* note 2 and Waite, *supra* note 23 at 138-139 for treatments of the security issues.

economic climate, it is thus critical that this be adequately addressed if B2C e-commerce is to continue to grow.

Some argue that “the Internet is widely recognized as an open network whose communications are vulnerable to eavesdropping, whose organization is largely anarchic, and a good deal of whose content is pornographic,”<sup>42</sup> and scarce resources should not be devoted to protecting those who choose to shop in such a risky environment, particularly as the majority are high income and well educated and can well afford to buy elsewhere. However, this fails to recognize that the level of Internet access is steadily increasing across all sections of Canadian society,<sup>43</sup> and B2C e-commerce promises all consumers real benefits in the form of greater choice, convenience, competition, and access to information.

Meanwhile, others indicate that in the e-commerce environment, it is in fact the consumer, and not business, who has the advantage as competition between online enterprises is fierce and consequently the market will regulate behaviour and provide adequate protection for the consumer.<sup>44</sup> But market self-regulation appears unlikely to police e-commerce effectively, as the model only truly works when participants have equal access to resources. Consequently, self-regulation will not provide adequate protect to marginalized groups such as the poor or those of limited education, and simply serves to reinforce the power of those already in control.<sup>45</sup> Moreover, this model appears incapable of overcoming many of the issues that undermine consumer confidence, as this is self-referential - it requires consumers to trust in the marketplace to provide the protections needed to create trust in the marketplace - and certainly cannot remedy the failings of applicable legislation.

However, too much consumer protection can also threaten the growth of e-commerce, as more protection means greater restrictions on vendors, and if laws unduly punish vendors and shield

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<sup>42</sup> Waite, *supra* note 23 at 135.

<sup>43</sup> Indeed, Internet penetration rates in the lower income brackets experienced the highest degree of growth between 1999 and 2000. See Statistics Canada, *Household Internet Use Survey 2000* (Ottawa: Statistics Canada, 2001), online: Statistics Canada <<http://www.statcan.ca/Daily/English/010726/d010726a.htm>> (date accessed: 20 November 2001).

<sup>44</sup> See S. Zain, “Regulation of Electronic Commerce by Contract: Is it Fair to Consumers?” (2000) 31 U. West L. A. L. Rev. 163 at 165-166.

<sup>45</sup> Heckman, *supra* note 2 at 64-65. See also Rothchild, *supra* note 38, Budnitz, *supra* note 40 and J. Dickie, *Internet and Electronic Commerce Law in the European Union* (Portland: Hart, 1999) for detailed discussions of the failings of the self-regulatory model.

consumers, vendors may simply opt out.<sup>46</sup> Consequently, in order to secure the benefits of e-commerce by reducing actual and perceived risks without destroying the advantages for business or the consumer, the Canadian government adopted a co-regulatory approach to consumer protection issues in e-commerce that focuses on cooperation between all participants, including government, business and the consumer.

### *III) The Solutions: A Brief History of Consumer Protection Developments*

To facilitate effective co-regulation and foster the development of electronic commerce in Canada, the Federal Government adopted the Canadian Electronic Commerce Strategy in September 1998 as part of its 'Connecting Canadians' initiative.<sup>47</sup> This strategy outlines challenges and opportunities for business and consumers, and identifies priority issues for action. The most salient of these to the e-commerce consumer are 'building trust in the digital economy,' which proposes to increase consumer and business confidence in electronic commerce by addressing security, privacy, and consumer protection concerns, and 'clarifying marketplace rules,' as it recommends the removal of barriers to the use of electronic commerce by updating the legal and commercial rules governing the online marketplace.

To this end, the Office of Consumer Affairs established the Working Group on Consumers in Electronic Commerce, composed of representatives from government,<sup>48</sup> business, and consumer groups, to develop principles intended to guide the actions of government and industry in the development of a new consumer protection regime.<sup>49</sup> The Working Group released their *Principles*

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<sup>46</sup> Heckman, *supra* note 2 at 60.

<sup>47</sup> *Canadian E-Commerce Strategy*, *supra* note 10. See also Government of Canada, *Connecting Canadians: E-Commerce*, online: Connecting Canadians <<http://www.connect.gc.ca/en/500-e.htm>> (date accessed: 2 December 2001).

<sup>48</sup> More specifically, officials from Industry Canada and the consumer ministries of Alberta, Ontario and Quebec.

<sup>49</sup> See Industry Canada, *New Electronic Commerce Principles to Protect Consumers* (9 November 1999), online: Industry Canada <<http://www.ic.gc.ca/cmb/Welcmeic.nsf/cdd9de973c4bf6bc852564ca006418a0/85256779007b79ee852568240065f6f21OpenDocument>> (date accessed: 24 November 2001).

of *Consumer Protection for Electronic Commerce*<sup>50</sup> in November 1999. Designed to reflect established law and business practice,<sup>51</sup> the *Principles* are guided by three central tenets. The first is ‘Equivalent Protection’, which maintains that consumers should receive the same degree of protection regardless of medium, and consumer protection provisions should be designed to achieve this. The second, ‘Harmonization’, indicates that Canadian governments should adapt existing consumer protection laws to apply to electronic commerce, and should strive to harmonize provisions across jurisdictions without requiring any jurisdiction to lower its standards. ‘International Consistency’ is the third, asserting that the Canadian consumer protection framework should be consistent with guidelines established by international bodies such as the Organisation for Economic Co-operation and Development without compromising the level of protection provided under the *Principles* or existing laws.<sup>52</sup>

In summary, the *Principles* are:

- 1) **Information Provision:** *Consumers should be provided with clear and sufficient information to make an informed choice about whether and how to make a purchase.* Information should be ‘prominently disclosed’ in clear and understandable language. Essential information such as vendor identity and location, a fair and accurate description of products or services, limitations, level of privacy protection and security mechanisms available should be provided. All terms and conditions, including full price, delivery arrangements, cancellation, return and exchange policies and warranties should be disclosed prior to the conclusion of transaction, and consumers should be provided a record of the transaction.
- 2) **Contract Formation:** *“Vendors” should take reasonable steps to ensure that the consumer’s agreement to contract is fully informed and intentional.* Vendors should make clear what constitutes offer and acceptance, and employ a multi-step order process to confirm the consumer’s awareness of rights and obligations, or allow a reasonable period to cancel contract if they do not.

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<sup>50</sup> Working Group on Electronic Commerce and Consumers, *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework* (Ottawa: Office of Consumer Affairs, 1999), online: Consumer Connection <<http://strategis.ic.gc.ca/SSG/ca01182e.htm>> (date accessed: 6 November 2001) [hereinafter *Principles*].

<sup>51</sup> The *Principles* were also designed to be consistent with the *Declaration on Consumer Protection in the Context of Electronic Commerce*, Oct. 7-9, 1998, OECD Ministerial Conference on A Borderless World: Realising the Potential of Global Electronic Commerce, Conference Conclusions, Annex 2, OECD Doc. SG/EC(98)14/ REV6, endorsed at the OECD Ministerial Conference in Ottawa in 1998, and the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* (Paris: OECD, 1999), online: OECD <<http://www1.oecd.org/dsti/sti/it/index.htm>> (date accessed: 10 November 2001) [hereinafter *Guidelines*], which Canada helped develop. See *Speaking Notes for the Honourable John Manley, Minister of Industry, at the Launch of the Principles for Consumer Protection in Electronic Commerce* (9 November 1999), online: Industry Canada <<http://www.brancher.gc.ca/en/sp/1325-e.htm>> (date accessed: 23 November 2001).

<sup>52</sup> *Principles*, *supra* note 50 at 2.

- 3) **Privacy:** *Vendors and “intermediaries” should respect the privacy principles set out in the CSA International’s Model Code for the Protection of Personal Information.*
- 4) **Security of Payment and Personal Information:** *Vendors and intermediaries should take reasonable steps to ensure that “transactions” in which they are involved are secure. Consumers should act prudently when undertaking transactions. Both vendors and consumers should safeguard payment and personal information, and take reasonable steps to conduct transactions safely and securely.*
- 5) **Redress:** *Consumers should have access to fair, timely, effective and affordable means for resolving problems with any transaction. Vendors should provide adequate resources to handle complaints and make use of third-party processes when internal mechanisms fail, although consumers should not be required to submit to these processes. Appropriate standards for dispute resolution, and clear rules regarding applicable law, forum and cross-border enforcement of judgments should be developed.*
- 6) **Liability:** *Consumers should be protected from unreasonable liability for payments in transactions. Consumers should not be held liable for unauthorized transactions, and vendors should permit reasonable period for cancellation for inadvertent transactions. Prompt refunds for transactions where consumer does not receive what was paid for or for transactions where vendor failed to provide relevant information should be made available, and Credit card issuers should make reasonable efforts to help resolve consumer complaints in the event of unauthorized transactions or non-delivery.*
- 7) **Unsolicited Commercial E-mail:** *Vendors should not transmit commercial E-mail without the consent of consumers, or unless a vendor has an existing relationship with a consumer.*
- 8) **Consumer Awareness:** *Government, business and consumer groups should promote consumer awareness about the safe use of electronic commerce. Initiatives should highlight circumstances in e-commerce where consumers are most vulnerable and advise consumers of their rights and obligations and how to minimize their risk. Consumers should also take reasonable steps to inform themselves, and have access to information identifying disreputable practices and those convicted of illegal practices.*

Public response to the *Principles* was positive, and government, industry, consumer and technology associations alike endorsed them as an affirmative means to “help to create an environment of trust and set clear guidelines to help businesses and consumers develop confidence in electronic commerce.”<sup>53</sup> Indeed, the *Principles* address the majority of the consumer protection concerns expressed in the previous section, and remedy many of the failings of the existing

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<sup>53</sup> *Industry applauds the Canadian Principles of Consumer Protection for Electronic Commerce* (9 November 1999), online: Newswire <<http://www1.newswire.ca/releases/November1999/09/c2756.html>> (date accessed: 24 November 2001); *Canadian Marketing Association announces measures to boost consumer confidence online* (9 November 1999), online: Newswire <<http://www.newswire.ca/releases/November1999/09/c2651.html>> (date accessed 24 November 2001). Of course, most of these organizations also participated in the development of the *Principles*, so their endorsement is not entirely surprising.

legislation. However, they are conspicuously silent on online fraud,<sup>54</sup> do not directly address prevailing issues of jurisdiction, and resolve issues of unfair terms and delivery in a limited fashion, providing only that online consumers are to be aware of all terms and conditions without referring to their content and making redress available if the product or service purchased is not received with no stipulation as to time. Of course, these limitations appear to be consistent with the guiding concept of equivalent protection, as unfair terms in offline transactions are most often resolved by prevailing contract law, and the absence of a permissible timeframe for delivery implies ‘within a reasonable time.’

One month later, the OECD released its *Guidelines for Consumer Protection in the Context of Electronic Commerce*,<sup>55</sup> a set of general guidelines designed to assist governments, business and consumer groups in reviewing and implementing policies and principles necessary for effective consumer protection in age of e-commerce.<sup>56</sup> Although slightly broader in scope,<sup>57</sup> and possessing a greater emphasis on jurisdictional issues, the *Guidelines* are consistent with the *Principles*, providing principles to govern fair practices, information disclosure and ordering, redress, privacy, and education. The *Guidelines* conclude with a series of recommendations to facilitate implementation.

While both the *Principles* and the *Guidelines* improve the position of the e-commerce consumer immensely, neither is legally binding. Rather, they are intended only as guidelines, and unto themselves rely entirely upon voluntary compliance among businesses to be made manifest in the electronic marketplace. Some suggested that there was, in fact, little support among business for the government to act as an enforcer of these principles, and the market was the most effective means of ensuring compliance.<sup>58</sup> But shortly after their release, Industry Canada urged provincial governments to move quickly in the harmonization of consumer laws applying to electronic

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<sup>54</sup> This is curious, as the Competition Bureau, which is normally responsible for these issues, participated in the Working Group. See Ladouceur, *supra* note 38.

<sup>55</sup> *Guidelines*, *supra* note 51.

<sup>56</sup> J. F. Mann, “Canadian Government and OECD Issue Consumer Protection Guidelines on Electronic Commerce” (2000) 4 Info. & Tech. Law 5.

<sup>57</sup> The *Guidelines* contain principles governing fair business, advertising and marketing practices, which are generally absent from the *Principles*, and include a stipulation that businesses should not use unfair contract terms. See *infra* note 54.

<sup>58</sup> Mann, *supra* note 56

commerce,<sup>59</sup> suggesting that policy makers disagreed and fully intended to play an active in implementation. Indeed, at their annual meeting in November 1999, federal, provincial and territorial ministers responsible for consumer affairs adopted a series of principles intended to guide in the development of appropriate consumer protection legislation. The main legislative principles were:

- Consumer law should accept the use of electronic signatures where it requires that contracts be signed.
- Electronic contracts should contain the prescribed disclosures, such as location of merchant, delivery and warranty terms, and return and refund policies
- A '30-day delivery rule,' by which if goods not delivered within 30 days, the contract can be rescinded, should be adopted.
- The contract (including all required disclosures) and supporting documentation should be given into the custody and control of the customer, (e.g. by fax or file download) and be printable.
- Agreement to the terms of a contract should be a clear process that a consumer cannot perform unknowingly.
- Sellers should provide consumers with receipts as soon as possible after payment has been made. Receipts should be printed or in a printable form.
- Purchasers should be able to cancel contracts for non-compliance with disclosure terms or for late delivery.<sup>60</sup>

While these essentially mirror the *Principles*, and like them are built around the concept of equivalent protection, there are a few essential distinctions. The legislative principles basically ignore issues of privacy, security, and online fraud, but this is likely because such issues generally fall outside the scope of consumer protection legislation and would be more properly addressed elsewhere.<sup>61</sup> Indeed, by the time the legislative principles were adopted, the *Competition Act's* prohibitions on deceptive and misleading advertising had been deemed to apply to the electronic

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<sup>59</sup> See *Governments/Private Sector Called on to Further Protect On-Line Consumers* (25 November 1999), online: Industry Canada <<http://info.ic.gc.ca/cmb/welcomeic.nsf/cdd9dc973c4bf6bc852564ca006418a0/85256779007b79ee85256834005a5467?OpenDocument>> (date accessed: 24 November 2001) and *Runciman Joins Consumer Ministers to Protect Consumers Shopping Online* (19 November 1999), online: Ministry of Consumer and Business Services <[http://www.cbs.gov.on.ca/mcbs/english/2576\\_38a.htm](http://www.cbs.gov.on.ca/mcbs/english/2576_38a.htm)> (date accessed: 24 November 2001) and

<sup>60</sup> Gregory, *UETA & UECA*, *supra* note 27 at 474. See also Ontario Ministry of Consumer and Commercial Affairs, *Consumer Protection for the 21<sup>st</sup> Century* (Toronto: Queens Printer, 2000), online: Ontario Ministry of Consumer and Business Services <<http://www.cbs.gov.on.ca/pdf/EnConsProt.pdf>> (date accessed: 15 November 2001) [hereinafter *21<sup>st</sup> C.*] at 9.

<sup>61</sup> Fair Trading and Business Practice Acts often provide basic protections against misrepresentations, but these are fairly minimalist and certainly do not extend to fraud. See Ontario's *Business Practices Act*, R.S.O. 1990, c. B-18 at ss. 2-3.

marketplace,<sup>62</sup> and the Federal government had already introduced the *Personal Information Protection and Electronic Documents Act*<sup>63</sup> to address privacy and security concerns, rendering inclusion of these issues unnecessary. The disclosure requirements enunciated in the principles are also considerably less rigorous than the *Principles*, and do not mandate that essential information be accessible prior to purchase. However, they also provide an explicit resolution for delivery issues in the form of the '30-day delivery rule', which essentially places an e-commerce transaction on par with a direct sale.<sup>64</sup>

The Ministers also considered prevailing jurisdictional issues, and determined that, in accordance with the *Principles*, harmonization of provincial legislation the best method to address these. To effect this, the Consumer Measures Committee<sup>65</sup> was directed to develop a 'template'

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<sup>62</sup> See Ladouceur, *supra* note 38. By this time, some fraud and related security issues had also been addressed by successful self-regulatory measures such as employment of certification authorities to certify merchant identity and reliability, and the development of Secure Electronic Transactions ('SET') by Visa, Mastercard and IBM. See Waite, *supra* note 23.

<sup>63</sup> S.C. 2000, c. 5 [hereinafter *PIPEDA*]. The *PIPEDA* was introduced in October 1998 and passed in April 2000. It governs commercial use of personal information, and presently applies only to entities under the legislative authority of Parliament. However, as of January 2004, the Act will apply to all commercial endeavours within both federal and provincial jurisdiction unless a given province has already legislated in the field. See J.F. Mann and A. Morrow, "New Law in Canada on the Use of Personal Information" (2000-01) 4 *Info. & Tech. Law* 66.

<sup>64</sup> See *Ont. CPA*, *supra* note 28, at s. 23.3(3). The legislative principles also bypass statutory writing and signature requirements by deeming electronic equivalents acceptable to satisfy them. The *Principles* are silent on this matter, probably because the *Uniform Electronic Commerce Act* had already circumvented this problem in the same fashion, rendering its inclusion redundant. See *Uniform Electronic Commerce Act*, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u1>> (date accessed: 16 November 2001) at ss. 7-10. As most Canadian jurisdictions have either adopted or introduced such legislation (the exceptions being Nunavut and the Northwest Territories), this is no longer a pressing issue.

<sup>65</sup> The Consumer Measures Committee ('CMC') is an inter-jurisdictional committee of government officials established under the Agreement on Internal Trade. With a representative from the federal government as well as every province and territory, the CMC provides a federal-provincial-territorial forum for national cooperation to improve the marketplace for Canadian consumers, through harmonization of laws, regulations and practices and through actions to raise public awareness. See Industry Canada, *Consumer Measures Committee*, online: Industry Canada <<http://strategis.ic.gc.ca/SSG/ca01083e.html>> (date accessed: 24 November 2001). In 1998, the Ministers directed the CMC to review consumer issues related to electronic commerce and examine options with respect to consumer education, industry self regulation and consumer protection legislation, and asked them to provide them with a report for their consideration, and using Roger Tasse's *Consumer Protection Rights in Canada in the Context of Electronic Commerce* Report for the Office of Consumer Affairs as a basis for discussion, the CMC developed the legislative principles adopted at the 1999 meeting. See Industry Canada, *Consumer Ministers Take Action On Consumer Fraud* (13 November 1998), online: SCICS <[http://www.scics.gc.ca/cinfo98/83063514\\_e.html](http://www.scics.gc.ca/cinfo98/83063514_e.html)> (date accessed: 24 November 2001).

based on these principles “to guide jurisdictions in drafting their own legislation while achieving a high level of legislative uniformity” between jurisdictions.<sup>66</sup>

In the interim, several provinces also commenced independent efforts to give legal effect to protection measures for the e-commerce consumer, using the legislative principles and the *Principles* as a basis to ensure consistency across jurisdictions. **In August 2000, Manitoba adopted the *Electronic Commerce and Information Act*,<sup>67</sup> which contained several amendments to the *Consumer Protection Act*<sup>68</sup> designed to protect online consumers. To compliment and enhance these protections, Manitoba also introduced an *Internet Agreements Regulation*<sup>69</sup> under the amendments. Both came into force in March 2001, making that province the first to enact consumer protection laws for online consumers.**<sup>70</sup>

The new laws apply to all retail sale or retail hire-purchase agreements formed by Internet communications,<sup>71</sup> and oblige the seller to provide prescribed information in writing, including: name and address; a fair and accurate description of goods and/or services; the full price including applicable charges such as shipping; the details of warranties, guarantees, terms, conditions, and methods of payment; delivery date and arrangements; any restrictions, exchange, cancellation and refund policies; and arrangements for protection of financial and personal information.<sup>72</sup> This writing requirement is deemed satisfied if the information is provided in a manner that ensures the consumer has accessed it before entering into the agreement and is capable of retaining it.<sup>73</sup> The legislation also gives the consumer the right to cancel if the seller fails to provide the prescribed

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<sup>66</sup> CMC, *Draft Internet Sales Contract Harmonization Template Letter*, online: Industry Canada <[http://strategis.ic.gc.ca/pics/ca/internet\\_sales\\_letter.pdf](http://strategis.ic.gc.ca/pics/ca/internet_sales_letter.pdf)> (16 November 2001) [hereinafter *Draft Template Letter*]. See also Gregory, *UETA & UECA*, *supra* note 27.

<sup>67</sup> C.C.S.M., c. E55, online: Government of Manitoba <<http://www.gov.mb.ca/chc/statpub/free/pdf/e055.pdf>> (date accessed: 13 November 2001) [hereinafter *Man ECIA*].

<sup>68</sup> C.C.S.M., c. C200, online: Government of Manitoba <<http://www.gov.mb.ca/chc/statpub/free/pdf/c200.pdf>> (date accessed: 25 November 2001) [hereinafter *Man CPA*].

<sup>69</sup> Man. Reg. 176/2000, online: Government of Manitoba <[http://www.gov.mb.ca/cca/cpa/in\\_age.html](http://www.gov.mb.ca/cca/cpa/in_age.html)> (date accessed: 13 November 2001) [hereinafter *Man IAR*].

<sup>70</sup> See M. Geist, “Law Spurs Growth for E-Commerce”, *Globe & Mail* (19 April 2001), online: GlobeTechnology.com <<http://www.globetechnology.com/archive/20010419/TWGEIS.html>> (date accessed: 12 November 2001) and B. J. Freedman, “Canadian Provincial Internet Consumer Protection Laws” (2000-01) 2 *Internet and E-Commerce Law in Canada* 6.

<sup>71</sup> *Man CPA*, *supra* note 68 at s. 128.

<sup>72</sup> *Man IAR*, *supra* note 69 at s. 3(1).

<sup>73</sup> *Man CPA*, *supra* note 68 at s.129(2).

information, or fails to deliver the goods or services within 30 days after the delivery date or the date of the agreement if the delivery date is not specified.<sup>74</sup> To cancel, the consumer must supply notice in writing, but can deliver this by any means (including mail, fax or email),<sup>75</sup> and in the event of cancellation, the consumer's obligations under the agreement are extinguished and the seller must provide a refund within 30 days.<sup>76</sup> Furthermore, if the purchase was made by credit card, the consumer can require the card issuer to cancel or reverse all applicable charges if the seller fails to provide a refund within the stipulated 30-day period.<sup>77</sup> Additionally, failure to comply with any of these provisions is deemed an offence under the Act punishable by fines up to \$25,000, and imprisonment for a term of no more than 3 years.

Ontario has also taken steps to enhance consumer protection in e-commerce, releasing a consultation paper entitled *Consumer Protection for the 21<sup>st</sup> Century*<sup>78</sup> for public comment in August 2000. While the paper is geared towards general consumer protection reform across all sectors, many of the issues it addresses are relevant to the online consumer, and it includes specific proposals for e-commerce measures. It recommends consumer protection law apply equally to goods, services, and other forms of consumer transactions, and the adoption of standards governing electronic transactions based on the legislative principles.<sup>79</sup> Plain language should be used in all consumer agreements, and if the language is ambiguous the contract should be interpreted in the consumer's favour.<sup>80</sup> Disclosure requirements should include: full contact information and description of the goods or services; information about restrictions, limitations or conditions, and return, exchange, cancellation, or refund policies; applicable warranties and guarantees; full price including shipping and handling and similar charges; and proposed delivery dates and arrangements. Also, the '30 day delivery rule' should be applied to all future performance contracts, granting consumers the right to

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<sup>74</sup> *Ibid.* at s. 129(1); 130(1).

<sup>75</sup> *Ibid.* at s. 132.

<sup>76</sup> *Ibid.* at s.133(1).

<sup>77</sup> *Ibid.* at s. 134(2).

<sup>78</sup> *21<sup>st</sup> C.*, *supra* note 60. See also *Ontario Government looks to increase consumer protection in the New Economy* (10 August 2001), online: Ontario Ministry of Consumer and Business Services <[http://www.cbs.gov.on.ca/mcbs/english/2776\\_38a.htm](http://www.cbs.gov.on.ca/mcbs/english/2776_38a.htm)> (date accessed: 20 November 2001).

<sup>79</sup> *21<sup>st</sup> C.*, *ibid.* at 6, 8.

<sup>80</sup> *Ibid.* at 20-21.

cancel a contract and obtain a full refund if goods or services are not delivered within 30 days *or* the date promised [emphasis added]. However, this right is limited; the consumer cannot cancel if delivery has commenced before a cancellation is issued, and can be asked to agree to postpone the delivery date.<sup>81</sup> In the event these standards are violated, remedies should include the right to cancel, and receive a refund and pursue damages through civil action, but a ‘no harm, no foul’ provision should govern circumstances where unintentional non-compliance does not harm the consumer.<sup>82</sup>

**Under its *Fair Trading Act*,<sup>83</sup> Alberta introduced an *Internet Sales Contract Regulation*<sup>84</sup> that became effective in October 2001 and generally addresses online consumer protection issues in the same fashion as the new Manitoba laws.**<sup>85</sup> The regulation applies to all contracts over \$50 formed by text-based Internet communications where the consumer or the vendor are in Alberta, or the offer or acceptance is made in Alberta,<sup>86</sup> and requires disclosure of the same essential information as the Manitoba regulation.<sup>87</sup> This information is deemed disclosed if prominently displayed and made accessible in manner ensuring consumer access and retention, and furthermore the vendor must supply a copy of the contract containing all the prescribed information to the consumer within 15 days of the agreement.<sup>88</sup> If the vendor fails to disclose all the prescribed information, or does not provide an express opportunity to accept or decline the contract or correct errors, the consumer retains the right to cancel the agreement until 7 days after the contract is delivered, or 30 days if no copy is provided.<sup>89</sup> Also, if the goods or services are not delivered within 30 days of the delivery date, or the agreement date if this is not specified, the consumer may cancel the contract, and in the case of travel, transportation and accommodation services, the consumer can

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<sup>81</sup> *Ibid.* at 15-16.

<sup>82</sup> *Ibid.* at 12.

<sup>83</sup> S.A. 1998, c. F-1.05, online: Alberta Queen’s Printer <<http://www.gov.ab.ca/qp/ascii/Acts/WPD/F01P05.TXT>> (date accessed: 20 November 2001) [hereinafter *Alba. FTA*].

<sup>84</sup> *Alba. Reg.* 81/2000, online: Alberta Queen’s Printer <[http://www.gov.ab.ca/qp/ascii/regs/2001\\_081.txt](http://www.gov.ab.ca/qp/ascii/regs/2001_081.txt)> (date accessed: 14 November 2001) [hereinafter *Alba. ISCR*].

<sup>85</sup> See Freedman, *supra* note 70.

<sup>86</sup> *Alba. ISCR*, *supra* note 84 at ss. 1-2. The regulation also exempts certain regulated industries, such as real estate, from its scope.

<sup>87</sup> *Ibid.* at s. 4(1).

<sup>88</sup> *Ibid.* at ss. 4(2), 5(1).

<sup>89</sup> *Ibid.* at s. 6(1).

cancel if services have not commenced on the date agreed.<sup>90</sup> Notice of cancellation can be expressed in any manner that indicates intention, and legitimate cancellation operates to cancel the contract as if it never existed, cancels any and all related consumer transactions, and obliges the supplier to provide a full refund within 15 days.<sup>91</sup> If the supplier fails to do so, the consumer may recover the refund as an action in debt, or may have applicable credit card charges reversed or cancelled, and in this event the card issuer must comply within 2 billing cycles or 90 days, whichever comes first.<sup>92</sup> Lastly, to ensure that the regulation is reviewed for ongoing relevancy and necessity, it contains a sunset clause and is due to expire on September 30, 2006.<sup>93</sup>

As intended, all of these measures are generally consistent with the legislative principles, the *Principles*, the *OECD Guidelines*, and one another, although to varying degrees. For reasons explained previously, all omit privacy, security and fraud concerns, and instead focus upon resolving issues of contract formation, information disclosure, delivery, cancellation rights, and redress. In this regard, the Ontario proposals are the least consistent and grant the weakest protections; while information disclosure and delivery requirements are as stringent as other measures, Internet contract formation is not specifically addressed,<sup>94</sup> cancellation rights are limited and most importantly remedies are confined to traditional legal mechanisms. This suggests that the Ontario government is concerned with the potential detrimental effects on business interests granting too great a degree of protection might entail, which may limit the scope of protections implemented. However, undoubtedly part of the reason for these limitations was that the proposals were principally intended for general consumer protection reform, and some of the protections endorsed by other measures may

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<sup>90</sup> *Ibid.* at ss. 6(2), 6(3).

<sup>91</sup> *Ibid.* at ss. 8-10.

<sup>92</sup> *Ibid.* at ss. 11-12.

<sup>93</sup> *Ibid.* at s.14.

<sup>94</sup> In fairness, this is not entirely true as s. 21 of the Ontario *Electronic Commerce Act*, S.O. 2000, c. 17 [hereinafter *Ont. ECA*] provides that electronic transactions are not enforceable in the event of a material error. However, this provision is extremely limited in application, and grants only minimal protection for the online consumer. See P. Lawson, Public Interest Advocacy Centre, *Letter Re: Uniform Electronic Commerce Act and Consumer Protection* (6 June 2000), online: PIAC <<http://www.piac.ca/uecalet.htm>> (date accessed: 19 November 2001).

not be entirely appropriate outside the context of e-commerce.<sup>95</sup>

**The Manitoba laws and Alberta regulations are very similar and both grant a significant degree of protection of the e-commerce consumer. In doing so, both are almost entirely consistent with the various principles and guidelines, and in certain respects go beyond them.** However, there remain some fairly significant distinctions between the two. The Alberta regulations are more limited in scope, applying only to contracts over \$50 in value and potentially excluding some agreements by requiring a text-based format.<sup>96</sup> But the regulations are also potentially broader in application, specifically asserting jurisdiction over all consumers, vendors and/or Internet transactions occurring within Alberta, while the Manitoba laws remain silent on this point. Naturally, this may raise issues of extra-territoriality, as Alberta is potentially asserting jurisdiction over parties and operations lying outside provincial boundaries, but in light of the borderless nature of e-commerce and the need for effective consumer protection, it is a reasonable means to deal with the complex subject of jurisdiction, and reflects the prevailing trend of applying the law of the consumer's jurisdiction.

The Manitoba regulations contain more rigorous standards of disclosure, mandating that details of applicable warranties or guarantees, complaint handling procedures, arrangements for protection of financial and personal information, and information regarding the consumer's rights of cancellation be disclosed over and above the requirements of the Alberta regulations.<sup>97</sup> In this respect, the Manitoba laws are more harmonized with the *Principles*, which recommends details of complaint procedures, warranties, and privacy and security arrangements by provided, while the Alberta regulations are slightly deficient. Conversely, while both essentially mandate a multi-step ordering process that requires confirmation at various stages to satisfy disclosure requirements, which is in line with the *Principles* and the *Guidelines*, the Manitoba laws deviate as they do not ensure that the consumer is actively delivered a copy of the agreement rather than merely being

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<sup>95</sup> At first blush, this might appear to conflict with the concept of equivalent protection. However, equivalent protection does not necessarily entail that protections be identical on or offline. Rather, it mandates that consumers receive the same degree of protection.

<sup>96</sup> At the very least, 'text-based' requires clarification. If the agreement is graphical, would it then qualify?

<sup>97</sup> See *Man. IAR*, *supra* note 69 at s. 3(1).

capable of retaining one. Both go beyond the *Principles* by adopting the ‘30-day delivery rule’, but the Alberta regulations go further by providing exceptions for time-sensitive services and give even greater clarity by specifying timeframes for cancellation and refunds as well. The notice requirements in the Alberta regulations are also less restrictive than the Manitoba CPA, which requires notice of cancellation in writing, and the effect of cancellation is more powerful, deeming the contract non-existent rather than merely extinguishing the consumer’s obligations under it, suggesting that the contract is rendered void *ab initio* and the entire contract and related transactions are repudiated in their entirety.<sup>98</sup> Of course, the practical effect of either measure is the same, and in harmony with the principles and guidelines - the seller is obliged to promptly provide a full refund. Moreover, the absolute nature of this nullification does have consequences, as the Manitoba CPA gives the consumer the option to repudiate a cancellation by accepting goods or services if delivered late,<sup>99</sup> while the Alberta regulations do not - once the contract has been cancelled and deemed void, it cannot be regenerated. Hence, the Alberta regulations also contain provisions obliging the consumer to return goods delivered late<sup>100</sup> while the Manitoba CPA does not, as it has no need for such a requirement. However, despite differences, both measures offer the e-commerce consumer substantial protections, and most significantly satisfy redress issues by requiring credit card issuers to reverse any applicable charges if a legitimate refund is not provided, granting the e-commerce consumer a practical means to enforce their rights without resorting to complex and costly legal mechanisms.

In contrast to the ringing endorsement given the *Principles* upon their release, the response of business and consumer associations to these measures has been mixed, and public response practically non-existent. Consumer groups have indicated that they are generally pleased with these measures, but have expressed some concern over restrictions on their scope and have emphasized the need for consumer education if these measures are to have practical effect.<sup>101</sup> While the CMA has

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<sup>98</sup> See S. Waddams, *The Law of Contracts*, 4<sup>th</sup> ed. (Toronto: Canada Law Book Inc., 1999) at paras. 584-595.

<sup>99</sup> *Man. CPA*, *supra* note 68 at ss. 133(2), (3).

<sup>100</sup> *Alba. ISCR*, *supra* note 84 at ss. 10(2)-10(7).

<sup>101</sup> See Consumer Council of Canada, *Response to Consumer Protection for 21<sup>st</sup> Century*, online: Consumer Council of Canada <<http://www.consumerscouncil.com/mccr21stc.htm>> (date accessed: 24 November 2001).

been supportive, noting that these measures are consistent with their own standards and will hold the “business community at large to standard of service consumers deserve and have come to expect,”<sup>102</sup> other business and industry associations have questioned the need for these measures, indicating that only a limited number of transactions actually deviate from good business practices and the current system is sufficient to apprehend rogue operators. Accordingly, it has been contended that consumer protection is not a high priority requiring government intervention, and suggested that government should instead focus on educating consumers of the ‘buyer beware’ imperative. Apprehensions over the practical applicability of the measures to operations outside provincial jurisdictions, which may unduly penalize vendors within the province, have also been expressed,<sup>103</sup> along with concerns that the credit card chargeback provisions may be too strong a measure, potentially invite consumer fraud, and be detrimental to business, and in particular SMEs.<sup>104</sup>

#### *IV) The Latest Development: The Internet Sales Contract Harmonization Template*

In early 2001, the CMC completed development of its ‘template’ for the harmonization of Internet sales legislation across Canada, and circulated a draft version of this *Internet Sales Contract Harmonization Template*<sup>105</sup> for public comment.<sup>106</sup> A few months later, the final version of the

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<sup>102</sup> J. Gustavson, CMA, *Letter in Response to Alberta Government Services' proposed Electronic Sales Contract Regulation* (30 October 2000), online: CMA <[http://www.the-cma.org/media/govt/alberta\\_electronic.html](http://www.the-cma.org/media/govt/alberta_electronic.html)> (date accessed: 24 November 2001). See also J. Gustavson, CMA, *Consumer Protection Consultation Letter* (4 October 2000), online: CMA <[http://www.the-cma.org/media/govt/response\\_on\\_mccr.html](http://www.the-cma.org/media/govt/response_on_mccr.html)> (date accessed: 24 November 2001).

<sup>103</sup> See J. Andrew, CFIB, *Response to Proposed "Consumer Protection for the 21st Century"* (6 December 2000), online: CFIB <<http://www.cfib.ca/legis/ontario/5189.asp>> (date accessed: 25 November 2001) and M. Currie, *Response to Ministry of Consumer and Commercial Relations August 2000 Consultation Paper "Consumer Protection for the 21<sup>st</sup> Century"* (28 November 2000), online: CFIB <<http://www.cfib.ca/legis/ontario/PDF%20Files/5190.pdf>> (date accessed: 25 November 2001).

<sup>104</sup> See Manitoba, Legislative Assembly, Standing Committee on Public Utilities and Natural Resources (26 July 2000), online: Manitoba Legislative Assembly <[http://www.gov.mb.ca/leg-asmb/hansard/1st-37th/pu\\_09/pu\\_09.html](http://www.gov.mb.ca/leg-asmb/hansard/1st-37th/pu_09/pu_09.html)> and <[http://www.gov.mb.ca/leg-asmb/hansard/1st-37th/pu\\_010/pu\\_010.html](http://www.gov.mb.ca/leg-asmb/hansard/1st-37th/pu_010/pu_010.html)> (date accessed: 16 November 2001).

<sup>105</sup> CMC, *Draft Internet Sales Harmonization Template*, online: Industry Canada <[http://strategis.ic.gc.ca/pics/ca/internet\\_sales.pdf](http://strategis.ic.gc.ca/pics/ca/internet_sales.pdf)> (date accessed: 16 November 2001).

<sup>106</sup> See *Draft Template Letter*, *supra* note 66. See also J. Millar, *Internet Contracts Standardized* (30 March 2001) online: canoe.ca <[www.canoe.ca/MoneyColumnsElaw/mar30\\_elaw.html](http://www.canoe.ca/MoneyColumnsElaw/mar30_elaw.html)> (date accessed: 16 November 2001).

template<sup>107</sup> was presented to the federal, provincial and territorial Consumer Ministers at their annual conference, and was approved for adoption by the Ministers on May 25, 2001.

Intended to be a model of consumer protection provisions that can be enacted by any provincial and territorial jurisdictions, either as entirely new legislation, or as part of existing legislation, the template offers extensive legal protections for consumers participating in e-commerce, containing provisions that oblige vendors to provide certain essential information and a copy of the internet contract to the consumer, grant cancellation rights and impose consequences of termination, and address consumer recourse.<sup>108</sup> As this may suggest, the template is consistent with the provisions introduced into the Manitoba CPA and *Internet Agreement Regulation*, and Alberta's *Internet Sales Contract Regulation*. Comparative analysis reveals that the *Internet Sales Contract Harmonization Template* is virtually identical to the Alberta regulations in almost every respect.<sup>109</sup> In light of this, a detailed review of its provisions would be redundant, and the subsequent analysis will instead focus upon distinctions between the two.

Like the Alberta regulations, the Template applies to consumer transactions formed by text-based Internet communications, but it possesses a slightly broader scope by excluding the \$50 limitation present in the regulations.<sup>110</sup> It is silent as to specific application, so it does not attend to issues of jurisdiction, but this is a function of its status as a model rather than draft legislation as it notes that this was deliberately left undefined as each jurisdiction should be free to individually determine the scope of application.<sup>111</sup> Save for a small difference in the language, disclosure requirements of both are identical, meaning that the Template is not quite as stringent in this regard

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<sup>107</sup> CMC, *Internet Sales Contract Harmonization Template*, online: Industry Canada <<http://strategis.ic.gc.ca/SSG/ca01642e.htm>> (date accessed: 16 November 2001) [hereinafter *Template*].

<sup>108</sup> See Office of Consumer Affairs, *Consumer Quarterly* (Fall 2001), online: Industry Canada <<http://strategis.ic.gc.ca/SSG/ca01722e.htm>> (date accessed: 17 November 2001); J. F. Mann, "Ministers Responsible for Consumer Affairs Approve Template Provisions on Internet Sales Contracts" (2001) 5 *Info. & Tech. Law* 36 [hereinafter *Ministers Approve Template*].

<sup>109</sup> While the Alba. Regulations were released before the Template, suggesting that the CMC perhaps used the Regulations as a guideline, it appears more likely that this is simply a matter of timing. Both the Template and the Alba. Regulations were drafted and refined over lengthy periods, and given that an official from Alberta co-chaired the CMC's E-Commerce Working Group, which drafted the template, it is probable that the two exerted reciprocal influence, and were amended to reflect one another in the interests of consistency and harmonization.

<sup>110</sup> *Template*, *supra* note 107 at s. 1(e).

<sup>111</sup> *Ibid.* at s. 2.

as the *Principles* or the Manitoba laws. But like the regulations, in all other respects the Template offers equivalent if not superior protections than those mandated by the *Principles*: the consumer must be given a chance to accept or decline contract and correct errors; must receive a copy including the prescribed information within 15 days of the agreement; can cancel within 7 days (30 days if no copy provided) if the vendor fails to disclose or 30 days if fails to deliver; can give notice of cancellation in any manner which has the effect of cancelling the contract as if never existed and obliges the vendor to give a full refund within 15 days; and grants rights of recovery in the event of vendor failure, either as an action in debt or reversal or cancellation of applicable credit card charges.<sup>112</sup> In this last regard, the Template does differ slightly from the regulations; while both require that certain basic information, such as credit information, total charged, description of goods or services, and reason, date and method of cancellation, be given to the card issuer in writing,<sup>113</sup> the regulations also require a written statement that the consumer did not receive a refund from supplier in accordance with the regulations.<sup>114</sup> But both require the issuer to acknowledge the request within 30 days of receipt, and comply within 90 days or 2 billing cycles, whichever is sooner.<sup>115</sup> Lastly, the Template deems that failure to comply with the refund provisions is an offence, but leaves the relevant act to be determined by the jurisdiction; for the regulations, this is the *Fair Trading Act*, rendering violators liable to fine of not more than \$100,000 or imprisonment for not more than 2 years or both.<sup>116</sup>

So, in the same manner as the Alberta Regulations and the Manitoba laws, the Template offers some fairly powerful protections for the e-commerce consumer, and give the consumer practical mechanisms for the enforcement of enforce their rights in the form of credit card chargebacks. With a few small exceptions, not only are the provisions consistent with the various principles and guidelines outlined, they in fact go beyond them. However, the Template is effectively limited to information disclosure, contract formation, cancellation and reimbursement

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<sup>112</sup> *Ibid.* at ss. 3-5, 7-11.

<sup>113</sup> *Ibid.* at s. 11(2).

<sup>114</sup> *Alba ISCR*, *supra* note 84

<sup>115</sup> *Template*, *supra* note 107 at s. 11(3).

<sup>116</sup> *Ibid.* at s. 12; *Alba. FTA*, *supra* note 83 at s. 164(1).

rights, and does fail to address other issues. It does not explicitly deal with the compelling issue of jurisdiction, leaving this to be determined by enacting provinces. But the purpose of the Template itself is to encourage harmonization, which is one means of addressing this problem. Further, given that this is such a pervasive and complex issue, it is questionable that consumer protection law can adequately resolve it, and a separate effort to address this appears to be in order. This, in fact, may be forthcoming, as the Uniform Law Conference heard reports on the matter at its August 2001 meeting, and resolved to examine legislative options for addressing Internet jurisdictional issues and work with the Consumer Measures Committee in addressing Internet jurisdictional issues in relation to consumer matters.<sup>117</sup>

Like the legislative principles underlying them, the Template also does not speak to privacy, security and fraud concerns, but this is understandable given the reasons previously discussed. Moreover, many security issues do not lie within the scope of legislative efforts as they are largely technological in nature, and correspondingly require technological solutions. Also, many concerns over theft of financial information have proven unfounded, and there is generally less danger that information will be stolen by third parties online than be misused by merchants or employees.<sup>118</sup> Further, in both Canada and the United States, consumer liability for unauthorized use of a credit card is limited to \$50, and the Manitoba CPA provides that holders are not liable for any debt incurred after the issuer has been notified that the card is lost or stolen.<sup>119</sup> Of course, that this was introduced in the recent amendments may suggest that the Template should have included a similar limitation on liability for unauthorized use. Similarly, it would have been within the scope of the Template include mandatory disclosure of the vendor's privacy and security arrangements as the Manitoba Regulations do to better accord with the *Principles*.

While the Template does grant many protections equivalent to those for direct sales, such as the 30-day delivery rule, it does not grant consumer cancellation rights in event of mistake, or adopt a cooling-off period to prevent this. Rather, cancellation rights are limited, provided only if the vendor

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<sup>117</sup> Uniform Law Conference of Canada, *Minutes* (August 2001), online: ULCC <<http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001hf>> (date accessed: 28 November 2001).

<sup>118</sup> See Waite, *supra* note 23 at 133; Ladouceur, *supra* note 38 at 298.

<sup>119</sup> See Waite, *ibid.* at 138; *Man. CPA*, *supra* note 68 at s. 116(1).

fails to disclose, deliver, or set up a multi-step mechanism that allows the consumer to accept or decline and correct errors. Hence, if the unwitting consumer responds to a confirmation hurriedly, an error may not be noticed until after the agreement is completed - too late to engage cancellation rights. But, in fairness, this deficiency is likely the result of balancing consumer interests with those of vendors. The purpose of consumer protection legislation is to equalize a potential disparity of bargaining power between consumers and vendors, not place the consumer in a superior position. Nor should it entirely do away with the 'buyer beware' imperative, and the consumer should be held to choices made in fair and equitable circumstances. Providing such rights means that a consumer can effectively change their mind at a later time without consequence, which creates substantial uncertainty for vendors. Moreover, the purpose of these protections in the direct sales context is to mitigate against high-pressure sales tactics, but in e-commerce, the consumer has a greater degree of control over participation in the process, and in fact has greater access to information necessary to make an informed decision. Similarly, while the Template generally ignores unfair terms, the principle of equivalent protection mandates these be governed by existing contract law. Further, these are mitigated by increased choice, as the consumer can readily go elsewhere if the terms are unfair.<sup>120</sup> Consequently, these omissions should not necessarily be regarded as deficiencies, but rather as limitations necessary to balance consumer protection with the interests of online vendors. Considering that the primary motivation underlying these measures is to encourage the growth of B2C e-commerce, such limitations are readily understandable, and in fact desirable.

Perhaps the most revolutionary measure the Template, and the measures preceding it, have introduced are the chargeback provisions. Considering that credit cards are the most prevalent form of payment in online transactions, this offers the consumer an efficient and effective mechanism for consumer redress in the event of inadequate disclosure, confirmation, or delivery, and provides a positive incentive for vendors to comply with the Template. In their absence, a consumer that

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<sup>120</sup> That increased choice will mitigate against unfair terms is generally recognized by contract law, as an absence of meaningful choice is often required to engage the doctrine of unconscionability. See *Post et al. v. Jones et. al.*, (1856) 60 U.S. 150. Further, increased access to information may also mitigate informational asymmetry, another staple of unconscionability in standard form contracts. However, increased convenience may negate this, as online consumers may be unwilling to take the necessary time to read and appreciate the terms of their agreements. See M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at 115 ff.

exercises cancellation rights may very well be unable to actually secure a refund, as the cost of litigation is simply too high and the difficulties inherent to cross-border actions simply too great to warrant such a measure, and aggrieved consumers might never obtain redress.<sup>121</sup> While online vendors may consider this too strong a measure potentially susceptible to consumer abuse, this is actually just a codification of existing practices. Currently, in card-not-present transactions – which by definition includes all Internet transactions – it is always the merchant and not the issuing bank that is liable for ‘unauthorized’ transactions. So, if a consumer disputes a charge, the credit card company will charge the amount back to the vendor if proof of authorization is not presented. However, in the ephemeral realm of e-commerce, such proof can be difficult to come by,<sup>122</sup> potentially rendering the vendor vulnerable to a chargebacks in the event of a dispute.<sup>123</sup> Hence, the formal introduction of this mechanism into consumer protection law is simply the recognition of a redress mechanism already available to the online consumer. Furthermore, while this may potentially have a detrimental effect on SMEs, the statistics reviewed earlier reveal that the primary vendors engaged in B2C e-commerce are actually larger enterprises, which can most afford to bear the financial burden of chargebacks. Consequently, these provisions provide effective measures of enforcement, and their presence should not present a barrier to adoption.

Of course, much like the *Principles*, the Template on its own is merely a model and carries no legal weight. It will be up to each jurisdiction in Canada, with the obvious exception of Manitoba and Alberta, to adopt it, and determine the scope, manner and timing of adoption. In the present economic climate, if and when this will occur remain open questions. From the general lack of public interest expressed in both the Template and the measures previously introduced, it appears evident that consumer protection in electronic commerce is simply no longer a pressing topic, as both

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<sup>121</sup> See P. Lawson, PIAC, *Draft Internet Sales Harmonization Template: Comments to the CMC* (29 March 2001), online: PIAC <<http://www.piac.ca/CMCInternetSalesTemplatecomments.htm>> (date accessed: 21 November 2001) for further commentary.

<sup>122</sup> This serves to explain some of the enthusiasm expressed by businesses over the legal validity of digital signatures, which can be used as proof of authorization for some of these transactions. See *Ont. ECA*, *supra* note 94 at s. 11.

<sup>123</sup> See K. Kerr, *Accepting Credit Card Payments on the Internet*, online: The Gartner Group <<http://gartner3.gartnerweb.com/public/static/hotc/hc00085970.html>> (date accessed: 27 November 2001); D. Obie, *The Mechanics of Credit Card Chargebacks* (21 August 2000), online: Workz.com <<http://www.workz.com/content/778.asp>> (date accessed: 27 November 2001).

the public and the media have come to appreciate that B2C makes up only a very small percentage of overall e-commerce, and a much smaller proportion of retail trade. This effect has only been exacerbated by the burst of the dot com bubble, which appears to have largely deflated public and industry enthusiasm in the subject. Indeed, as industry response to the new laws indicate, this is simply not a priority for the business sector, and the introduction of these measures has been driven not by public interest, but by the policy-makers.

Due to this, there may be resistance from industry to widespread adoption of the Template. Unlike the *Principles*, which was a consensus document drafted by government, business, and consumer groups, the Template was purely a government initiative, using a process very similar to that of drafting regulations. This would appear to defy the co-regulatory approach generally espoused, excluding business and consumer groups for active participation in the process. Further, that it took well over a year to agree on just the principles underlying the rules suggests that there is in fact little consensus on the actual rules to apply, and business may consider that their interests were not fairly represented. Moreover, there is a substantial distinction between principles and actual regulations, and the legal consequences of the latter may undermine the efficacy of voluntary codes by requiring compliance and may not be well received by the business community.

The Template also may garner resistance from Consumer groups, which may have concerns that the Template grants greater levels of protection to online customers than offline ones. This is particularly problematic as a high proportion of internet shoppers are in the high income bracket, effectively denying the benefit of greater protection from the segment of the population that most needs it. Consequently, these groups may recommend that general Consumer Protection legislation be amended to provide similar protections, such as chargeback provisions.

Notwithstanding these concerns, suggestions have been made that other provinces are expected to enact laws similar to Manitoba and Alberta,<sup>124</sup> indicating that the Template may well be adopted in the near future. Indeed, that these measures have been driven primarily by government rather than industry or public interest groups potentially bodes well for this, as it is the policy makers

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<sup>124</sup> Freedman, *supra* note 70 at 6.

who will be responsible for introduction. Given the general structure of the Template, and the need to respond quickly to changing technology, it would appear more practical to introduce these measures as regulations rather than legislation, as only the former truly possesses the flexibility required to ensure ongoing effectiveness.<sup>125</sup> Ontario appears a particularly likely candidate for adoption, as officials from that province have been heavily involved in devising the measures, and the Ministry of Consumer and Business Services announced its intention to introduce new comprehensive consumer protection legislation. However, these measures were to be introduced in fall 2001, and nothing has been released so far,<sup>126</sup> suggesting perhaps that other matters have taken priority. Considering general public response to these measures, and their relative importance in the economy, it is entirely possible that consumer protection in electronic commerce may take a back seat to other issues. If this is indeed the case, then widespread adoption truly remains to be seen.

### *Conclusion*

In conclusion, it would appear evident that several Canadian jurisdictions have made sincere and active efforts to remedy the issues perceived to undermine consumer confidence in the online marketplace, and hence sustain the impressive growth B2C e-commerce has experienced. While not entirely comprehensive, the measures introduced thus far are generally consistent with national and

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<sup>125</sup> The recent bankruptcy of Canada 3000 bears this out. After the airline declared bankruptcy, consumers who purchased tickets through registered agents were entitled to reimbursement under the *Travel Industry Act*. To facilitate this, and prevent agents from going bankrupt themselves, the Ontario Ministry of Consumer and Business Service amended the regulations under the act to grant consumers access to a general compensation fund within three weeks of the bankruptcy, demonstrating the efficiency of regulations over legislation. See MCBS, *Ontario steps in to help travellers/travel agents in Canada 3000 bankruptcy*, online: MCBS <<http://www.cbs.gov.on.ca/mcbs/english/54QPKX.htm>> (date accessed: 30 November 2001).

Interestingly, the bankruptcy also reveals the effectiveness of the new consumer protection laws. In Ontario, consumers who purchased tickets online directly from the airline did not receive the protection of the *Travel Industry Act*, and were not entitled to reimbursement, essentially becoming unsecured creditors. However, in Manitoba and Alberta, where the measures are in force, these same consumers were entitled to cancel their contracts for services not rendered, and accordingly require credit card companies to reverse the charges. See Alberta Government Services, *Consumer Tips for Canada 3000 Airline ticket buyers*, online: AGS <> (date accessed: 1 December 2001). This insulated consumers from the bankruptcy, and shifted the outstanding debt to the credit card issuers who were better able to absorb it. Of course, the fact that the issuers became responsible is not entirely fair, and one wonders if this example may dampen enthusiasm for the new measures in the credit community.

<sup>126</sup> See *MCBS Business Plan 2001-2001*, online: MCBS <<http://www.cbs.gov.on.ca/mcbs/english/minbusplaneng.htm>> (date accessed: 29 November 2001).

international guidelines on the subject, and offer the e-commerce consumer potent protections largely equivalent, and in certain respects superior, to those granted in conventional transactions, thus rectifying the failings of existing consumer protection legislation. But so far only two provinces have given legal effect to these measures, and the likelihood of adoption for the remainder is presently uncertain. Furthermore, the actual effectiveness of these measures in sustaining the growth of B2C e-commerce remains to be determined, as this is predicated on the perception that it is consumer protection issues that ultimately undermine growth. However, the impressive growth B2C e-commerce has displayed absent these protections suggests that these concerns may not be as large a factor as policy-makers appear to believe. Also, consumer awareness of these measures will be essential to their success in this regard, and the general lack of public attention paid so far does not bode well for this. Thus, while the effect of these measures on the individual online consumer is certainly a positive one, the effect they will have on B2C e-commerce as a whole appears quite questionable, a rather ironic result considering the market impetus behind devising these protections.

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