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E-Commerce Legislation and Materials in Canada: Lois sur le commerce électronique au Canada et documents connexes

Sunny Handa, Claude Marseille & Martin Sheehan (Markham, Ont.: Lexis/Nexis Butterworths, 2005)

John D. Gregory†

This hefty volume is a useful compendium of the basic source materials for the law of electronic commerce in Canada. It offers the text of all the general-purpose legislation that removes legal barriers to the use of electronic communications, for all jurisdictions in the country. It then takes a dozen related areas of law, from domain names to taxation, from competition law to consumer protection, from security to standards, and offers a quick overview and the key documents applicable to each. In each case the commentary is in English then in French, and where the texts are available in both languages, they are presented in both, either together or in turn. The present volume is the second edition of the work.

The first part of the book assembles the basic legislation, from the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)¹ at the federal level, through all the provinces in alphabetical order, as well as the two territories that have passed laws. A brief commentary to each jurisdiction summarizes the high points of the statutes, which are generally confined to the enabling legislation and the amendments, if any, to the law on electronic evidence, consumer protection and privacy. No attempt is made to compare the laws with those of the other jurisdictions; readers can turn the pages themselves for that purpose. Perhaps it would demand too much space to try to anticipate the particular interests of all the readers and to comment on each.

Since all of the common law jurisdictions have adopted the *Uniform Electronic Commerce Act* (“UECA”)² and the *Uniform Electronic Evidence Act*,³ with fewer or more variations, the text sometimes comments on the differences from those models. Oddly, there is no express cross-reference to the text of the Uniform Acts themselves, which appear in a much later

part of the volume. It is also a bit unfortunate that the authors have not reproduced the annotated version of the UECA, for a bit more help in interpretation.

For Alberta and British Columbia, the text reproduces their personal privacy statutes, but does not comment on the issue of their interaction with the federal PIPEDA. The book was finished before the provincial statutes were decreed to be “substantially similar” to the federal Act, but the issue was on the table before then. There is also no mention of the existence of separate statutes on the protection of health information. The provincial laws on consumer protection are not compared to the national standard, the *Internet Sales Contract Harmonization Template*,⁴ though the text of this document appears later. The authors clearly assume that their readers are diligent in their use of the whole book, or at least of the detailed table of contents.

At times the comment can be puzzling, or misses the point, though this does not occur frequently given the scope of the text. Alberta’s *Electronic Transactions Act*⁵ is “contrasted” to the Uniform Act with respect to the degree of consent needed from public bodies, though the two statutes are in practice the same on that point. The British Columbia *Electronic Transactions Act*⁶ is said to be “somewhat remarkable” for its details on e-documents, but the provisions are right out of the UECA, which is not itself said to be remarkable on this point. The provision in the Nova Scotia Act⁷ on documents in original form under the *Personal Property Security Act* (“PPSA”)⁸ is noted, but its significance is not explained, and the parallel provision in Ontario does not rate a mention. The reproduction of Ontario’s press release on Ontario’s statute omits a couple of important negatives. “The Act is designed . . . not to require anyone to use or accept electronic communications, and not to

†Reviewed by John D. Gregory, Ministry of the Attorney General, Ontario. The views in this note are not necessarily those of the Ministry. © J.D. Gregory

prescribe particular technology". Since the press release is no longer online, it is hard for the reader to verify this. The effect of Ontario's 2000 amendment on electronic evidence is misstated. PEI's Act⁹ is said to be much like the UECA, but its quite different definition of electronic signature is not noted. The Yukon electronic evidence statute¹⁰ is said to shift the burden of proof of evidence. This is wrong, and the description of the Uniform Act on page 777 says correctly that the provision does not shift the burden but merely codifies it.

The authors offer considerably more commentary on the Quebec statute,¹¹ no doubt in part because it is unique in the country, and in part because they practise in that province. A couple of Quebec documents, including a useful FAQ on the use of French in online texts, appear in the collection without mention in the commentary; this is sufficiently rare, that the only-partly-attentive reader might miss them.

The description of the Uniform Acts is helpful, and the parallel American text is mentioned, though without a URL to find it online. Many of the texts mentioned are not given URLs, in fact, even though their online sources are probably fairly stable. The UECA is said to be different from the *UN Model Law on Electronic Commerce*¹² in that it excludes some rules of law from its scope. The Model Law expressly contemplates exclusions; it just leaves the list to enacting countries. The text says that the UECA has a general statement of reliability of electronic signatures, unlike the more demanding rule in the Model Law. In fact the UECA has no reliability rule; any electronic signature meeting the definition is acceptable, unless the enacting jurisdiction prescribes otherwise, which no one has (except the federal government, which is unusual in its signature rules).

After the legislative part, the authors turn to areas of special interest in electronic commerce, though not in any perceptible order. In general the commentary is a bit more thorough than with the legislation, certainly in the lead-off domain names section. Arguably the authors offer more narrow technical details about registration than someone would look to a book of this breadth for. Some of the figures given for the number of registrations need review: the text refers to 200,000 dot.ca registrations, and "over 10 times as many dot.com names", which a footnote tells us were 23,000,000!

A substantial section on consumer protection sets out the *Internet Sales Contract Harmonization Template* and the *Code of Practice for Consumer Protection in Electronic Commerce*,¹³ but the difference in scope or purpose is not explained. The Template "will certainly act as a guideline for legislators", but no examples are given of where this has been done, though such laws existed at the time of publication. The advertising section that follows discusses in detail (but does not reproduce) Draft Guidelines on advertising online,¹⁴ by the Competition Bureau. It then goes through the contents of an Interpretation Bulletin, from the same source,

on essentially the same topic. The relation between the sets of rules is not given, and the need for the duplication not explained. The section includes a discussion of the evolution of Industry Canada's thinking on spam, but the book went to press before the report of the Anti-Spam Task Force¹⁵ that represented a reversal of the original hands-off position.

A section on business guides to e-commerce helps balance the consumer orientation, though some of the lessons of the consumer part also apply readily to business-to-business dealings. The language of the commentary is heavy, perhaps influenced by the official federal text that is annexed. Oddly, there is no mention in this section or in the consumer protection section of the need to consider privacy protection. The topic of privacy plays remarkably little role in this section of the book, though the main statutes are reproduced earlier.

Commodity taxes are mentioned as problematic. There is little discussion of jurisdictional questions in tax, or what constitutes a permanent establishment for purposes of showing where a business may be subject to tax.

The security section deals with authentication (which the authors call a "method" of security) and encryption. The opening commentary refers to "the attached guide" about implementing a privacy policy, but no such guide appears. A very brief overview of its contents closes the commentary. Privacy is also one of several elements of the *Principles for Electronic Authentication*,¹⁶ a public-private sector product that provides high-level guidelines for thinking about authentication. It is probably a sign of incomplete evolution of the text from one edition to the next that a footnote defines authentication from a draft version of the Principles, even though the commentary goes on to mention that the final version is available. Likewise the cryptography part focuses on a 1998 consultation draft of a Canadian policy, without telling us if any later version appeared, or what responses Ottawa received in its consultation.

Online dispute resolution (ODR) used to be considered more promising than it is today, outside the context of domain name disputes and closed-market systems (like the dispute mechanisms on e-Bay or AOL.com). The text reproduces a consumer organization's survey of desirable characteristics of ODR services, published in 2000. It is likely that the authors have not overlooked any developments since then. ODR is still a potential.

A section on standards hints at a topic of great importance in e-communications. The texts offered speak of criteria for developing business communications standards. There is little talk of legal standards, or of the legal policy implications of apparently technical standards. Unfortunately, a lot of standards literature can be very hard to read, and sometimes it is very narrowly focused. Like some of the other sections, the topic could justify a book of its own.

The authors offer as well a useful overview of some of the most important international developments. This helps sum up one of their main themes, the cross-border or global nature of electronic commerce. Thus we find detailed commentary on (but not the text of, or a URL for) the European Union *Directive on Electronic Commerce*.¹⁷ We have commentary on and text of the influential Organisation for Economic Co-operation and Development (OECD) documents on consumer protection and cryptography, and a G8 plan to fight the digital divide. Arguably it is no longer necessary to reprint the full text of several bilateral agreements on e-commerce made by Canada with places such as the EU, Australia or Costa Rica in the late 1990s. Reading any of these texts, shows that they were almost all symbolic statements of good intentions with no legal and probably little practical effect. They sounded good at the time, when governments wanted to show that they were aware of what was happening, even if not what they might do about it. One has a bit the same reaction to the description of a 1998 World Trade Organization document: has the work since then produced nothing of note?

The book closes with a couple of pages on the use of electronic documents in securities trading in Canada. It mentions Canadian Securities Administrators' rules and the Toronto Stock Exchanges rules, with no information about their separate applications or their prob-

able overlaps. No source documents appear in this section.

One has the impression at this stage that a lot has been going on in e-commerce. The field is not new and is no longer one of first impression. The authors point out in their opening that many of the developments in e-commerce lately have been practical rather than legal. Their work, however, shows that there is no shortage of law. They have chosen the right texts to demonstrate that point.

The potential buyer might ask what the collection adds to a Google search for the same kind of information. The answer is over 90 pages of commentary in each language, plus a selection of topics and documents that especially in the non-legislative parts one might have had to hunt for. The convenience of having this all at hand would appeal to a frequent user.

In sum, this is quite a worthwhile book. Its bilingual nature will broaden its appeal to many. The translation is generally well done. If the collection does not let the reader complete his or her research on the law of electronic communications, it certainly provides the documents that one is likely to want to reach for first, with orientation to their context. It is hard to ask for more from a single volume.

Notes:

¹ S.C. 2000, c. 5.

² *Uniform Electronic Commerce Act* (1999), online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1999&sub=1999ia>>.

³ *Uniform Electronic Evidence Act* (1998), online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u2>>.

⁴ *Internet Sales Contract Harmonization Template* (2001), online: Industry Canada <[http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Sales_Template.pdf/\\$FILE/Sales_Template.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Sales_Template.pdf/$FILE/Sales_Template.pdf)>.

⁵ S.A. 2001, c. E-6.5.

⁶ S.B.C. 2001, c. 10.

⁷ *Electronic Commerce Act*, S.N.S. 2000, c. 26.

⁸ S.N.S. 1995-96, c. 13.

⁹ *Electronic Commerce Act*, S.P.E.I. 2001, c. 31.

¹⁰ *Electronic Commerce Act*, S.Y. 2000, c. 10.

¹¹ *An Act to establish a legal framework for information technology*, R.S.Q., chapter C-1.1.

¹² UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, (1996) 1 Unif. L. Rev. 716, online: United Nations Commission on

International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

¹³ *Canadian Code of Practice for Consumer Protection in Electronic Commerce*, online: Consumer Measures Committee <<http://cmcweb.ca/epic/internet/incmc-cmc.nsf/en/fe00064e.html>>.

¹⁴ *Draft — Staying “On-side” When Advertising On-line: A Guide to Compliance with the Competition Act When Advertising on the Internet*, online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1835&lg=e>>.

¹⁵ Industry Canada, *Stopping Spam Creating a Stronger, Safer Internet: Report of the Task Force on Spam, May 2005* (Ottawa: Task Force on Spam, 2005), online: Industry Canada <http://strategis.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/h_gv00317e.html>.

¹⁶ Industry Canada, *Principles for Electronic Authentication* (Ottawa: Industry Canada, 2004), online: Industry Canada: The Digital Economy in Canada <[http://e-com.ic.gc.ca/epic/Internet/inecic-ceac.nsf/vwapj/Authentication.pdf/\\$file/Authentication.pdf](http://e-com.ic.gc.ca/epic/Internet/inecic-ceac.nsf/vwapj/Authentication.pdf/$file/Authentication.pdf)>.

¹⁷ EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, [2000] O.J. L. 178/1.