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Electronic Commerce — A Practitioner's Guide

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Harmonie Roesch-West[†]

At a time when there seems to be no clear consensus on how to regulate electronic commerce comes a much-needed discussion of the many salient factors impacting the matter in *Electronic Commerce: A Practitioner's Guide*. The collaborative effort includes works from several authors, compiled by Alan M. Gahtan, Martin P.J. Kratz, and J. Fraser Mann. This guide is an excellent first step in clarifying the issues and summarizing the precedents and relevant statute law to date. Although the target is an audience of law professionals, other e-commerce stakeholders, including business professionals, will find this collection useful.

The need for this publication is overwhelming. The exponential growth of the electronic commerce medium in recent years has led to difficulty relating existing laws, designed for another purpose, to the new spectrum of potential legal issues created by this revolutionary technology. A significant time lag exists between the introduction of societal innovations such as e-commerce and the creation of applicable regulations to enforce society's best interests regarding those innovations. The resulting difficulty in determining a course of action for litigation in the interim is a problem for many legal practitioners. By identifying the areas yet to be resolved by Canadian policy makers, this publication informs the practitioner of current practices that are in place, thereby alleviating the need for a clear procedural direction.

Examining the content of this comprehensive effort yields the finding that many of the most contentious areas in e-commerce today are discussed thoroughly and objectively. For example, since the Internet is not physically bound, jurisdiction is currently an unresolved area that has very important implications for any party with vested interests in e-commerce. Because jurisdiction in law is generally bound by geographic regions, determining jurisdiction in e-commerce is difficult at best.

Ultra vires rulings are easily argued, making just rulings subject to unfounded appeals. The result is a slow, convoluted legal process deterring those with a genuine basis for action instead of those who are wrongdoers. Furthermore, taxation issues in e-commerce naturally flow from the jurisdiction problem. Since geography is of no consequence in e-commerce, proper taxation is hard to enforce. Additionally, contract issues, information security, Web site content liability, and privacy are other matters that currently have no definitive prescriptive and prohibitive rules. In this guide, all of these topics and many more are addressed thoroughly in the context of existing applicable law and of precedents in areas where statute law is not currently present.

Besides compiling the work of experts on each featured topic, Gahtan, Kratz, and Mann each contribute to the anthology by authoring the sections corresponding to their individual areas of expertise. Alan M. Gahtan has ample credibility in the area of information technology, intellectual property, and outsourcing. He has authored several articles on those topics and done extensive work in those areas. He is also a pioneer in the field, having developed and taught Canada's first computer law course at Osgoode Hall Law School in the late 1980s. Additionally he has been an active member of several associations, including the Information Technology and Electronic Commerce Section of the Ontario Bar Association and the Toronto Computer Lawyers' Group. Martin P.J. Kratz also has expert knowledge in the area of intellectual property. Hailing from Bennett Jones LLP, Kratz's credentials include professorships at the University of Calgary, Concordia, and Osgoode. He has published in excess of 170 articles and books and has served as chair of an intellectual property committee. J. Fraser Mann is an expert on information and technology law. He co-chairs the Technology and E-Commerce Law Committee of the International Bar Association. The extensive work of all three editors lends credibility to their individual contributions and suggests the other

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information presented in the collection is also well researched and reliable.¹

The physically well-organized text is presented in a three-ring, loose-leaf binder format with tabbed sections. The binder format of this book is the first indication of the great need for it. The first page after the details of publication informs the reader that the publication is incomplete, accounting for several empty tabbed sections within the book. The content as listed on the tabs is what should be found in the book, although several of these topics are not actually included in the publication and will be the subject of subsequent releases. Missing topics include chapters on consumer protection and competition law issues, among others. Out of 26 tabbed and titled sections in the initial release, five are empty.

Using a binder with tabbed sections is both beneficial and detrimental. The advantage of using empty tabbed sections is to give the reader a signal of what is to come. The fact that the book is a work in progress is appropriate for the topic of electronic commerce, as it too has not yet fully evolved. The publisher must only issue supplements instead of an entirely new edition to incorporate current information as it materializes. But the fact that there is more to come in itself is a disadvantage. Since the book is incomplete, readers are inconvenienced, as they must make multiple purchases to obtain one complete book. The integrity of the text might also be hindered, since the book was released incomplete. When one weighs the advantages with the disadvantages, the subject matter of the book dictates the necessity of the early release. It will be well worth it to many readers to have the information in this book on hand now — despite the problem of missed parts.

With that in mind, the reader will be able to dismiss other evidence appearing throughout the compilation indicating that this is a rushed publication. One obvious example without even looking at the content is the spelling error on the tab marking the fourth chapter. Although most practitioners would know that “Patent Law for Information Technology” should instead read “Patent Law for Information Technology”, this small error could easily mislead the less-informed reader at first glance. Blatant errors like this one may hurt the image of professionalism of the authors, editors, and/or publishers, which in turn hurts the credibility of the material.

A great advantage exists in using the work of many authors in one book. Namely, it allows for experts in different areas to write about the topic of their expertise. Since not all work is done by one writer, the quality of the information presented is better overall, and more comprehensive. Each chapter is written in a different style with different formatting. While this text employs the compilation method well, the drawback of this method is the potential for duplication of information, causing wasted time for the reader.

Indeed, looking at the actual content of the collection does indicate the occurrence of the same information in multiple places. Overlapping of explanations across chapters may serve to waste the time of busy practitioners who need concise information. One such example found is the repetition of trademark information. Sections on trademarks found in chapter five, “Intellectual Property, Technology & E-commerce Due Diligence” and also chapter eight, “Advertising in Cyberspace” closely resemble some of the points already discussed in chapter two, “Trade-Marks and the Internet”. In chapter two, this definition appears:

A trade-mark is a mark used by a trader for the purpose of distinguishing ... its wares or services from the wares or services of others. A trade-mark may be a word, design, ... [page 2-3, paragraph 1].

Compare this to what is found in chapter five:

A trade-mark is a word, symbol, or shape, or a combination of them, used by a person to distinguish his or her goods or services from those of others. Trade-marks include word mark ... design marks, ... [page 5-31, 5-32].

Again in chapter eight is this:

A trade-mark is a word, mark or other *indicia* that is capable of distinguishing one person's wares, services or business from another's ... [page 8-17].

There does not seem to be a useful purpose in having the same information presented three times, or possibly even more, in different places in one publication, especially when the publication is intended to be a reference guide. A more concise text would improve the effectiveness of the material presented.

The previous example is not the only occurrence of content overlap. Chapter six, “Technology and Criminal Liability” and chapter ten, “Computer Security Investigation” both extensively discuss the same topic of unauthorized use of a computer in the context of section 342.1 of the *Criminal Code* (pages 6-3 to 6-4 and pages 10-5 to 10-7). The physical dispersion of identical topics does not help the reader find the information needed with ease. One section could be eliminated and replaced with an instruction to the reader to refer to the other section. This would save the reader time, as he or she would not have to read several sections to ensure that he or she had all the relevant information.

It is true that information overlap is an inherent problem when there are multiple authors attempting to cohesively discuss a specific topic that relates to a broad area. However, the fact that such physical oversights occur suggest that this was a hurried work that could have been more useful to the reader had more attention been given to such matters as the obvious spelling mistake found on one of the tabs and the duplication of information throughout the text. The nature of the law profession is reliance on precise detail. The value of the book is minimized if the law practitioner cannot have

absolute confidence and certainty that there is an absence of potentially costly mistakes.

Specific to the chapters, the authors' work is excellent. Generally, concepts are well explained and referred to in layman's terms as often as possible so the reader does not need to be a practitioner to understand the book. Authors also acknowledge areas where there are no requirements currently under the law; for example, the discussion of the copyright registration requirements in chapter one, "Copyright & E-Commerce" (page 1-7). The attention of the reader can be captured easily by straightforward writing as well as the use of interesting cases. Throughout the book, all authors cite relevant case law and statute law in the context of their individual topics. For example, there are 12 citations of cases involving Playboy Enterprises Inc. alone! The use of interesting cases makes the information easier to digest.

The freedom to use individual style in the composition of the chapters presents the opportunity to add a personal touch. Particularly, chapter seven, "Cyberlibel" by David Potts uses several quotations to open the discussion and give the reader a broad introduction to the topic. Brenda Pritchard and Shelley Samel, authors of chapter eight, "Advertising in Cyberspace" supplemented their discussion by anticipating exactly what information the user would be looking for in the conclusion section, which lists explicitly how to avoid potential legal issues while advertising on the Internet (page 8-30). The Appendix to chapter thirteen, "Online Agreements", a

chart of the applicable law governing e-commerce, is an excellent summary deserving to be placed at the beginning of the book. Chapter twenty, "Self-Regulation — Netiquette", features a useful appendix informing the reader of current Internet etiquette guidelines. These extras provide the reader with practical and helpful information.

The text is a great summary of the existing legal situation; however, this book generally lacks a forward-looking perspective. Reform measures are not suggested for the most important issues. The exception is found in chapter twenty-two, "Jurisdiction & Procedure Issues", where there is a discussion of the international initiatives for the future. Chapter sixteen, "E-Taxation" addresses recent trends in the taxation of e-commerce (page 16-51) and discusses the likely implications of those trends, although it is not as forward-looking as the discussion in chapter twenty-two. Generally, this book takes a historical view with regard to the important issues listed previously.

An all-encompassing compilation on the topic of e-commerce is rare, but even more scarce is one that is easy to understand, interesting to read, and greatly informative. The necessity of the publication of this book warrants overlooking the few minor physical problems discussed above. The practitioner will find this book helpful and relevant. Readers of this collection will appreciate the systematic detail of each section and the excellent work of all the included authors.

Notes:

¹ Biographical information found at the Web sites of Bennett Jones LLP, Thomson Carswell, and Alan M. Gahtan.