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The Missing Hyperlink — An Empirical Study: Can Canadian Laws Effectively Protect Consumers Purchasing Online?

Mariella Montplaisir*

Abstract

*Canadian consumer protection legislation applicable to online transactions generally works by a two-pronged method: first, private international law rules ensure that in most cases, consumers can sue in their home province under that province's law; and, second, a wide range of substantive obligations are imposed on merchants, and failure to comply with these obligations provides consumers with a right of cancellation. This study considers the private international law rules applicable to online consumer contracts, and discusses the unique jurisdictional challenges presented by online transactions. This study also provides an overview of Canadian legislation applicable to online consumer transactions, and examines the provisions of the **Internet Sales Contract Harmonization Template** that were incorporated into the consumer protection legislation of several provinces. Given that there is little to no hard data on whether current consumer protection is actually effective in protecting consumers, an empirical study was designed to assess the limits of current legislation and offer recommendations to improve e-businesses and online consumers' experience. The study's main finding is that **not a single business complied fully with its legal obligations**. This suggests that in order for Canadian consumer protection law to have a significant impact on e-businesses' practices, substantive obligations imposed by the legislation must be combined with a more effective coercive mechanism. State intervention is required to reshape legislation and ensure the protection of consumers' basic rights.*

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INTRODUCTION

On April 15, 2010, Fox News reported that a computer game retailer revealed that it owns the souls of thousands of online shoppers, thanks to a clause in the terms and conditions agreed to by online shoppers.¹ The British online gaming store, GameStation, pulled a devious prank resulting in the voluntary surrender of 7,500 souls by adding an “immortal soul clause” to its contract:

By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorized minions.

The terms were updated on April Fool’s Day as a gag. While all shoppers were able to opt out by checking a box on the website, very few did. In fact, according to GameStation, only 12% of consumers noticed the ruse. The retailer reminded us that very few consumers will read an online merchant’s terms and conditions prior to entering into a contract.

Fortunately for the consumers who sold their soul to GameStation, most consumer protection laws provide that companies are not allowed to insert any language they want into their contracts and impose burdensome obligations on buyers.

Soulless consumers might initially take comfort in the fact that such immortal soul clauses are invalid, but the relief they might gain from that knowledge soon gives way to further agitation, as they realize they still need to retrieve their souls from the merchant. How will consumer law help them then? Since consumer protection legislation was designed primarily for conventional transactions for the purchase of tangible products, the redress available does not always suit the online environment.

If a Quebec consumer had purchased from the British online gaming store and requested the cancellation of the contract, as is permitted under Quebec Law, could the British merchant argue that such a request is invalid under English law and, consequently, that the consumer cannot lawfully cancel the transaction? How can the consumer determine which law applies to that transaction? Would the consumer be protected if he purchased his game with Bitcoins? Is there a way to force the British merchant to appear before a Quebec court? How can the online shopper retrieve his soul?

Many questions asked, very few answered. While all 10 Canadian provinces provide consumers with information on how to protect themselves while

¹ “7,500 Online Shoppers Unknowingly Sold Their Souls”, *Fox News* (15 April 2010), online: < www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls/ > .

purchasing online, not all consumer protection agencies have user-friendly websites with comprehensive and accessible information. Actually, many only display a list of the relevant laws and give a basic overview of consumers' rights and obligations under the province's consumer protection legislation.

While consumer protection statutes often appear to be exhaustive, they are far from the beginning and end of consumer law. In fact, consumer protection depends on a number of laws and principles, as well as on effective means of redress and enforcement. Moreover, since consumer protection legislation is not uniform across Canada (let alone between countries), purchases made from foreign businesses raise concerns as to whether consumers can expect the same level of protection regardless of the geographical location of the business they are purchasing from.

Given that a consumer agreement — whether carried out electronically or otherwise — is essentially the formation of a sales contract, tenets and rules governing general contracts apply to all consumer agreements. Whenever specialized legislation fails to cover a particular situation,² laws applicable to contracts in general serve a supplementary role.³ While this article is not limited to issues covered by consumer protection legislation, the examination of universally-applicable contract law principles lies beyond its scope.

Part I provides an overview of Canadian legislation applicable to online consumer transactions, and examines the provisions of the *Internet Sales Contract Harmonization Template* that were incorporated into the consumer protection legislation of several provinces.⁴ This section also considers the private international law rules applicable to online consumer contracts, and discusses the unique jurisdictional challenges presented by online transactions.

The protection of Canadian consumers purchasing online generally operates on two levels.⁵ First, private international law rules ensure that in most cases,

² The law applicable to online consumer contracts is often segregated among several statutes. See Teresa Scassa & Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, 2nd ed. (Toronto: CCH Canadian Ltd., 2012) at 1, 42 [Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*].

³ Didier Lluellas and Benoit Moore, *Droit des obligations*, 2nd ed. (Montreal: Thémis, 2012) at 81 [*Droit des obligations*]. Claude Masse, “Fondement historique de l'évolution du droit québécois de la consommation” in Pierre-Claude Lafond, ed., *Mélanges Claude Masse: En quête de justice et d'équité* (Cowansville: Yvon Blais, 2003) at 46 [Masse, “Fondement historique”]; Harold Buchwald, “Consumer Protection In The Community: The Canadian Experience - An Overview” (1978) 2 Can Bus LJ 182 at 185-186.

⁴ The *Template* is an online consumer protection guide prepared by the Consumer Measures Committee, a federal-provincial-territorial working group, to assist Canadian jurisdictions with the implementation of uniform online consumer protection legislation. Innovation, Science and Economic Development Canada, “Internet Sales Contract Harmonization Template”, Office of Consumer Affairs (Ottawa: OCA, 25 May 2001), online: < www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca01642.html > [*Internet Sales Template*].

⁵ The scope of this analysis is limited to online consumer protection from a contractual perspective. Consequently, laws dealing with illicit online advertising or invasion of

consumers can sue in their home province under that province's laws. Second, a wide range of substantive obligations are imposed on merchants, and failure to comply with these obligations provides consumers with a right of cancellation. To evaluate the effectiveness these protections, I designed an empirical study to assess the extent to which merchants meet the legal obligations relating to their online activities.⁶

Results of the empirical study are presented in Part II. This section explains the various steps taken to test e-businesses' compliance with consumer protection legislation, and identifies the limits of the current legal framework. The study's main finding is that *not a single business complied fully with its legal obligations*. This suggests that substantive obligations imposed by Canadian legislation must be combined with a more effective coercive mechanism if they are to have a significant impact on e-businesses' practices.

Effective enforcement of consumer protection laws requires an intervention that offers innovative solutions to meet online commerce needs. To achieve its potential, the online marketplace needs a uniform and accessible set of rules that ensures commercial predictability and access to justice, while fostering consumer confidence. In Part III, it is argued that these goals can best be achieved through the harmonization of online consumer protection legislation and the development of a compulsory online dispute resolution mechanism.

privacy through technological means, and federal legislation, such as the *Competition Act* (*An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition*), R.S.C. 1985, c. C-34 or the *Hazardous Products Act* (*An Act to prohibit the advertising, sale and importation of hazardous products*), R.S.C. 1985, c. H-3, are not discussed even if they provide important protections to consumers purchasing online. For a discussion on online advertising, phishing and other schemes that target consumers, see Éric Labbé, *Guide Juridique du commerçant électronique* (Montreal: Thémis, 2003); Payam Hanafizadeh and Mehdi Behboudi, *Online Advertising and Promotion: Modern Technology for Marketing* (Hershey: IGI Global, 2012); William L. Poulsen, *Advertising: developments and issues in the digital age* (New York: Nova Science Publishers, 2011); Catherine E. Tucker & Avi Goldfarb, "Online advertising, behavioral targeting, and privacy" (2011) 54:5 *Communications of the Association for Computing Machinery* 25. For a discussion on privacy and the confidentiality of data, see Michael Abels, "Paying on the Net: Means and Associated Risks" (1998) 3 *IBLJ* 349; Jay P. Kesan, Carol M. Hayes & Masooda N. Bashir, "Information Privacy and Data Control in Cloud Computing: Consumers, Privacy Preferences, and Market Efficiency" (2013) 70 *Wash & Lee L Rev* 341.

⁶ Businesses were initially assessed in 2013-2014. Then in 2017, one third of all businesses initially tested were once again evaluated to verify whether there had been significant variations in the manner in which they carried on their online activities. The 2017 analysis confirmed that the results of the empirical research are still relevant and may be relied on. A codebook is available online: Mariella Montplaisir, "Internet Shopping Data 2013: User Guide and Codebook", online: < <https://qspace.library.queensu.ca/bitstream/handle/1974/15388/law-internet-shopping-ug-cdbk.pdf?sequence=5> > .

PART I: CONSUMER PROTECTION — A CANADIAN PERSPECTIVE

1.1 Consumer Protection Brief History

To fully appreciate the impact of modern technology on consumer protection, it is useful to consider the origins of consumer law. Consumer culture developed throughout the 20th century: businesses' sophisticated marketing techniques convinced consumers of the satisfaction that consumption brings; in an effort to be competitive the manufacturing process was often rushed, increasing the number of faulty products in the market. Consumers entered the consumption cycle with minimal information regarding products' characteristics and with virtually no resources to protect themselves against the potential danger associated with these commodities.⁷ The advent of mass consumption in the aftermath of the Second World War is seen as the real catalyst behind the development of consumer law.⁸ In the 1950s, mass production and mass consumption created an uneven relationship between producers, distributors and service providers on the one side, and consumers on the other.⁹ The disparity in resources resulted in limited access to justice for consumers and greater bargaining power for businesses, who were able to impose their terms on consumers.¹⁰

⁷ Nicole L'Heureux & Marc Lacoursière, *Droit de la consommation*, 6th ed. (Cowansville: Yvon Blais, 2011) at 1-2 [L'Heureux & Lacoursière, *Droit de la consommation*]; Emilie Conway, *La protection du consommateur à l'épreuve de l'Organisation mondiale du commerce* (Cowansville: Yvon Blais, 2012), at 16 [Conway, *La protection du consommateur à l'épreuve de l'Organisation mondiale du commerce*].

⁸ Luc Thibaudeau, *Guide pratique de la société de consommation* (Cowansville: Yvon Blais, 2013), 59-67 [Thibaudeau, *Guide pratique de la société de consommation*]; Conway, *La protection du consommateur à l'épreuve de l'Organisation mondiale du commerce*, *supra* note 7 at 14; L'Heureux & Lacoursière, *Droit de la consommation*, *supra* note 7 at 1-5; Katalin Judit Cseres, *Competition Law and Consumer Protection* (The Hague: Kluwer Law International, 2005), 152 [Cseres, *Competition Law and Consumer Protection*].

⁹ Thierry Bourgoignie, *Éléments pour une théorie du droit de la consommation au regard des développements du droit belge et du droit de la Communauté économique européenne* (Bruxelles: E. Story Scientia, 1988), 64-78 [Bourgoignie, *Éléments pour une théorie du droit de la consommation*]; Harold Buchwald et al., *Consumer and the Law in Canada* (Toronto: Osgoode Hall Law School, 1970), at 1-2 [Buchwald et al., *Consumer and the Law in Canada*]; Jacob S. Ziegel, "The Future of Canadian Consumerism" (1973) 51 *Can Bar Rev* 191 at 193 [Ziegel, "The Future of Canadian Consumerism"]; Thierry Bourgoignie & Jean Gillardin, *Droit des consommateurs: Clauses abusives, pratiques du commerce et réglementation des prix* (Bruxelles: Saint-Louis University Publications, 1982), at 3 [Bourgoignie & Gillardin, *Droit des consommateurs: Clauses abusives*]; Cseres, *Competition Law and Consumer Protection*, *supra* note 8 at 153.

¹⁰ For instance, consumers had difficulty bringing successful claims against merchants, individually or collectively. For discussions on the laboriousness of the authorization proceedings and the funding of class actions today, see Philippe Trudel, "Standing Issues in Consumer Class Proceedings" (43rd Annual Workshop on Commercial & Consumer Law, Montreal, 11 October 2013) [Trudel, "Standing Issues in Consumer Class Proceedings"].

To restore some balance, courts in common law jurisdictions developed strict tort liability for defective products, thereby ensuring that manufacturers were held liable for injuries caused by their defective products.¹¹ Although the product liability doctrine led businesses to exercise closer control over the quality of their products, they still had total discretion over the information they provided to consumers.¹² To protest against this situation, all across North America and Europe, consumers joined together to insist that governments take action to address the imbalances in the marketplace.¹³

The consumer movement started in the United States¹⁴ and quickly spread to Canada and Europe. Although the first “consumer laws”¹⁵ go back as far as 1872 in the United States¹⁶ and 1889 in Canada,¹⁷ these pieces of legislation were scarce and were not specifically designed with consumer protection in mind.¹⁸

¹¹ Proof of corporate negligence was no longer required for courts to place responsibility for these injuries on the manufacturers. Since negligence is often difficult to prove, the adoption of product liability lowered consumers’ burden of proof, resulting in an increased chance of a successful claims; see *Greeman v. Yuba Power Products*, (1963) 59 Cal. 2d 57; *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453.

¹² Consumer activists regarded asymmetric information as the most important reason for the imbalance between buyers and seller; Cseres, *Competition Law and Consumer Protection*, *supra* note 8 at 153.

¹³ L’Heureux & Lacoursière, *Droit de la consommation*, *supra* note 7 at 1-4; Conway, *La protection du consommateur à l’épreuve de l’Organisation mondiale du commerce*, *supra* note 7 at 15; Ziegel, “The Future of Canadian Consumerism”, *supra* note 9 at 193; Thibaudeau, *Guide pratique de la société de consommation*, *supra* note 8 at 64-65; Jean Calais-Auloy, “Brève histoire du droit français de la consommation” in *Mélanges Claude Masse: En quête de justice et d’équité* (Cowansville: Yvon Blais, 2003), 262 [Calais-Auloy, “Brève histoire du droit français”].

¹⁴ Thibaudeau, *Guide pratique de la société de consommation*, *supra* note 13 at 65; L’Heureux & Lacoursière, *Droit de la consommation*, *supra* note 7 at 4.

¹⁵ It can be argued that consumer laws have existed for as long as the recorded history of civilized man (see: Ziegel, “The Future of Canadian Consumerism”, *supra* note 9 at 191). Starting with the first Dynasty of Babylon during Hammurabi’s reign to Roman times and medieval France all the way through to pre-industrial England, where governing authorities adopted regulations to protect citizens against unfair practices and defective products (see: Willard Z. Estey, “The Fluctuating Role Of Contract Law In The Community” (1983-1984) 8 Can Bus LJ 272, 273 and 286; James Muirhead, *Historical Introduction to the Private Law of Rome* (Edinburgh: Adam and Charles Black, 1886) at 286; Edward P. Belobaba, “Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection” (1977) 15 Osgoode Hall LJ 327, 328). This being said, there is a general consensus among scholars and historians that the modern phase of consumer law started after the Second World War.

¹⁶ The *mail fraud* statute was enacted in 1872. It enabled the government to prosecute undesirable activities such as securities fraud and real estate scams, thus protecting consumers.

¹⁷ *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41.

¹⁸ William T. Vukowich, *Consumer Protection in the 21st Century: a Global Perspective*

Laws that were aimed primarily at protecting consumers' interests began to appear in the 1960s.¹⁹ A speech given by John F. Kennedy on March 15, 1962 is considered to be one of the first official recognitions of consumer interests.²⁰ The U.S. President declared that the federal government had a responsibility to aid consumers in the exercise of their rights, including: the right to safety, the right to be informed, the right to choose, and the right to be heard. From that moment onward, these rights were addressed in every relevant legislative and regulatory consumer action program.²¹

Most western countries undertook important legislative reforms during the 1970s, to protect consumers' right to safety, information, choice and representation.²² Legislatures had to depart from the rules governing general contracts because contract law and its fundamental principles did not provide adequate legal protection for weaker parties.²³ Under classical contract law, freedom of the parties to negotiate and set their own terms is assumed, and so is the approximate equality of bargaining power of the parties. In post-industrial consumer societies, neither of these assumptions obtains support.²⁴ Consequently, states had to reshape contractual relations through mandatory provisions in order to counterbalance consumers' weak bargaining position.²⁵

In the last two decades, the transformation of the marketplace has revived the market deficiencies that prevailed at the origin of the consumer movement. Electronic mediums have facilitated global trade, but have also further contributed to the anonymity and standardization of transactions.²⁶ Advances in telecommunications and new marketing techniques²⁷ have exacerbated the

(Ardsley: Transnational Publisher, 2002) at 97 [Vukowich, *Consumer Protection in the 21st Century*]; Calais-Auloy, "Brève histoire du droit français", *supra* note 13 at 260-261.

¹⁹ Vukowich, *Consumer Protection in the 21st Century*, *supra* note 18 at 97.

²⁰ John F. Kennedy, "Special Message to the Congress on Protecting the Consumer Interest", *The American Presidency Project* (15 March 1962), online: < www.presidency.ucsb.edu/ws/?pid=9108 >; L'Heureux & Lacoursière, *Droit de la consommation*, *supra* note 7 at 4-5.

²¹ Cseres, *Competition Law and Consumer Protection*, *supra* note 8 at 155.

²² Calais-Auloy, "Brève histoire du droit français de la consommation", *supra* note 13 at 262.

²³ Masse, "Fondement historique", *supra* note 3 at 53-55; Cseres, *Competition Law and Consumer Protection*, *supra* note 8 at 153; John Goldring, "Consumer Law and Legal Theory" (1990) 13:2 *Journal of Consumer Policy* 113, 128 [Goldring, "Consumer Law and Legal Theory"].

²⁴ Goldring, "Consumer Law and Legal Theory", *supra* note 23 at 121.

²⁵ Cseres, *Competition Law and Consumer Protection*, *supra* note 8 at 155.

²⁶ Mostly through standard form contracts, sometimes referred to as adhesion or boilerplate contracts. These types of contract reduce the possibility for consumers to negotiate more favorable terms.

²⁷ See Asif Khan, "Online Advertising in Canada: Workshop on Business, Consumer and Regulatory Issues" (Keynote address delivered in Ottawa, 1 October 2013), online: < www.onlineadvertisingworkshop.ca/2013/multimedia/ > [Khan, "Online Advertis-

natural imbalances affecting consumers.²⁸ State intervention was, and is still, once more required to reshape legislation and ensure the protection of consumers' basic rights.

1.2 Consumer Protection in Canada

The term “consumer” is a multifaceted concept²⁹ that appears in different contexts and spheres of activity.³⁰ Although there is no universal definition of consumer, Canadian scholars and legislatures have outlined a common understanding of the concept:³¹ (i) a consumer is a natural person, a human being as opposed to a legal person, (ii) who enters into a contract to make private or non-commercial use of products or services.³²

In 1967, the Federal government created the Department of Consumer and Corporation Affairs³³ to look after consumer interests and to administer federal policies regarding the marketplace.³⁴ Around the same period, it also adopted several laws inspired by the Canadian Charter of Consumer Rights,³⁵ which lists the following consumer rights:

ing”]; Gilles Lipovestsky, *Le bonheur paradoxal, essai sur la société d'hyperconsommation* (Paris: Gallimard, 2006) at 27 [Lipovestsky, *Le bonheur paradoxal*].

²⁸ Claudia Lima Marques “Consumer protection in private international law rules: the need for an inter-American Convention on the law applicable to some consumer contracts and consumer transactions (CIDIP)” in Thierry Bourgoignie, ed., *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville: Yvon Blais, 2006), 146 [Marques, “Consumer protection in private international law”].

²⁹ Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall L J 537 [Deutch, “Are Consumer Rights Human Rights?”]; Kate Soper, “Re-thinking the ‘Good Life’: The Citizenship Dimension of Consumer Disaffection with Consumerism” (2007) 7:2 Journal of Consumer Policy 205 [Soper, “Re-thinking the ‘Good Life’”].

³⁰ “Consumers are market players, citizens, and participants in everyday life”, see Lucia A. Reish, “Principles and Visions of a New Consumer Policy” (2004) 27:1 Journal of Consumer Policy 1, 2 [Reish, “Principles and Visions of a New Consumer Policy”].

³¹ Differences arise mainly in cases where the consumer is also a professional. For example, a lawyer who buys a printer for his office is considered a professional by most definitions, even though he does not have expertise regarding printers.

³² Buyers entering into contracts in pursuit of profit do not lose their consumer status so long as they do not habitually engage in such practice for livelihood or gain. See *Moko c. Ebay Canada Ltd.*, 2013 QCCA 1912, 2013 CarswellQue 11407 (C.A. Que.) at paras. 24-40.

³³ This department was later dismantled and merged with the Department of Trade, Industry and Technology (or as it is now known: Innovation, Science and Development Canada) in 1993; Jacob S. Ziegler, “Is Canadian Consumer Law dead?” (1995) 24:1 Can Bus LJ 417, 420 [Ziegler, “Is Canadian Consumer Law dead?”].

³⁴ Such as consumer affairs; corporations and corporate securities; mergers; monopolies; bankruptcy and insolvency; patents; trademarks and copyrights.

³⁵ In 1971, the Canadian Consumer Council adopted The Canadian Charter of Consumer Rights and suggested its adoption to the Department of Consumer and Corporation Affairs. Even if the Department decided not to follow the Council suggestion, it

- the right to basic goods and services which guarantee survival;
- the right to be protected against goods or services that are hazardous to health and life;
- the right to be given the facts needed to make an informed choice, to be protected against misleading advertising or labeling;
- the right to choose products and services at competitive prices with an assurance of satisfactory quality;
- the right to express consumer interests in the making of decisions;
- the right to be compensated for misrepresentations, shoddy goods or unsatisfactory services; and
- the right to acquire the knowledge and skills necessary to be an informed consumer.

Between the late 1960s and the late 1970s, all 10 provinces adopted laws to regulate consumer transactions.³⁶ Since then, the scope of these statutes has been substantially enlarged to include regulation of unsolicited goods and credit cards, avoidance of disclaimer clauses in consumer sales, as well as unfair and deceptive consumer representations. Although there have been several attempts at harmonization,³⁷ consumer protection legislation is not uniform across Canada, and not all provinces have dealt specifically with the issue of jurisdiction over consumer contracts. Alas, without clear jurisdictional rules, consumers cannot know with certainty which law will govern their rights, or whether they will be able to sue in their home jurisdiction. Likewise, businesses need to know which consumer protection laws they must comply with and where they may be subject to court proceedings. Due to the internet's facilitation of cross-border transactions, these jurisdictional questions need to be answered

incorporated the leading principles of the Charter in several Acts such as: The *Consumer Packaging and Labelling Act*, S.C. 1970, c. 41; the *Food and Drug Act*, S.C. 1920, c. 27; the *Hazardous Products Act*, R.S.C. 1970, c. H-3; the *Motor Vehicle Safety Act*, R.S.C. 1970, c. 26.

³⁶ Edward P. Belobaba, "L'évolution du droit de la consommation au Canada de 1945 à 1984" in Ivan Bernier & Andrée Lajoie, *La protection des consommateurs, le droit de l'environnement et le pouvoir des sociétés* (Ottawa: Commission royale sur l'union économique et les perspectives de développement du Canada, 1986) at 6 [Belobaba, "L'évolution du droit de la consommation"]; (British Columbia) *Consumer Protection Act*, S.B.C. 1967, c. 14; (Alberta) *The Direct Sales Cancellation Act*, S.A. 1966, c. 28; (Saskatchewan) *The Direct Sellers Act*, S.S. 1965, c. 71; (Manitoba) *The Consumer Protection Act*, C.C.S.M. 1970, c. C200 [MCPA]; (Ontario) *Consumer Protection Act*, S.O. 1966, c. 23; (Quebec) *Protection of the Consumer Act*, L.Q. 1971, c. 74; (New Brunswick) *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1 [NBCPWLA]; (Newfoundland) *The Newfoundland Consumer Protection Act*, S.N.L. 1969 no. 36; (Nova Scotia) *Act to Provide for the Fair Disclosure of the Cost of Credit and for the Protection of Buyers of Consumer Goods*, S.N.S. 1966, c. 5; (Prince Edward Island) *An Act to Provide for the Fair Disclosure of the Cost of Credit and for the Protection of Buyers of Consumer Goods*, P.E.I.A. 1967, c. 16.

³⁷ Notably regarding consumer protection legislation in electronic commerce. See the *Internet Sales Harmonization Template*, *supra* note 4.

before consumer protection measures can efficiently achieve their goal. The strongest online consumer protection legislation is of no help to consumers if merchants are not subject to it.

1.2.1 Private International Law Issues

Given the absence of specific legislation dealing with jurisdiction over consumer contract disputes or online transactions, until a recent Supreme Court of Canada's decision,³⁸ one could not ascertain whether businesses operating entirely online were subject to the regulatory regime of a province if they only enter its territory via internet. Traditionally, the establishment of jurisdiction required a physical connection between the court's territory and the dispute or the parties. However, the Supreme Court of Canada upheld the British Columbia courts' conclusion that because *Google* carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of *in personam* and territorial jurisdiction. As a result, service providers such as *Grammarly* [writing-enhancement and proofreading] and *Brandyourself* [online reputation management] offering products and services consumable entirely online to Canadian consumers are now subject to the jurisdiction of Canadian provinces.

Since common law and civil law jurisdictions have different approaches to the resolution of conflicts of laws, the following subsection deals with the two legal systems separately. General principles of private international law used to determine both courts' jurisdiction and choice of law are examined for Quebec and then for the common law provinces.

The traditional civil law method involves characterizing the dispute as belonging to a defined category (family matter, contract, tort, etc.), and then identifying the provisions that will determine whether the tribunal seized of the matter has jurisdiction to hear the claim and determine the applicable law.³⁹ Officially, Quebec is a civil law jurisdiction. However, since Quebec's conflict of laws rules are influenced by common law's principles,⁴⁰ one must interpret these rules in light of both legal systems.⁴¹ In Quebec, the fact that a court finds it has jurisdiction to rule on a dispute does not mean that Quebec law will automatically apply.

In the common law provinces, the traditional principles attributing competence are mostly based on case law and on procedural rules.⁴² With

³⁸ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728 (S.C.C.) at para. 37 [*Equustek*].

³⁹ Civil law courts characterize issues according to their substantive law.

⁴⁰ Such as the codified common law principle of *forum non conveniens*.

⁴¹ See *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, 2002 CarswellQue 2593, 2002 CarswellQue 2594 (S.C.C.) at paras. 61-62 [*Spar*].

⁴² The Supreme Court of Canada established the "real and substantial connection" test. The origins of the test can be traced to a 1951 decision of the Privy Council, *Bonython v. Commonwealth of Australia*, [1951] A.C. 201 (P.C.) at 219 [*Bonython*]. The test then

respect to the applicable law, Canadian common law courts have followed the English approach in adopting the proper law rule.⁴³ Under this rule, courts give effect to the parties' express choice of law, and in the absence of such a choice, apply the law with which the transaction has the closest connection.⁴⁴

1.2.1.1 Civil Law Province: Quebec Courts' Jurisdiction over Online Consumer Disputes

In addition to the grounds in Article 3148 al.1, Article 3149 of the *Civil Code of Quebec* (CCQ)⁴⁵ provides that a consumer who wants to bring a claim against a foreign business only needs to prove *prima facie* that his domicile or residence is in Quebec to establish Quebec jurisdiction.⁴⁶ While a consumer may waive his right to pursue any claims related to the contract in his jurisdiction — for example through a choice of forum clause or an arbitration clause in the contract — such waiver may not be enforced against him.⁴⁷ Essentially, article 3149 CCQ

worked its way through Canadian courts and ended up being adopted by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) [*Morguard*]. *Hunt v. T & N plc* ([1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.)) confirmed the constitutional nature of the real and substantial connection test in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, 2003 CarswellOnt 5101, 2003 CarswellOnt 5102 (S.C.C.). The “real and substantial connection” test limits the reach of provincial conflicts rules, but it does not dictate the content of conflicts rules, which may vary from province to province. For example, the international competence of Ontario courts is mostly based on Rule 17 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

⁴³ Since the UK's adhesion to the European Union in 1990, Canadian courts are less inclined to use modern English cases as a comparative source given that England has rejected the proper law rule to adopt the choice of law rules used across Europe. See Stephen G. A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 270-271 [Pitel & Rafferty, *Conflict of Laws*].

⁴⁴ Pitel & Rafferty, *Conflict of Laws*, *ibid.*, at 270.

⁴⁵ *Civil Code of Quebec*, L.Q. 1991, c. 64 [CCQ]. With regard to the application of the real and substantial connection test in Quebec, the Supreme Court of Canada held in *Spar*, *supra* note 41 at paras. 55-57, that the required connection between the action and the province of Quebec is subsumed under the provisions found in Book Ten of the CCQ. Therefore, the real and substantial connection requirement is not an additional criterion that must separately be satisfied in determining the jurisdiction of Quebec courts. See Janet Walker and Jean-Gabriel Castel, *Canadian Conflict of Laws*, 6th ed., vol. 1, (loose-leaf) (Markham: LexisNexis, 2014) at 561-562 [Walker & Castel, *Canadian Conflict of Laws*]; Claude Emanuelli, *Droit international privé québécois*, 3rd ed. (Montreal: Wilson & Lafleur, 2011), 117.

⁴⁶ See art. 3149 CCQ: *A Quebec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Quebec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.*

⁴⁷ Art. 3149 CCQ is an exception to art. 3148 al.2 CCQ: “*Quebec authority has no*

guarantees that consumers have access to Quebec courts once grounds for jurisdiction are met. Consequently, even if a merchant were to ask a Quebec court to declare itself *forum non conveniens*,⁴⁸ it is unlikely that it would exercise its discretion to deprive a consumer of access to his domestic courts.⁴⁹

1.2.1.2 Law Applicable to Consumer Disputes in Quebec

After a court determines that it can exercise jurisdiction over an international dispute, it will turn to the question of applicable law.

Article 3117 CCQ governs the choice of law in consumer contract disputes.⁵⁰ It contemplates two scenarios that lead to the application of Quebec law and consequently the application of Quebec's consumer protection legislation in the context of online transactions.

For Quebec law to apply under the first scenario, two requirements must be met: (1) the consumer received a special offer or advertisement in Quebec, and (2) he accepted the offer while in Quebec. Considering that article 3117 CCQ was adopted in 1991,⁵¹ its first requirement was not designed with online commerce in mind, hence it does not take into account the mobility of consumers, the role of IP addresses, and the effects of location-based marketing.⁵² As a result, the consumer has to notice the online "advertisement" or "special offer" while in Quebec to meet the first requirement of article 3117 CCQ.

Since the legal concepts in article 3117 CCQ are to be understood in light of Quebec legal system,⁵³ the characterization of "necessary steps for the formation

jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authority".

⁴⁸ This concept is found under art. 3135 CCQ.

⁴⁹ *Bousquet c. Acer American Corporation (Canada)*, 2012 QCCQ 1261, 2012 CarswellQue 1501, 2012 CarswellQue 8973 (C.Q.) at para. 72 [*Bousquet c. Acer*].

⁵⁰ Art. 3117 CCQ covers all types of consumer contracts, including virtual and tangible products. The fact that a product will never physically be in Quebec is not relevant for the application of art. 3117 CCQ. If the requirements of the first or the second scenario are met, Quebec law will govern the contract to the extent provided in art. 3117 CCQ (see *Quality Plus Tickets inc. c. Quebec (Procureur général)*, 2013 QCCS 3780, 2013 CarswellQue 11252, 2013 CarswellQue 7869 (C.S.Q.) at paras. 46-47 [*Quality Plus Tickets*]).

⁵¹ The Quebec legislature was inspired by article 5 of the European Economic Community's *Convention on the law applicable to contractual obligations, Rome* (19 June 1980), 80/934/EEC; and by article 120 of the Swiss *Federal Code on Private International Law (CPIL)* (18 December 1987).

⁵² Technology enables businesses to locate consumers through their smartphones, tablets and computers. With information regarding consumers' whereabouts, businesses can market their products according to consumers' location and preferences. While outside of his jurisdiction, a consumer can be targeted by a company whose plan is to sell him a product once he is back in his home jurisdiction. For further discussion on geo-targeted marketing, see Khan, "Online Advertising", *supra* note 27.

⁵³ Art. 3078 CCQ provides that characterization of legal concepts is made according to the

of the contract” is done according to provisions of the Quebec *Consumer Protection Act (QCPA)*.⁵⁴ Article 54.2 of Quebec *Consumer Protection Act* provides that: “a distance contract is deemed to be entered into at the address of the consumer”; it is therefore assumed that the second requirement of the first scenario is met if the consumer accepts the offer while residing in Quebec.⁵⁵

According to *QCPA*, the address of the consumer is “the place of his usual residence indicated in the contract, or of a new residence of which he subsequently notifies the merchant”.⁵⁶ This definition can give rise to interpretation problems. When websites require that consumers provide a billing address that matches their credit card information, as well as a delivery address, which address should be used to determine the consumer address? As this conclusion will most likely determine the law applicable to the contract, the information regarding the consumer’s address needs to be transmitted without ambiguity. Since it is not possible to presume that one address prevails over the other⁵⁷ — in the absence of legislative intervention — e-businesses should require consumers to provide them with their contact information for contract formation purposes.

The second scenario that leads to the application of Quebec law to an international transaction requires that the order from the consumer be received in Quebec. In other words, if the service or item purchased is delivered in Quebec, regardless of the address specified in the contract, then Quebec law applies to the transaction.

A choice of law made by the parties shall not result in depriving the consumer of the protection he would otherwise enjoy if the mandatory provisions of the country in which he has his residence were to apply to his situation.⁵⁸ As a

legal system of the court seized of the matter. Since there is no definition of “advertisement” or “special offer” in the Civil Code, Quebec courts have turned to scholars’ interpretation of these terms in an online context. In *Union des consommateurs c. Air Canada*, 2014 QCCA 523, 2014 CarswellQue 1204, 2014 CarswellQue 14658 (C.A. Que.) at para. 62, the Court turned to the definition of “advertisement” in the *Consumer Protection Act*, L.R.Q. c. P-40.1 [*QCPA*], before exploring different forms of online advertisement; see also L’Heureux & Lacousière, *Droit de la consommation*, *supra* note 7 at 506. Online advertisement directed at consumers can take the form of advertisement in emails, or publicity banners on websites.

⁵⁴ *QCPA*, *supra* note 53.

⁵⁵ *Quality Plus Tickets*, *supra* note 50 at paras. 45-46.

⁵⁶ See *QCPA*, *supra* note 53, art. 1(iii).

⁵⁷ The billing address might not always correspond to the consumer’s usual residence. In fact, in most cases, it will match the consumer’s domicile. As for the delivery address, it might correspond to the consumer’s usual residence, but it might also correspond to his work address or even a friend’s address if the purchase was made as a gift.

⁵⁸ Art. 3117 CCQ creates an exception to art. 3111 CCQ: *A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act. A juridical act containing no foreign element remains, nevertheless, subject to the mandatory provisions of*

result, if the law chosen by the parties is more favourable to the consumer than Quebec law, then the foreign law will apply despite the fact that their contractual relationship falls within one of the scenarios depicted in article 3117 CCQ. In the absence of such a choice, the contract is governed by the law of the country in which the consumer has his residence if his situation matches one of the scenarios described in article 3117 CCQ.⁵⁹ In the event that the conditions of article 3117 CCQ are not met, then the applicable law will be determined according to article 3114 CCQ.

Article 3114 CCQ sets out the general principles regarding the law applicable to sales contracts. Unless the parties expressly designate a law in the contract, the law of the state where the business's establishment is located will govern the parties' contractual relationship. In other words, if the establishment is located in Quebec, Quebec law will govern the contract. However, 3114 CCQ provides that the sale is governed by the law of the state where the consumer has his residence if: (1) the negotiations have taken place there and the contract has been formed in the consumer's jurisdiction; (2) the contract provides expressly that delivery shall be made in the consumer's jurisdiction; (3) the contract is formed on terms determined mainly by the buyer, in response to a call for tenders.

Given that the vast majority of consumer contracts concluded online are boilerplate or adhesion contracts, negotiations will seldom take place where the consumer has his residence. Thus, 3114(1) CCQ will rarely find application. On the other hand, every time a consumer orders a product and requires that the delivery take place in the province, Quebec law will apply, as per article 3114(2) CCQ. As for the situation described in 3114(3) CCQ, it is doubtful Quebec law would apply since consumers do not normally submit tenders.

In sum: Most online merchants sued by Quebec consumers are subject to Quebec courts and Quebec law

Foreign businesses⁶⁰ will have to submit to Quebec courts if they conclude a transaction with a consumer that resides or has his domicile in Quebec. They will have to comply with at least the mandatory provisions of consumer protection legislation if the services or products were delivered in Quebec, regardless of whether the contract provides that the delivery shall take place in Quebec or if

the law of the country which would apply if none were designated. The law of a country may be expressly designated as applicable to the whole or a part only of a juridical act.

⁵⁹ Some authors have interpreted art. 3117(3) CCQ to mean that in the absence of an express choice of law by the parties, the law that governs a consumer contract is that of the consumer's country of residence (see Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 31-39). This interpretation does not take into account the "Commentaires" of the Minister of Justice provided with the 1994 Civil Code, which state that in the absence of a choice of law clause, the law of the place where the consumer has his residence will apply if the situation meets one of the scenarios in paragraph (1) or (2) of art. 3117 CCQ. See Québec, Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. 2 (Québec: Publications du Québec, 1993) at 1987.

⁶⁰ "Foreign Businesses" means businesses that do not have an establishment in Quebec.

the formation of the contract was preceded by a special offer or an advertisement in Quebec. In most cases, therefore, disputes between Quebec consumers and domestic or foreign merchants will be subject to Quebec law and Quebec courts' jurisdiction.

1.2.1.3 Common Law Provinces: Courts' Jurisdiction over Online Consumer Disputes

In the common law provinces, principles and rules on conflict of laws are found mostly in case law and practice rules.⁶¹ While some statutes are devoted exclusively to conflict of laws—such as the *Reciprocal Enforcement of Judgments Act*⁶²—most conflict of laws provisions are scattered among various statutes that do not specifically deal with matters involving foreign elements.

Given the numerous sources of conflict of laws rules, there is no uniform approach to private international law issues among common law provinces. Until the Supreme Court of Canada revisited the *Morguard* “real and substantial” test in *Van Breda*,⁶³ there was uncertainty as to its scope of application, and as to whether it replaced all provincial common law and statutory conflict of laws rules.⁶⁴ The Court stated in *Van Breda* that

⁶¹ See Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 1-5, 1-6.

⁶² (British Columbia) *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78; (Alberta) *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6; (Saskatchewan) *Reciprocal Enforcement of Judgments Act*, S.S. 1996, c. R-3.1; (Manitoba) *Reciprocal Enforcement of Judgments Act*, C.C.S.M. 1987, c. J20; (Ontario) *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5; (New Brunswick) *Reciprocal Enforcement of Judgments Act*, R.S.N.B. 2014, c. 127; (Newfoundland) *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4; (Nova Scotia) *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c. 388; (Prince Edward Island) *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6.

⁶³ *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, sub nom. *Club Resorts Ltd v. Van Breda* (S.C.C.) [*Van Breda*] is part of a trilogy of Ontario cases involving private international law issues that went to the Supreme Court of Canada. It clarified the “real and substantial” connection requirement that courts must consider when determining whether they have jurisdiction over foreign defendants and reduced the scope of courts' discretion. The Court declared that when a real and substantial connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. Quebec has a similar rule codified under art. 3139 CCQ: Where a Quebec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

⁶⁴ *Spar*, *supra* note 41 at para. 52. In *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577, 2002 CarswellOnt 1756 (C.A.) at para. 76, additional reasons 26 C.P.C. (5th) 203, 213 D.L.R. (4th) 661, 162 O.A.C. 122 (C.A.) [*Muscutt*], the Ontario Court of Appeal tried to bring some clarity and certainty to the real and substantial test by providing judges and litigants with structured guidance as to when courts should assume jurisdiction over foreign defendants. As the jurisprudence developed, the *Muscutt* factors appeared to confer too much discretion upon motion judges and to blur the distinction between the analysis for finding jurisdiction and *forum non conveniens*. See

independent conflict of laws rules should continue to operate and that those rules may vary between provinces.⁶⁵

In 1998, Industry Canada (subsequently re-named “Innovation, Science and Economic Development Canada”) commissioned a report to determine whether existing legislation was adequate for online consumer protection in Canada. The report acknowledged that contract formation issues should generally be left to the determination of the courts, but recommended that legislative action be taken with regard to jurisdiction issues in consumer transactions. The report proposed that online contracts be deemed entered into at the address of the consumer.⁶⁶

As of March 2018, it appears that no common law province has an equivalent to article 54.2 *QCPA*, which states that a consumer contract concluded at a distance is deemed concluded at the address of the consumer. Such a provision could have brought certainty and predictability to internet sales in common law jurisdictions, because, at the moment, the legal requirements relating to where and when contracts are formed online have not kept up with technology.⁶⁷

Since conflict of laws rules vary between provinces, the analysis of jurisdiction rules in common law provinces has been limited to *Consumer Protection Acts*, and to relevant connecting factors in the Ontario *Rules of Civil Procedure* and the *Court Jurisdiction and Proceedings Transfer Act* such as (1) choice of law clause, (2) choice of forum clause, (3) where the breach occurred, and (4) where business is being carried on.

(1) Choice of law clause: When a contract stipulates that it is governed by the law of the province where the consumer resides, this normally suffices to establish valid jurisdiction in the province.⁶⁸ This connecting factor reflects the principle of party autonomy. Parties to a contract are generally free to determine the terms of their agreement and the legal system that will govern their contract.⁶⁹ However, it is important to note that choice of law and choice of forum clauses in consumer contracts are typically imposed on consumers in

Van Breda, *supra* note 63 at paras. 51, 56; *Doiron v. Bugge* (2005), 258 DLR (4th) 716 at 719, 2005 CarswellOnt 4930 (Ont. C.A.); Tanya J. Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007) 33:1 Queen’s LJ 179 at 190-191 [Monestier, “Real and Substantial Mess”].

⁶⁵ *Van Breda*, *supra* note 63 at para. 23. The Court also set aside the contextual considerations of the *Muscutt* test, such as whether there would be unfairness to the defendant or the plaintiff in assuming or declining jurisdiction.

⁶⁶ Innovation, Science and Economic Development Canada, “Consumer protection rights in Canada in the context of electronic commerce”, by Roger Tassé and Kathleen Lemieux (Ottawa: Office of Consumer Affairs, 1999) at 56, online: < www.ic.gc.ca/app/oca/crd/dcmnt.do?id=44&lang=eng > .

⁶⁷ See Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 617.

⁶⁸ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 11-53, 11-62.

⁶⁹ *Ibid*, at 31-1.

standardized, non-negotiable contracts. Consequently, they are not the result of real choices made by consumers. Accordingly, this party “autonomy” is somewhat limited by provinces’ consumer protection legislation.⁷⁰

(2) Choice of forum clause: Parties to a contract are also generally free to nominate particular courts for the resolution of disputes between them.⁷¹ While exclusive jurisdiction clauses will preclude the parties from seeking relief in another jurisdiction, non-exclusive jurisdiction agreements will only preclude the parties from challenging the jurisdiction of the forums selected.⁷² Where the consumer contract stipulates that disputes are to be dealt with in the consumer’s province, a determination that the agreement is valid will satisfy the real and substantial connection requirement.⁷³

If the contract designates another forum as the exclusive forum for the resolution of the parties’ disputes, the courts in the consumer’s province may be precluded from deciding the matter. The two-step common law test adopted by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*⁷⁴ provided the appropriate analytical framework to determine whether the court should enforce the forum selection clause. At the first step, the party seeking a stay was required to establish that the forum selection clause was valid, clear and enforceable and that it applied to the cause of action before the court. At the second step, the plaintiff was required to show strong reasons why the court should not enforce the forum selection clause and stay the action (“strong cause”). In *Douez v. Facebook, Inc.*,⁷⁵ the Supreme Court of Canada noted that although the strong cause factors had been interpreted and applied restrictively in the commercial context, the consumer context may provide strong reasons not to enforce forum selection clauses, and thus the Court modified the *Pompey* strong cause factors in the consumer context. In the absence of legislation to the contrary, when considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts are to

⁷⁰ Any restriction of the parties’ freedom to arbitrate must be found in the legislation of the jurisdiction, and courts’ interference with that freedom depended on the legislative context. See *Wellman v. TELUS Communications Co.*, 2017 ONCA 433, 413 D.L.R. (4th) 684, 2017 CarswellOnt 8100 (Ont. C.A.) at para. 63, leave to appeal to S.C.C. allowed 2018 CarswellOnt 4703, 2018 CarswellOnt 4704 [*Wellman*].

⁷¹ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 11-6.1.

⁷² Walker & Castel, *ibid.* In Quebec, a choice of forum clause is considered valid only if it grants exclusive jurisdiction to the courts of one State. See *Bedford Resource Partners Inc. c. Adriana Resources Inc.*, 2010 QCCA 2030, 2010 CarswellQue 11738 (C.A. Que.), leave to appeal to S.C.C. refused 2011 CarswellQue 1086, 2011 CarswellQue 1087, (*sub nom. Bedford Resource Partners Inc. v. Adriana Resources Inc.*); *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, 2005 CarswellQue 5110, 2005 CarswellQue 5111 (S.C.C.) at para. 27; *Hewlett-Packard France c. Matrox graphics Inc.*, 2007 QCCA 1784, 2007 CarswellQue 11978, 2007 CarswellQue 14448 (C.A. Que.) at paras. 77, 84.

⁷³ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 11-6.1.

⁷⁴ 2003 SCC 27, 2003 CarswellNat 1031, 2003 CarswellNat 1032 (S.C.C.).

⁷⁵ 2017 SCC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664 (S.C.C.).

take account of all the circumstances of a particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. In *Facebook*, having found that the forum selection clause was enforceable, the Court considered that the importance of adjudicating quasi-constitutional privacy rights, the interests of justice, and the comparative inconvenience and expense of litigating in California were strong reasons for the Court not to enforce the clause.

British Columbia, Alberta, Manitoba, and Newfoundland and Labrador

British Columbia's *Business Practices and Consumer Protection Act* (*BCBPCPA*) does not permit waivers setting aside consumer rights, benefits or protections granted under the Act.⁷⁶ In *Seidel v. TELUS Communications Inc.*,⁷⁷ the Supreme Court of Canada held that since British Columbia had not enacted explicit legislative direction that would remove consumer disputes from the reach of arbitration legislation,⁷⁸ arbitration clauses were valid and enforceable unless it was determined that by denying consumers access to the court system, rights, benefits or protections conferred by the *BCBPCPA* would be infringed.⁷⁹ In other words, the British Columbia legislature ensured that only certain consumer claims would proceed through its court system, leaving others to be resolved according to the agreement of the parties,⁸⁰ whether by arbitration or litigation in a foreign jurisdiction. Similarly, Alberta's *Consumer Protection Act*,⁸¹ Manitoba's *Consumer Protection Act*,⁸² and Newfoundland's *Consumer Protection and Business Practices Act*⁸³ provide that any contractual term that would have the effect of waiving consumers' benefits, protections or remedies under these Acts or their corresponding regulations is void. In other words, if an arbitration or choice of forum clause were to limit — in any way — the consumer's rights under the *Consumer Protection Act*, the dispute settlement clause would be void.

Saskatchewan

In 2013, after Supreme Court decisions made clear that legislative intervention was necessary to restrict the application of arbitration agreements in consumer contracts, Saskatchewan adopted the *Consumer Protection and Business Practices Act*.⁸⁴ New protections prevent consumer contract wording from avoiding the requirements of this Act. Section 101 of the Act ensures that

⁷⁶ *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 3 [*BCBPCPA*].

⁷⁷ 2011 SCC 15, 2011 CarswellBC 553, 2011 CarswellBC 554 (S.C.C.) [*Seidel v. TELUS*].

⁷⁸ *Seidel v. TELUS*, *ibid*, at para. 40.

⁷⁹ *Ibid*, at para. 50.

⁸⁰ *Ibid*, at para. 40.

⁸¹ *Consumer Protection Act*, R.S.A. 2000, c. C-26.3, s 2.1 [*ACPA*].

⁸² *MCPA*, *supra* note 36, s. 96.

⁸³ *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1, s. 3(1) [*NLCPBPA*].

consumers are not tied into arbitration clauses and that they are not prevented from participating in class actions. However, after a dispute has arisen, consumers may select arbitration if they deem it appropriate to resolve their dispute.

Ontario

The Ontario *Consumer Protection Act* limits the effects of arbitration clauses insofar as they prevent consumers from exercising a right to commence an action before the Ontario Superior Court of Justice, and provides that substantive and procedural rights given under the Act apply despite any agreement or waiver to the contrary.⁸⁵ However, after a dispute has arisen, the parties may agree to resolve the dispute using any procedure that is available in law.⁸⁶

New Brunswick, Nova Scotia, and Prince Edward Island

As of March 2018, New Brunswick, Nova Scotia and Prince Edward Island have not enacted provisions limiting the effects of dispute settlement clauses in consumer contracts.

(3) Breach of the contract: A Court in a Common law province will have jurisdiction when a breach of the contract has been committed in the province rendering impossible the performance of the contract, or part of the contract that ought to have been performed in the province. The idea that a contractual breach occurs in a given place is premised on the contract dealing with tangible products or real-life services. As soon as the subject matter of the contract is entirely consumable online, it becomes virtually impossible to determine where the breach occurred or where the contractual obligations were to be performed. Hence, this connecting factor is relevant when the contract (concluded online or otherwise) requires delivery of the product, but is inapplicable to contracts conducted entirely online,⁸⁷ unless a legal fiction is used to determine where a virtual contract is to be performed.

(4) Where business is being carried out: Merchants can choose whether they wish to become connected to any given forum. They can list on their website the jurisdictions they want to do business with, they may use filters to block consumers from jurisdictions they do not wish to target, and they can limit the geographical zones within which they offer delivery.⁸⁸ As a result, merchants offering products and services for sale on their websites to residents of a targeted jurisdiction will be considered as carrying on business in the jurisdiction.⁸⁹

⁸⁴ *Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2 [SCPBP]. See also *Seidel v. TELUS*, *supra* note 77.

⁸⁵ *Consumer Protection Act*, S.O. 2002, c. 30, ss. 6, 7(1), 7(2) [OCPA]; *Wellman*, *supra* note 70 at para. 6.

⁸⁶ *OCPA*, *supra* note 85, s. 7(3).

⁸⁷ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 11-62.

⁸⁸ The American Bar Association Jurisdiction in Cyberspace Project, "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet" (2000) 55:4 Bus Lawyer 1801, 1826-1829.

1.2.1.4 Law Applicable to Consumer Disputes in Common Law Provinces

As part of the freedom of contract principle, common law provinces enable parties to determine the “proper law” that will govern their agreement. In the absence of such a designation, the contract will be governed by the system of law with which it has the closest and more real connection.⁹⁰

However, there may be circumstances where mandatory rules of the forum will apply to the contract despite the fact that these rules do not form part of the proper law.⁹¹ Courts are required to apply statutory rules — in force in their province — which are meant to supersede the proper law of the contract in determining the parties’ rights and obligations.⁹² Since consumer protection legislation is directed at protecting the public and the integrity of the market,⁹³ courts might well construe consumer protection provisions as mandatory and give them precedence over the proper law, or over other rules that would otherwise lead to the application of a foreign law.⁹⁴

When deciding whether to apply the *lex fori* statutory rules, courts consider the purpose of the legislation, the relevance of the performance of the main obligation (characteristic performance), and the interpretation of the statute.⁹⁵ Since there are no cases dealing directly with the territorial scope of consumer protection statutes, the legislation of all common law provinces was reviewed to identify provisions that would expressly state that the laws of the province should take precedence over the rules that would otherwise apply to the parties’ agreement.

British Columbia, Alberta, Ontario, and Saskatchewan

The British Columbia *Business Practices and Consumer Protection Act* provides that it applies to consumers and suppliers — whether in British Columbia or not — that enter into a consumer transaction.⁹⁶ Additionally, s. 3

⁸⁹ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 11-62; see also *Equustek*, *supra* note 38 at para. 37.

⁹⁰ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 31-11, 31-13; see *Bonython*, *supra* note 42, adopted in *Imperial Life Assurance Co. of Canada v. Colmenares*, 1967 CarswellOnt 65, [1967] S.C.R. 443. See also John Westlake, *Private International Law*, 5th ed. (London: Sweet & Maxwell, 1912) at 305.

⁹¹ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 31-1.

⁹² *Ibid.*, at 31-39, 31-65.

⁹³ *Ibid.*, at 31-64, 31-65.

⁹⁴ Walker & Castel, *Canadian Conflict of Laws*, *supra* note 45 at 31-39, 31-66.

⁹⁵ *Pearson v. Boliden Ltd.*, 2002 BCCA 624, 2002 CarswellBC 2769 (C.A.) at para. 63 (in the context of securities legislation, the court makes an analogy with consumer protection legislation). See Walker & Castel, *ibid.*, at 31-66, 31-67.

⁹⁶ *BCBPCPA*, *supra* note 76, ss. 1, 17 (distance sales contract). It appears that courts will apply provincial consumer laws not only when the affected consumer is within the province and the offending business is outside, but also to situations where the consumer is located outside the province and the business is in the province. See *British Columbia*

of the *BCBPCPA* provides that consumers may not waive their rights or benefits under the Act. Hence this provision would supersede a choice of law designation that would have the effect of depriving the consumer of such protections. Likewise, Alberta's *Consumer Protection Act* limits the application of waivers,⁹⁷ and provides for a broad application of its consumer protection measures. Its *Internet Sales Contract Regulation*⁹⁸ applies to internet sales contracts in which the supplier or consumer is a resident of Alberta, and to contracts in which the offer or acceptance is made in or is sent from Alberta. In theory, this regulation covers all online consumer contracts that constitute "internet sales contracts"⁹⁹ and that are not listed in the exceptions under s. 3 of the regulation. Ontario's *Consumer Protection Act* provides that — despite any agreement or waiver to the contrary — the substantive and procedural rights given under the Act apply "in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place."¹⁰⁰ In other words, being domiciled or resident in Ontario is not required for *OCPA* provisions to apply. If a German tourist purchases an audiobook on his tablet while in Ontario, he would, in theory, benefit from the substantive and procedural rights given under *OCPA*. Saskatchewan also limits the application of waivers,¹⁰¹ and provides for a broad application of its consumer protection measures.¹⁰²

Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island

Manitoba,¹⁰³ New Brunswick,¹⁰⁴ Newfoundland,¹⁰⁵ Nova Scotia,¹⁰⁶ and Prince Edward Island¹⁰⁷ adopted provisions, albeit less specific, to a similar effect.¹⁰⁸

(*Director of Trade Practices*) v. *Ideal Credit Referral Services Ltd.*, 1997 CarswellBC 794, 145 D.L.R. (4th) 20 (C.A.).

⁹⁷ *ACPA*, *supra* note 81, s. 2(1).

⁹⁸ *Internet Sales Contract Regulation*, Alta. Reg. 81/2001 [*AISCR*].

⁹⁹ *AISCR*, *ibid.*, s. 2.

¹⁰⁰ *OCPA*, *supra* note 85, ss. 2(1), 7(1).

¹⁰¹ *SCPBPBA*, *supra* note 84, ss. 15, 101.

¹⁰² *SCPBPBA*, *ibid.*, s. 102(2); *The Consumer Protection and Business Practices Regulations*, R.R.S. c. C-30.2 Reg. 1 [*SCPBPBR*].

¹⁰³ *MCPA*, *supra* note 36 at ss. 3, 96, 96.1, 128.

¹⁰⁴ *NBCPWLA*, *supra* note 36, ss. 2(3), 24-26.

¹⁰⁵ *NLCPBPA*, *supra* note 83 at s. 3(1).

¹⁰⁶ *Consumer Protection Act*, R.S.N.S. 1989, c. 92, s. 21 [*NSCPA*].

¹⁰⁷ *Consumer Protection Act*, R.S.P.E.I., 1988, c. C-19, s. 21 [*PEICPA*].

¹⁰⁸ See for example the wording used in Nova Scotia and Prince Edward Island's statutes (*supra* notes 106, 107): "This Act applies notwithstanding any agreement or waiver to the contrary."

In sum: In most common law provinces, jurisdiction is left to the courts' determination, and Consumers may not waive their rights or benefits under Canadian consumer protection legislation

The scope of online consumer protection is uncertain in common law provinces given that several jurisdictional questions are left to the determination of the courts on a case-by-case basis. Also, access to domestic tribunals cannot be taken for granted, as not all provinces view court access as essential to consumer protection. With the exception of Ontario, no common law province has explicitly restricted arbitration clauses in consumer contracts. In British Columbia, Alberta, Saskatchewan, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, the validity of an arbitration or selection of forum clause depends on whether the court determines that giving effect to such a clause would amount to depriving consumers of their rights, benefits or protections granted by legislation.

In British Columbia, Alberta and Ontario, consumers are protected by their domestic consumer protection legislation whenever their domestic courts have jurisdiction. The other common law provinces only provide that consumers may not waive their rights or benefits under consumer protection legislation. Thus, a choice of law designation cannot strip consumers of their rights under consumer protection legislation. In the absence of such a designation, the contract will be governed by the system of law with which it has the closest connection and other mandatory rules as identified by courts.

1.2.2 Substantive Protections for Online Consumers

Online shopping is essentially a contract concluded through electronic means. Hence, consumers transacting online should benefit from the same substantive protections as those purchasing through more traditional channels of commerce. When buying from brick and mortar businesses, consumers can assume with sufficient certainty that their home laws protect them from unfair business practices and ensure them access to their national courts. Purchasing online does not provide the same level of certainty.

The virtual marketplace presents numerous challenges that Canadian legislatures are only gradually addressing. For instance, most provinces now have consumer protection laws that focus specifically on online commerce issues. They adopted rules to deal with disclosure of information, online contract formation and cancellation, as well as reversal of credit card charges.¹⁰⁹ Provinces have also taken concrete steps toward the harmonization of online consumer protection legislation. In 2001, a federal-provincial-territorial working group designed an online consumer protection guide, *The Internet Sales Harmonization Template*, to assist Canadian jurisdictions through the implementation of uniform online consumer protection legislation.¹¹⁰ At the

¹⁰⁹ Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 43-44.

time of writing, eight provinces have adopted measures based on or otherwise similar to the *Template's* recommended provisions: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Nova Scotia.¹¹¹ The following subsections provide an overview of the *Template* and a brief analysis of each province's internet-specific consumer protection legislation.

1.2.2.1 The Internet Sales Contract Harmonization Template: Online Businesses and Consumers' Obligations

From a consumer standpoint, purchasing online entails relying entirely on e-businesses to obtain fundamental information relating to the identity of the supplier; the description of the products or services; the price; the currency; the delivery method, and the terms of the contract. Incomplete information puts consumers at risk of having to deal with all sorts of hardships, from hard-to-reach merchants and nonconforming products to unidentified additional charges and inefficient delivery companies. Accordingly, the *Template* sets out a list of key information that should be disclosed to consumers prior to contract formation, so that they can make an informed decision as to whether or not they wish to go through with the transaction:¹¹²

- (i) the supplier's name and, if different, the name under which the supplier carries on business;
- (ii) the supplier's business address and, if different, the supplier's mailing address;
- (iii) the supplier's telephone number and, if available, the supplier's e-mail address and facsimile number;
- (iv) a fair and accurate description of the goods or services being sold to the consumer, including any relevant technical or system specifications;
- (v) an itemized list of the price of the goods or services being sold to the consumer and any associated costs payable by the consumer, including taxes and shipping charges;
- (vi) a description of any additional charges that may apply to the contract, such as customs duties and brokerage fees, whose amounts cannot reasonably be determined by the supplier;

¹¹⁰ The *Internet Sales Template*, *supra* note 4, was prepared by the Consumer Measures Committee under the auspices of the Agreement on Internal Trade (AIT). The AIT is an intergovernmental trade agreement signed by Canadian First Ministers that came into force in 1995. Its purpose is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market, online: < www.ait-aci.ca > . Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 44.

¹¹¹ Alberta and Manitoba modified their consumer protection legal framework to address internet agreements during the development of the *Template*. See *BCBPSPA*, *supra* note 76; *AISCR*, *supra* note 98; *SCPBA*, *supra* note 84; *MCPA*, *supra* note 36; *OCPA*, *supra* note 85; *QCPA*, *supra* note 53; *NLCPBA*, *supra* note 83; *NSCPA*, *supra* note 106.

¹¹² *Internet Sales Template*, *supra* note 4, section 3(1).

- (vii) the total amount of the contract or, where the goods or services are being purchased over an indefinite period, the amount of the periodic payments under the contract;
- (viii) the currency in which amounts owing under the contract are payable;
- (ix) the terms, conditions and method of payment;
- (x) the date when the goods are to be delivered or the services are to begin;
- (xi) the supplier's delivery arrangements, including the identity of the shipper, the mode of transportation and the place of delivery;
- (xii) the supplier's cancellation, return, exchange and refund policies, if any;
- (xiii) any other restrictions, limitations or conditions of purchase that may apply.

All information required pursuant to the *Template* must be presented in a prominent, clear and comprehensible manner.¹¹³ In other words, the information must be displayed in a manner that would allow the ordinary hurried purchaser — who does not take more than ordinary care to observe what is staring him in the face — to distinguish the relevant information from the rest of the material visible on the website.¹¹⁴ Failure to do so provides the consumer with a right of cancellation.¹¹⁵

Although the *Template* does not say much about contract formation, it specifies that immediately prior to entering into an online agreement, consumers should be provided with the express opportunity to accept or decline the contract and to correct errors.¹¹⁶ In practical terms, this provision requires that the consumer be given the opportunity to review the terms and conditions of the agreement and re-examine the characteristics of the product or service before deciding to go through with the purchase.¹¹⁷

The *Template* does not specify which method businesses should adopt to enable the correction of errors, and Canadian courts have not yet interpreted this obligation. As a result, it is impossible to know with certainty what it

¹¹³ *Ibid*, section 3(2)(a).

¹¹⁴ In 2012, the Supreme Court of Canada analyzed the notion of “average consumer”. In *Richard v. Time Inc.*, 2012 SCC 8, 2012 CarswellQue 1218, 2012 CarswellQue 1219 (S.C.C.) at paras. 65-74 [*Richard v. Time*], the Supreme Court, on appeal from a judgment of the Quebec Court of Appeal, held that the average consumers protected by consumer protection legislation are the “ordinary hurried purchasers”, that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement (citing *Mattel Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, 2006 CarswellNat 1400, 2006 CarswellNat 1401 (S.C.C.)). The Court added that consumer law does not protect consumers only if they can prove they were prudent and well-informed.

¹¹⁵ *Internet Sales Template*, *supra* note 4, section 5(1)(a)(i).

¹¹⁶ *Ibid*, section 3(1)(b).

¹¹⁷ Michael Deturbide, *Consumer Protection Online* (Markham: LexisNexis Canada, 2006) at 25 [*Consumer Protection Online*]; Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 46-47.

encompasses, but one could assume it covers keystroke errors that could result in mistakes regarding the quantity purchased, the delivery address, or characteristics of the item purchased.¹¹⁸ To comply with this obligation, online businesses should display a message along these lines: “Please review your transaction and correct any errors. Once you click on ‘I Agree’, your order will be processed.” Failure to provide such opportunity also grants consumers the right to request the cancellation of the contract.¹¹⁹

The *Template* further specifies that online businesses must provide consumers with a written or electronic copy of the agreement with all the required information within 15 days from the contract formation.¹²⁰ Failure to provide such a copy within the allotted time renders the transaction subject to cancellation by the consumer.¹²¹

Where the delivery or commencement dates are not specified, businesses ought to deliver the products or begin the service within 30 days from the date of contract formation. Where a performance date is indicated in the contract, businesses must perform their obligation within 30 days from the specified date. If businesses do not comply within these time frames, consumers are entitled to request the cancellation of the contract.¹²²

The *Template* only allows cancellation in these four circumstances.¹²³ Consumers may express their notice of cancellation in any way, as long as it indicates their intention to cancel the online contract.¹²⁴ Unless their notice of cancellation is given by personal service, it is deemed given when sent.¹²⁵ The

¹¹⁸ Although section 3(1)(b) of the *Internet Sales Template* (*supra* note 4) reflects a provision on error correction for interactions between natural persons and electronic agents found in the *United Nations Model Law on Electronic Commerce* (online: <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>), it is not limited to electronic agents and could also apply to contracts formed by email. In 1999, the UN *Model Law on Electronic Commerce* was implemented by the Uniform Law Conference of Canada in *The Uniform Electronic Commerce Act (UECA)*, online: <www.ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated>, to serve as a model upon which provincial and territorial legislatures should develop their electronic commerce legislation. See also Deturbide, *Consumer Protection Online*, *supra* note 117 at 25-26; Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 46-47.

¹¹⁹ *Internet Sales Template*, *supra* note 4, section 5(1)(a)(ii).

¹²⁰ *Ibid*, section 4.

¹²¹ *Ibid*, section 5(1)(b).

¹²² *Internet Sales Template*, *supra* note 4, sections 5(2), 5(3).

¹²³ The consumer may not request the cancellation of the contract where businesses complied with their legal obligations. The concept of “cooling off period” is not reflected in the provisions of the *Template*.

¹²⁴ The notice of cancellation may be given to the supplier by any means, including, but not limited to, personal service, registered mail, telephone, courier, facsimile and email. *Internet Sales Template*, *supra* note 4, section 7(3).

¹²⁵ *Ibid*, section 7(4).

cancellation has the effect of cancelling the contract as if it had never existed, as well as any related transaction, guarantee or security given by the consumer.¹²⁶ Consequently, businesses are not allowed to charge consumers for cancelling or returning the products when the cancellation is based on businesses' failure to comply with their online legal obligations.

Once the cancellation notice has been transmitted, the *Template* sets out a time frame during which both parties should discharge their respective obligations. Businesses must refund — within 15 days — all amounts the consumer paid under the contract and related contracts,¹²⁷ including reasonable return shipping costs (if products were delivered).¹²⁸ As for consumers, they have the obligation to return the products — unused and in the same condition in which they were delivered — within 15 days from the cancellation date or delivery of the products — whichever is later.¹²⁹ It is unclear if “returning” the product means that the consumer must ship the product within the 15 days, or rather that the merchant should receive the product within the specified period. Since consumers do not generally have control over transportation, it seems that the 15 days should cover only the time within which consumers must ship the product.

If businesses do not refund all of the consideration within the specified time frame, consumers may recover the consideration from them through civil action, or may request that their credit card company cancel or reverse the charges, if the payment was done with a credit card.¹³⁰ However, if consumers do not return the products within the allotted time, the only recourse businesses have is civil action¹³¹ — they may not hold any money paid by consumers or hinder, in any way, a chargeback request.

The *Template* provides no exemption for businesses selling virtual products. They must refund all sums paid under the contract even though—technically speaking—it is impossible for consumers to return products downloaded onto their electronic devices. Since businesses can exercise control over access, use, and further dissemination of their virtual products through digital right management systems,¹³² the fact that consumers cannot actually return these types of purchases should not limit their rights under the *Template*.

¹²⁶ Related transactions can include delivery arrangements or credit extended or arranged by the supplier, which are deemed to be conditional on the online contract. *Internet Sales Template, ibid*, section 8.

¹²⁷ *Internet Sales Template, supra* note 4, section 9(1). This provision applies whether the contract is for the sale of products or services.

¹²⁸ *Ibid*, section 9(5).

¹²⁹ *Ibid*, section 9(2).

¹³⁰ *Ibid*, sections 10, 11.

¹³¹ *Ibid*, section 9(7).

¹³² A digital rights management system is a program that limits distribution and use of a particular digital product. It can be used to disable software or render a video unplayable after a certain window of time or if a certain prohibited action is performed by a

1.2.2.1 *The Internet Sales Contract Harmonization Template: Chargeback Mechanism*

Since credit card payment is the most common means of paying for online purchases,¹³³ the *Template* provides a mechanism for consumers to avoid jurisdictional issues and problems associated with court actions like costs and delays. Upon cancellation, if a business has not refunded all the sums paid by the consumer within 15 days, the consumer may request that the credit card issuer cancel or reverse the charges that were initially charged to the credit card account.¹³⁴ The chargeback request must be made in writing or on an electronic form, and must contain sufficient information to identify the credit card charge sought to be cancelled or reversed.¹³⁵ Upon receipt of the chargeback request, the credit card issuer has 30 days to acknowledge the consumer's request and 90 days to cancel or reverse the credit card charges and any associated interest.¹³⁶ Failure to cancel or reverse the charges in the allotted period would constitute an offence.¹³⁷

consumer. See Margaret Jane Radin, "Regulation by Contract, Regulation by Machine" (2004) 160 *Journal of Institutional and Theoretical Economics* 142, at 152 [Radin, "Regulation by Contract, Regulation by Machine"].

¹³³ While credit card is still the most common method to pay for online purchases (see Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 50), a study of the global payment landscape shows that online purchases made using alternative methods of payment is on the rise. E-wallets are expected to be the most popular payment method globally in 2021, with a 46% share of the overall payments market (WorldPay, *Global Payments Report 2017*, online: < <https://www.worldpay.com/global/insight/articles/2017-11/global-payments-report-2017> > [*Global Payments Report 2017*]). As the range of payment channels available to consumers continues to grow, consumer protection decreases. Given that the *Template* does not address issues arising from payments with debit cards, prepaid cards, or loyalty cards, nor consider other alternative payment methods such as online bank transfers, mobile payments (payments charged to consumers' mobile phone bills) and digital wallet payments, consumers using any form of payment other than credit cards cannot benefit from the chargeback mechanism (or similar mechanism) when the rules are contravened.

¹³⁴ *Internet Sales Template*, *supra* note 4, section 11(1).

¹³⁵ *Internet Sales Template*, *supra* note 4, section 11(2). The chargeback request must contain the following information: the consumer's name; the consumer's credit card number; the expiry date of the consumer's credit card; the supplier's name; the date the internet sales contract was entered into; the dollar amount of consideration charged to the credit card account in respect of the internet sales contract and any related consumer transaction; a description of the goods or services sufficient to identify them; the reason for cancellation of the internet sales contract; the date and method of cancellation of the internet sales contract.

¹³⁶ *Ibid*, section 11(3).

¹³⁷ *Ibid*, section 12. In theory, upon a brief assessment of the request, credit card companies should automatically process the chargeback. However, in practice, the lack of review mechanism of chargeback requests has left commercial third parties—banks and credit card companies—with the discretion to dispense justice as they see fit. For instance, the National Bank protocol provides for a two-stage process at the ombudsman level. The

1.2.2.3 Provinces' Internet-specific Consumer Protection Legislation

Despite several Canadian provinces' endorsement of the *Template*, harmonization with respect to online consumer protection legislation has not been entirely achieved. Provinces have developed slightly different legal frameworks to address online consumer transactions. The following paragraphs provide an overview of each Canadian province's online consumer protection legislation and highlight the similarities and major differences between their legislation and the *Template*.

British Columbia

Fourteen years ago, British Columbia updated its consumer protection legislation to deal with contracts concluded at a distance. Since no specific reference to internet sales contracts is made in the *Business Practices and Consumer Protection Act*, one must turn to the provisions applicable to future performance contracts and distance sales contracts.¹³⁸ The *British Columbia Consumer Contracts Regulation* specifies that future performance and direct sales provisions only apply to sales for which the consideration exceeds \$50.¹³⁹ Thus, the protection of the Act only applies to these transactions. The requirements regarding disclosure of information, copy of the contract, cancellation, and chargeback mechanism mirror the *Template* provisions with minor variations.¹⁴⁰

In addition to its online consumer protection legislation, British Columbia launched Canada's first online tribunal.¹⁴¹ The Civil Resolution Tribunal

first step is akin to a procedural review where analysts look at whether the process followed the internal guidelines that differ from what the law provides. The second stage is a review on the merits—senior analysts look at whether the international rules of the bank have been followed. Canadian law and businesses' legal obligation will be considered but not necessarily used as guidelines. The National Bank ombudsperson is not bound by the law but rather by the framework adopted by the bank. See comment by Karim Benyekhlef, Professor at Université de Montreal and Director of the Cyberjustice Laboratory (author's translation) "The State should take charge of the redress mechanism, because in a dispute with a merchant, the buyer is the vulnerable party. We cannot ask the credit card companies to become courts or arbitrators in disputes with businesses", quoted in Isabelle Ducas, "Les pièges du magasinage en ligne", *La Presse +* (18 August 2013), online: <http://plus.lapresse.ca/screens/43d2-6130-520e8d7c-9e1b-484eac1c606d__7C__IIKBpWbFtG-.html> .

¹³⁸ *BCBPCPA*, *supra* note 76 at s. 17: "distance sales contract means a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person and, with respect to goods, for which the consumer does not have the opportunity to inspect the goods that are the subject of the contract before the contract is entered into, but does not include a prepaid purchase card; future performance contract means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed [. . .]".

¹³⁹ *Consumer Contracts Regulation*, B.C. Reg. 272/2004, ss. 4,6.

¹⁴⁰ *BCBPCPA*, *supra* note 76, ss. 46-52.

¹⁴¹ The Civil Resolution Tribunal (CRT) was implemented in phases. It started with strata

resolves small claims disputes \$5,000 and under, and condominium disputes of any amount. The online dispute resolution services offered by the tribunal range from free legal information written in plain language to dispute resolution tools including negotiation, facilitation, and adjudication. The online dispute resolution process is completely voluntary; parties cannot be forced to use it.¹⁴²

Alberta

After engaging in extensive consultations on consumer protection in the summer and fall of 2017, the Government of Alberta passed a bill called “A Better Deal for Consumers and Businesses Act” in December 2017. The bill amended the *Fair Trading Act*, making the *Consumer Protection Act* Alberta’s primary legislation to protect consumers from unfair practices and businesses from unfair competition.¹⁴³ A new plain language preamble was added to the Act to further explain the intention and purpose of the Act, and help courts interpret any provisions that may be unclear. New provisions now include: limitations on businesses’ ability to make unilateral amendments to contracts except in cases where consumers are provided with advance notice and given the right to cancel the contract; prohibitions of clauses in contracts that prevent consumers from posting negative reviews of the business or transaction, provided the negative review is not malicious or vexatious; prohibitions regarding the enforcement of mandatory arbitration clauses in contracts; expansion of consumers’ right to sue when they suffered a loss from a breach of the Act or regulations beyond unfair practices.

In October 2001, Alberta implemented the *Internet Sales Contract Regulation*,¹⁴⁴ which applies to contracts formed by text-based Internet communications so long as consideration exceeds \$50.¹⁴⁵ While this restriction

disputes in July 2016, and, in June 2017, began resolving small claims up to \$5,000. While preserving adjudication as a last resort, the tribunal encourages the use of a broad range of collaborative dispute resolution tools to resolve disputes as early as possible. To cut cost, delay and complexity for the users of British Columbia’s justice system, the Civil Resolution Tribunal combines technology with the case management and dispute resolution strengths of British Columbia’s administrative justice system. The tribunal process begins with an application for dispute resolution. It provides a dispute notice package to the applicant and all respondents, which indicates that disputes may be resolved by the parties at any stage of the tribunal process. Once respondents submit a response, the process moves to a negotiation stage that is followed by facilitation, and, as a last resort, adjudication. The tribunal’s decisions are in writing. A copy of the decision is sent to all parties, either by email, mail, or fax. With some exceptions, decisions are also published on the CRT website. The parties may resolve their dispute at any stage of the tribunal process. The role of the Civil Resolution Tribunal is not limited to helping BC residents with their disputes, and also extends to the prevention of disputes. The CRT’s platform provides online accessible legal information to all BC residents, not just litigants. See Civil Resolution Tribunal, online: < www.civilresolutionbc.ca > .

¹⁴² See Small Claims BC, “Online Help Guide”, online: < www.smallclaimsbcc.ca/settlement-options/ODR > .

¹⁴³ See Alberta Government, “Consumer protection consultation”, online: < www.alberta.ca/consumer-protection-consultation.aspx > .

leaves out most sales of mobile apps typically falling in the price range of \$1 to \$30, it does not exclude virtual products altogether. The *Regulation* also excludes several business sectors that have shown substantial online growth over the last years, such as real estate traders, financial services, and businesses that sell cut flowers or perishable food.¹⁴⁶ As for disclosure requirements, cancellation timeframes, and the chargeback mechanism, the *Regulation* mirrors the *Template*.¹⁴⁷ To ensure the relevance of its online consumer regulation, the Alberta legislature included a sunset provision that sets the *Internet Sales Contract Regulation's* expiration at September 30, 2018.¹⁴⁸

Saskatchewan

Between 2006 and 2007, Saskatchewan adopted many of the substantive protections of the *Template* relating to online contract requirements, cancellation obligations, and consumers' recourse to chargebacks into its now repealed *Consumer Protection Act*¹⁴⁹ and *Consumer Protection Regulations*.¹⁵⁰ In an effort to make the legislation more accessible and easier for consumers to understand, Saskatchewan adopted the new *Consumer Protection and Business Practices Act*¹⁵¹ and the *Consumer Protection and Business Practices Regulations*.¹⁵² These latest changes added more consistency and flexibility to Saskatchewan's consumer protection legal framework, but did not alter the core of the *Template's* substantive protections that had previously been adopted.¹⁵³ Saskatchewan also adopted severe penalties of up to \$500,000 for any corporation that contravenes any provision of the *SCPBP*A or corresponding regulations.¹⁵⁴

Like other jurisdictions, Saskatchewan excluded certain types of transactions from the application of its online consumer protection provisions. As such, consumers entering into internet transactions for which the consideration is less than \$50,¹⁵⁵ transactions for financial products,¹⁵⁶ or transactions for the supply of accommodations, or perishable food¹⁵⁷ cannot rely on Saskatchewan consumer protection legislation relating to Internet sales.

¹⁴⁴ *AISCR*, *supra* note 98.

¹⁴⁵ *AISCR*, *supra* note 98, s. 1(d)(i).

¹⁴⁶ *AISCR*, *supra* note 98, s. 3.

¹⁴⁷ *AISCR*, *supra* note 98, ss. 4, 6, 8-12.

¹⁴⁸ *AISCR*, *supra* note 98, s. 14.

¹⁴⁹ *The Consumer Protection Act*, S.S. 1996, c. C-30 [SCPA], ss. 75.5-76.

¹⁵⁰ *The Consumer Protection Regulations*, R.R.S., c. C-30.1 Reg. 2, ss. 5-10.

¹⁵¹ *SCPBP*A, *supra* note 84.

¹⁵² *SCPBP*R, *supra* note 102.

¹⁵³ These protections are now found in *SCPBP*R, *supra* note 102, ss. 3-3 to 3-14.

¹⁵⁴ *SCPBP*A, *supra* note 84, s. 108(3)(b).

¹⁵⁵ *SCPBP*R, *supra* note 102, s. 3-2; *SCPBP*A, *supra* note 84, s. 45(2)(e).

¹⁵⁶ *SCPBP*R, *supra* note 102, s. 3-4(1).

Manitoba

In March 2001, Manitoba was the first province to enact specific online consumer protection legislation.¹⁵⁸ It modified its *Consumer Protection Act (MCPA)* and enacted specific regulations to address internet agreements, but it restricted the application of its provisions to tangible products and services.¹⁵⁹ When Manitoba adopted these provisions, online sales of films, music, magazines, newspapers, e-learning material and all sorts of software were not as common as they are today.¹⁶⁰ As a result, Manitoba's restrictions did not exclude an important proportion of online sales back in 2001.¹⁶¹ However, in 2018, most of the top-selling internet products are entirely consumable online, so the proportion of unprotected online consumers has increased.

While the *Template* specifies that businesses must ensure that the required information is displayed in a clear and comprehensible manner, there is no such requirement to be found in the *MCPA*. This, however, does not mean businesses need only post the information on their website to comply with their disclosure requirement, they must ensure consumers have accessed the information before entering into the agreement.¹⁶²

Unlike the *Template*, the *MCPA* does not require that businesses provide consumers with an express opportunity to accept or decline the online contract and to correct errors immediately before entering into the agreement. The cancellation time frames and refund deadlines are also different under the *MCPA*.¹⁶³ However, the requirements under Manitoba legislation with respect

¹⁵⁷ *SCPBPR*, *supra* note 102, s. 3-4(3)(b) and (c).

¹⁵⁸ Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 52.

¹⁵⁹ *MCPA*, *supra* note 36, ss. 1, 127-135; *Internet Agreements Regulation, (Consumer Protection Act)* Man. Reg. 176/2000 [*MIAR*].

¹⁶⁰ Until 2001, when iTunes and Wikipedia did not exist, and most major newspapers websites were updated once a week, only 14.6% of Canadians were ordering products or services online, see OECD, "Internet Economy, Electronic commerce", online: < www.oecd.org/internet/ieconomy/electroniccommerce.htm > . In 2014, at least 87% of Canadian consumers shop online at least once a year, and nearly half do so on a monthly basis. See PwC Canada, "Canadian consumers shopping in stores and online, but expect the 'Total Retail' package" (24 February 2014), online: < www.pwc.com/ca/en/media/release/2014-02-26-canadian-consumers-shopping-stores-online-expect-total-retail-package-jhtml > , and 22% of online purchases were software (in 2012, according to Statistics Canada, 42% of online shoppers purchased online books, magazines and newspapers, 35% purchased music, while 24 percent purchased software. See Statistics Canada, "The Daily", online: < www.statcan.gc.ca/daily-quotidien/131028/t131028a001-eng.htm >).

¹⁶¹ See *MIAR*, *supra* note 159, s. 1; *MCPA*, *supra* note 36, s. 1(1).

¹⁶² *MCPA*, *supra* note 36, s. 129(2).

¹⁶³ The Manitoba Law allows consumers to cancel the contract anytime before delivery, and requires businesses to refund all sums paid within 30 days after the cancellation, while consumers have 30 days to return the products after accepting delivery. *MCPA*, *supra* note 36, s. 129(1).

to consumers' recourse to chargebacks are virtually identical to those provided by the *Template*.¹⁶⁴

Ontario

Guided by the *Template*, Ontario added several provisions to its *Consumer Protection Act (OCPA)* to include protections for consumers who engage in internet transactions.¹⁶⁵ Like Alberta and Saskatchewan, Ontario restricted the application of its online consumer protection legislation to sales of products or services for which the consumer pays more than \$50.¹⁶⁶ It also excluded several types of businesses,¹⁶⁷ such as businesses providing accommodations,¹⁶⁸ businesses offering products and services through public auction,¹⁶⁹ and businesses selling perishable food.¹⁷⁰ The *OCPA* disclosure requirements and cancellation obligations essentially reflect the *Template's* provisions.¹⁷¹

Under the *Template*, the reversal of the credit card charges is practically automatic once a consumer requests a chargeback, but in Ontario, credit card issuers have a discretionary right to refuse reversal if, after investigation, the issuer determines that the consumer is not entitled to cancel the agreement or demand a refund.¹⁷²

Quebec

In 2006, Quebec added provisions dealing with distance contracts to its *Consumer Protection Act*.¹⁷³ Although these amendments were based on the *Template*, the new provisions are not limited to internet transactions; they also apply to telemarketing and contracts concluded by mail.¹⁷⁴ While the Quebec *Consumer Protection Act* and associated regulations do not limit their application to transactions over a certain dollar value, they expressly exclude several types of contracts, such as contracts for the sale of products likely to deteriorate rapidly and contracts entered into via auction.¹⁷⁵ Quebec's new provisions mostly

¹⁶⁴ *Ibid*, s. 134; *MIAR*, *supra* note 159, s. 5.

¹⁶⁵ *OCPA*, *supra* note 85, ss. 37-40. See Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 57.

¹⁶⁶ *OCPA*, *supra* note 85, s. 37; Ontario Reg. 17/05, s. 31 [*OR 17/05*].

¹⁶⁷ *OR 17/05*, *supra* note 166, ss. 1-9.

¹⁶⁸ *Ibid*, s 4.

¹⁶⁹ *Ibid*, s 5.

¹⁷⁰ *Ibid*, s 7.

¹⁷¹ *OCPA*, *supra* note 85, s. 40; *OR 17/05*, *supra* note 166, s. 32.

¹⁷² *OCPA*, *supra* note 85, s. 99(5). Ontario legislature deviated from the requirements of the *Template* and adopted an approach consistent with the American *Fair Credit Billing Act*, 15 USC §1601 (1974). See Deturbide, *Consumer Protection Online*, *supra* note 117 at 29.

¹⁷³ *OCPA*, *supra* note 53, ss. 54.1-54.16.

¹⁷⁴ Quebec, National Assembly Journals des débats de la Commission des institutions (Hansard), 37th Leg., 2nd Sess., Vol. 35, No. 67 (5 December 2006), online: < www.assnat.qc.ca/fr/travaux-parlementaires/commissions/ci-37-2/journal-debats/CI-061205.html > .

replicate the requirements of the *Template* with respect to disclosure requirements, copy of the contract, cancellation, and reversal of credit card charges.

Since 2016, Quebec provides consumers and merchants with a neutral, confidential, secure, and free platform to resolve disputes online: PARLe. Developed by the Université de Montréal's cyberjustice laboratory and adapted to the needs of the Consumer Protection Office, it enables consumers and businesses to negotiate and, where appropriate, use the services of an independent mediator. To initiate a claim through PARLe, the dispute must be of a civil nature and involve one of the participating businesses. Claims requests must be approved by the Consumer Protection Office before an agent of the Office can send the consumer an e-mail with the information necessary for the creation of an account on PARLe.

Newfoundland and Labrador

In 2009, Newfoundland adopted a new *Consumer Protection and Business Practices Act*, and incorporated the substantive rights and obligations of the *Template* under the sections relating to distance sales contracts,¹⁷⁶ and distance service contracts.¹⁷⁷ The Newfoundland *Consumer Protection and Business Practices Act* does not expressly exclude certain types of businesses or transactions from its application, and its provisions closely resemble the *Template*.¹⁷⁸

Nova Scotia

Between 2001 and 2002, Nova Scotia amended its *Consumer Protection Act* and adopted the *Internet Sales Contract Regulation* to incorporate the requirements of the *Template*.¹⁷⁹ Nova Scotia online consumer protection legislation departs from the *Template* in that it specifies that it does not apply to products and services that are immediately downloaded or accessed using the internet.¹⁸⁰ All sales of virtual products and services are thereby excluded from its application. Transactions where the total amount payable by the consumer is less than \$50 are also excluded under the *Regulation*.¹⁸¹ One other distinction that is worth noting is that the Nova Scotia *Regulation* does not require that businesses provide consumers with an express opportunity to review the contract

¹⁷⁵ *Regulation respecting the application of the Consumer Protection Act, (Consumer Protection Act)*, Quebec Reg. c. P-40.1, r. 3, s 6.1 [*QRCPA*].

¹⁷⁶ *NLCPBPA*, *supra* note 83, ss. 28-35.

¹⁷⁷ *Ibid*, ss 35.1-35.16.

¹⁷⁸ *Ibid*, s 2.

¹⁷⁹ *NSCPA*, *supra* note 106; *Internet Sales Contract Regulation*, N.S. Reg. 91/2002 [*NSISCR*].

¹⁸⁰ *NSCPA*, *supra* note 106, s. 21W(a).

¹⁸¹ *NSISCR*, *supra* note 179, s. 2.

before the transaction is concluded. Otherwise, Nova Scotia legislation mirrors the *Template*.

New Brunswick and Prince Edward Island

As of March 2018, New Brunswick and Prince Edward Island have not yet passed consumer protection laws that deal expressly with internet commerce.

In sum: The Template achieved a degree of legislative harmony

While most Canadian provinces have adopted specific legislation to deal with online consumer transactions, not every province covers all types of internet sales. British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia exclude low value transactions from the application of their consumer protection legislation. Two provinces — Nova Scotia and Manitoba — also exclude sales of virtual products. Other provinces restrict the application of their internet-specific provisions by excluding certain types of contracts such as auction sales and sales of perishable products.¹⁸²

That said, the *Template* achieved a degree of consistency across provincial jurisdictions. As a matter of fact, although the scope of application differs, the substantive protections put forward by the *Template* are found in the consumer protection legislation of eight provinces. As a result, consumers purchasing apps for their mobile phones or ordering appliances online would benefit, at least in theory, from the same protections in most Canadian provinces. However, there is little to no hard data on whether current legislation is actually effective in protecting consumers. The following empirical study was designed to test if substantive consumer protection provisions succeeded in establishing a safe and predictable online marketplace.

PART II: Evaluation of the Online Marketplace

2.1 Research Purpose

Although the type and scope of online consumer protection legislation varies between provinces, the consumer protection measures of the *Template* have made their way into eight provinces' legislation. The *Template's* provisions as adopted by British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland were tested. Three research questions were asked: (1) Do merchants comply with the legal requirements of the Canadian jurisdictions in which they conduct business? (2) Do businesses adapt their terms and conditions to fit the requirements of Canadian provinces that prohibit certain types of clauses? (3) Do particular business characteristics (such as size, products

¹⁸² See Quebec, National Assembly Journals des débats de la Commission des institutions (Hansard), 37th Leg., 2nd Sess., Vol. 39, No. 37 (8 December 2006), online < www.assnat.qc.ca/en/travaux-parlementaires/commissions/ci-37-2/journal-debats/CI-061208.html > .

offered, and place of incorporation) make businesses more or less likely to comply with consumer protection legislation?

The following section identifies and explains the substantive consumer protection provisions that were tested, as well as the three factors hypothesized to affect businesses' degree of compliance. This methodology section is followed by the results section, which describes findings on overall compliance, observance of disclosure requirements, compliance with requirements regarding the consumer contract, compliance with cancellation obligations, and compliance with requirements regarding businesses' terms and conditions. The data gathered made it possible to assess the limits of current legislation and offer recommendations to improve e-businesses and online consumers' experiences.

2.2 Methodology

To test e-businesses' compliance with Canadian consumer protection laws, the obligations imposed by all eight Canadian provinces that have enacted internet-specific consumer protection legislation were identified. There are in total 17 distinct obligations businesses must fulfill when selling to consumers in each of these provinces.¹⁸³ These requirements are referred to in this study as the dependent "factors" or "variables". Since all the purchases were made from Quebec or Ontario, the wording used by these two provinces was adopted.

The obligations can be divided into three categories, based on the time at which the obligation must be fulfilled. The first 11 requirements deal with businesses' obligations before the conclusion of the contract. Under the first category, businesses must make available on their websites certain information about their company and about the products they are selling, so that consumers can make an informed decision about their online purchases.

The second category includes three requirements that must be fulfilled after the conclusion of the contract. Businesses are required to provide consumers with a copy of their online contract and other particulars related to the sale.

The third category includes three requirements that arise only when businesses fail to comply with their online obligations and the buyer cancels the contract.¹⁸⁴ Businesses are required to acknowledge a consumer's cancellation request and to refund all sums in a timely manner.¹⁸⁵

To test businesses' compliance with these requirements, products or services from 101 different websites were purchased.¹⁸⁶ When a situation permitting the cancellation of a purchase arose, cancellation of the transaction and a refund

¹⁸³ However, the scope and wording are sometimes different between provinces.

¹⁸⁴ Broadly stated, when businesses fail to fulfill one of their obligations regarding disclosure of information, or when they fail to provide consumers with a copy of the contract, consumers are entitled to request the cancellation of the online agreement.

¹⁸⁵ For time frames see Chapter II.

¹⁸⁶ Purchases were made from 2013 to 2015. In 2017, a random sample of 34 of the retailers previously studied revealed that they have not changed their contract terms or practices.

were requested. The selected websites represent the 12 most popular retail industries for online purchases in Canada:¹⁸⁷ travel; recreational goods; appliances and housewares; communication services; apparel, clothing and footwear; computers and electronics wholesale; jewellery; music, videos and movies; books and newspapers; mobile phones applications; internet information providers; software and virtual commodities.¹⁸⁸

This study tested businesses' compliance and not websites' compliance. Since some businesses sell their products and services through multiple websites,¹⁸⁹ each website was linked to its managing business to ensure that businesses were evaluated only once.¹⁹⁰

No purchases were made from businesses that limited their activities to people residing outside Canada.

¹⁸⁷ Statistics Canada, "E-commerce: Shopping on the Internet", by Larry McKeown & Ben Veenhof (Ottawa: Statistics Canada, 27 September 2010), online: < www.statcan.gc.ca/daily-quotidien/100927/dq100927a-eng.htm > [*E-commerce: Shopping on the Internet*]; Canadian Internet Registration Authority (CIRA), "Internet Factbook (2016)", online: < www.cira.ca/sites/default/files/public/Ecommerce-Factbook-March-2016.pdf > [*CIRA's Internet Factbook: The state of e-commerce in Canada*].

¹⁸⁸ The industry to which a business belongs appears as one of the independent variables in the database link to the study.

¹⁸⁹ For example, after analyzing the Best Buy and Future Shop websites, it became clear that these websites were identical: same prices, same purchasing procedures, same terms and conditions, etc. When the managing business of these websites was identified, it became clear that the same company owned both websites (and both stores). To avoid duplication of data in this analysis, only one of these two websites was selected: Bestbuy.com. Websites such as Kijiji, Etsy and Ebay were also excluded because they do not themselves sell products. They are marketplaces where sellers and buyers come together to transact business autonomously and pay a percentage of their sales to the online marketplace owner. At first blush, Amazon seems to operate in a similar fashion because it has opened its platform to third party sellers. However, its compliance was tested because, unlike with Etsy, Kijiji and Ebay, I was able to purchase products Amazon sells as an independent merchant on its own platform.

¹⁹⁰ Four different methods were used to identify the business operating each website. The first method was simply to read the terms and conditions or the "About Us" section on the website. Three-quarters of the websites analyzed included the name of the business in these sections. For the remaining websites, the "WHOIS" tool of the Canadian Internet Registration Authority's (CIRA) website was used to find the name of the entity that registered the domain. When I could not find any relevant information on the CIRA website, the Canadian Intellectual Property Office's (CIPO) website was consulted to find the name of the registrant or applicant, i.e., the name of the person who registered the website's name as a trade-mark. The information found on CIPO and CIRA websites was always validated with the information available on other websites or databases such as Industry Canada, Registraire des entreprises de Québec (REQ), and Million Dollar Database. For instance, the company behind the website Voyagesaprixfou.ca was found by looking up the website name on CIPO. The record revealed that the registered trade-mark design was identical to the design on the website. The name of the website on REQ was also verified: the record showed that the website Voyagesaprixfou.ca is owned by the company Agence De Voyage Mont St-Hilaire Inc; and that the trade-mark applicant is a shareholder and the president of Agence de Voyage Mont St-Hilaire. On the basis of this

All of the obligations were treated equally and were assigned the same value, so that each business would get an overall compliance score out of 17, a separate score for the first 14 obligations, and another separate score for the cancellation requirements.

To be coded as having complied with a disclosure requirement, e-businesses had to ensure that the information was provided in a manner that made it accessible, accurate, clear and comprehensible¹⁹¹ to the average consumer.¹⁹² They also had to present the information in a prominent manner. This means that the required information had to be distinguishable from the rest of the website (such as being presented in a different font size or color) and had to be brought expressly to the consumer's attention. For example, when businesses placed the required information at the bottom of a webpage buried among other links, or in a smaller font than the rest of the webpage, or when the link leading to the information did not function properly, then businesses were not given a point for their disclosure obligations.¹⁹³

In addition to providing consumers with clear, accurate and accessible information, businesses had to take appropriate measures to ensure that consumers had in fact accessed the information (for example, by clicking an "I Agree" button before proceeding to place an order) and were able to retain and print it.¹⁹⁴

information, it was possible to draw reasonable inferences with respect to the name of the company operating Voyagesaprixfou.ca. In cases where the first three methods failed, an email was sent directly to the website administrator asking for collaboration.

¹⁹¹ *BCBPCCA*, *supra* note 76, s. 46(2); *AISCR*, *supra* note 98, s. 4(2)(a); *SCPBPR*, *supra* note 102, s. 3-6(2)(a); Manitoba does not have a clarity requirement with regard to internet agreements; *OCPA*, *supra* note 85, ss. 5(1); *QCPA*, *supra* note 53, s. 54.4 al.2; *NLCPBPA*, *supra* note 83, s. 29(2); *NSISCR*, *supra* note 179, s. 4.

¹⁹² Each website selected for this study was analyzed from the point of view of the average consumer as defined by the Supreme Court of Canada in *Richard v. Time*, *supra* note 114, at paras. 65-74.

¹⁹³ For example, before making travel arrangements on SignatureVacations.com, consumers must acknowledge the terms and conditions by ticking a box that reads "I have read and accept the terms and conditions". When tested, the link leading to the terms and conditions displayed a blank page. Even if the link was presented in a prominent manner, the business did not bring the information in its terms and conditions expressly to the consumer's attention, so it failed to comply with its disclosure obligations, online: < www.signaturevacations.com > [see Appendix A]. Since businesses have access to information and have the necessary expertise to evaluate the reliability of a given technology, as well as the ability to limit and plan for the risks created by electronic commerce better than consumers, they should bear the risk of technology failures. Besides, if losses associated with online transaction technologies are not allocated to online merchants, there will be little incentive for further improvement of electronic commerce technologies.

¹⁹⁴ *BCBPCCA*, *supra* note 76, s. 47(2)(a); *AISCR*, *supra* note 98, s. 4(2)(b); *SCPBPR*, *supra* note 102, s. 3-6(2)(b)(i); *MCPA*, *supra* note 36, s. 129(2); *OCPA*, *supra* note 85, ss. 5(2), 38(3); *QCPA*, *supra* note 53, s. 54.4 al.2; *NLCPBPA*, *supra* note 83, s. 30(2)(a).

References made to interactions with customer service representatives serve as anecdotal data of a company's actual practices, and it should be noted that the fact that only one purchase was made from each company might create an inaccurate picture of a company's standard practices.

The following table explains the 11 requirements that must be fulfilled before an online contract is entered into. Businesses obtained one point for each requirement they met.

Table 1: Requirements that must be fulfilled before contract formation

1	<p>Did the merchant disclose its name and any other name under which it conducts business?¹⁹⁵</p> <p>In order to secure a point with regard to this requirement, businesses had to disclose their name and any other name under which they conduct business. This could be done through their terms and conditions, as long as these were brought to the attention of the consumer.¹⁹⁶ Elements taken into consideration: size of the font, color of the font and accessibility of the information.</p>
2	<p>Did the merchant disclose the address of the premises from which it conducts business?¹⁹⁷</p> <p>To obtain a point, the street address from which the merchant conducts its business had to be easily accessible on the main web page or on any subsequent page viewed prior to conclusion of the transaction. Businesses that prominently displayed a “contact us” tab that led to the relevant information were coded as having complied with the address disclosure requirements. However websites with a “store locator” tab were not deemed to comply because this requirement was understood¹⁹⁸ as requiring that businesses provide the address from which</p>

¹⁹⁵ *BCBPCPA*, *supra* note 76, ss. 46(1)(a), 19(a); *AISCR*, *supra* note 98, s. 4(1)(a)(i); *SCPBR*, *supra* note 102, s. 3-6(1)(a); *MIAR*, *supra* note 159, s. 3(1)(a); *OR 17/05*, *supra* note 166, s. 32(1); *QCPA*, *supra* note 53, s. 54.4(a); *NLCPBPA*, *supra* note 83, ss. 29(1)(a), 24(1)(a); *NSISCR*, *supra* note 179, s. 3(a).

¹⁹⁶ Like most websites, YourFolks.com disclosed the business's name in its terms and conditions. The link to access these terms appeared—in a much smaller font—under the button “proceed to secure payment”: therefore, this disclosure of information did not meet the “prominence standard” and the business failed to satisfy its disclosure obligation, online: <www.yourfolks.com> .

¹⁹⁷ *BCBPCPA*, *supra* note 76, ss. 46(1)(a), 19(b); *AISCR*, *supra* note 98, s. 4(1)(a)(ii); *SCPBR*, *supra* note 102, s. 3-6(1)(a); *MIAR*, *supra* note 159, s. 3(1)(b); *OR 17/05*, *supra* note 166, s. 32(2); *QCPA*, *supra* note 53, s. 54.4(b); *NLCPBPA*, *supra* note 83, ss. 29(1)(a), 24(1)(b); *NSISCR*, *supra* note 179, s. 3(b).

¹⁹⁸ Provisions regarding the disclosure of the address are all based on the *Internet Sales Contract Harmonization Template*. British Columbia, Alberta, Saskatchewan and Manitoba use the *Template*'s wording “the supplier's business address, and, if different, the supplier's mailing address”. Newfoundland legislation, on the other hand, only mentions “business address”, whereas Quebec refers to “the merchant's address”, and defines the notion of address as being “the place of his establishment or office indicated in the contract”. As for Ontario, it requires the disclosure of “the address of the premises

	they conduct their online activities. ¹⁹⁹ For the same reason, providing consumers with only a post office box did not satisfy the address requirement. Elements taken into consideration: size of the font, size of the tab, color of the font and accessibility of the information.
3	<p>Before the contract was concluded, did the merchant disclose its telephone number and, if available, any other contact information?²⁰⁰</p> <p>Businesses were given a point if a contact telephone numbers was displayed in a prominent manner on a web page before the conclusion of the contract. Businesses were considered to have fulfilled their obligation if a “contact us” tab or the terms and conditions were brought to the attention of the consumer. All available phone numbers were tested to verify if, in fact, the business could be reached using the contact information provided.²⁰¹ Elements taken into consideration: size of the font, size of the tab, color of the font, accessibility of the information and accuracy of the information.</p>

from which the supplier conducts business”. The first theory of interpretation — textualism — reveals that if taken in context according to their plain meaning, these provisions only refer to one address: the address of the supplier. If online stores are distinguishable from their namesake physical stores, then merchants cannot not be seen as complying with this requirement if they provide consumers with all the physical stores’ addresses without identifying the one that deals with their online business. If we were to turn to a purposive interpretation of the provisions (this second theory of interpretation is not a substitute for the plain meaning of words, in fact it should only be used to determine legislative intention where statutory language is obscure or ambiguous), this would show that the goal of this requirement is to facilitate the communication between consumers and businesses. This interpretation is moreover supported by the fact that the following requirements mention other ways in which the consumer can contact the supplier. If businesses do not have a physical address where consumers can turn to when they have a problem with their online purchases, then they should disclose that, because by displaying only a list of their physical stores (when these stores are of no use for online buyers), they confuse consumers.

¹⁹⁹ For example, Sears, The Bay and Forever 21 have a “store locator” tab on their website, but give no other information as to the address from which their online business is conducted. When a cancellation was requested by email, the request was denied. For these three businesses, the physical stores were visited to provide an explanation of the situation. Representatives said that the physical stores do not deal with online purchases and that the online department should be contacted by email.

²⁰⁰ *BCBPCPA*, *supra* note 76, ss. 46(1)(a), 19(c), 46(1)(b); *AISCR*, *supra* note 98, s. 4(1)(a)(iii); *SCPR*, *supra* note 132, ss. 7(b), (c); *MIAR*, *supra* note 159, s. 3(1)(c); *OR 17/05*, *supra* note 166, s. 32(2); *QCPA*, *supra* note 53, s. 54.4(c); *NLCPBPA*, *supra* note 83, ss. 29(1)(a), 24(1)(b), 29(1)(b); *NSISCR*, *supra* note 179, s. 3(c).

²⁰¹ On June 21, 2013, the phone system governing the phone number provided on Toys R Us’ website had been hacked and was out of service for several days. As a result, Toys R Us failed to meet this disclosure requirement. This conclusion can seem severe given that everyone’s systems go down at some point, but considering that the phone system was inoperable for several days, that the website did not display any information respecting this issue, and that no alternative phone number was provided, Toys R Us could not be coded as complying with this disclosure obligation because consumers were unable to reach the support service by phone during at least one week.

4	Before the contract was entered into, did the merchant provide the consumer with a detailed description of the products or services? ²⁰²
	This obligation was satisfied when businesses presented consumers with detailed information, depending on the type of product or service. In some cases, this meant specifying the size, weight, color and components of the product. In others, it required disclosing the product's compatibility with other devices ²⁰³ and whether or not the product needed batteries or any other element to function properly. In other instances, businesses had to explain how to use the product. ²⁰⁴ Elements taken into consideration: relevance of the information for the average consumer and accessibility of the information.
5	Before the contract was entered into, did the merchant provide the consumer with an itemized list of prices for the products and services to be supplied to the consumer, including taxes and shipping charges, customs duties or brokerage fees? ²⁰⁵
	To satisfy this requirement, any sum charged to the consumer must have been previously disclosed. Businesses had to provide consumers with an itemized list of all charges, including the cost of products/services and any additional charges payable to a third party, such as customs duties, delivery fees, taxes and brokerage fees. Elements taken into consideration: accessibility and accuracy of the information.
6	Before the contract was entered into, did the merchant provide the consumer with a detailed statement of the terms of payment: total amount to be paid/amount of instalments/applicable rate/total cost of credit...? ²⁰⁶
	To meet this requirement, in addition to providing consumers with an itemized list of prices, businesses had to disclose the total amount to be paid by the consumer

²⁰² *BCBPCPA*, *supra* note 76, s. 46(1)(c); *AISCR*, *supra* note 98, s. 4(1)(a)(iv); *SCPR*, *supra* note 132, s. 7(d); *MIAR*, *supra* note 159, s. 3(1)(d); *OR 17/05*, *supra* note 166, s. 32(3); *QCPA*, *supra* note 53, s. 54.4(d); *NLCPBPA*, *supra* note 83, s. 29(1)(c); *NSISCR*, *supra* note 179, s. 3(d).

²⁰³ Among other things, businesses had to disclose software's compatibility with smartphones, computers or tablets to meet this requirement.

²⁰⁴ For example, businesses selling Bitcoins and Linden dollars had to explain how to exchange and use these virtual commodities that do not share the same legal status of a currency. See Nathaniel Popper, "In the Murky World of Bitcoin, Fraud Is Quicker Than the Law", *The New York Times* (6 December 2013) A1; Canada Revenue Agency, "What you should know about digital currency", (Ottawa: CRA, 5 November 2013), online: < <http://www.cra-arc.gc.ca/nwsrm/fctshts/2013/m11/fs131105-eng.html> > .

²⁰⁵ *BCBPCPA*, *supra* note 76, ss. 46(1)(a), 19(f)(g)(h); *AISCR*, *supra* note 98, s. 4(1)(a)(v-vi); *SCPR*, *supra* note 132, ss. 7(e), (f); *MIAR*, *supra* note 159, s. 3(1)(f); *OR 17/05*, *supra* note 166, s. 32(4); *QCPA*, *supra* note 53, s. 54.4(e)(f); *NLCPBPA*, *supra* note 83, s. 24(1)(g); *NSISCR*, *supra* note 179, s. 3(f).

²⁰⁶ *BCBPCPA*, *supra* note 76, ss. 46(1)(a), 19(i)(j); *AISCR*, *supra* note 98, ss. 4(1)(a)(vii),(ix); *SCPR*, *supra* note 132, ss. 7(g), (i); *MIAR*, *supra* note 159, ss. 3(1)(h-j); *OR 17/05*, *supra* note 166, s. 32(5); *QCPA*, *supra* note 53, s. 54.4(g); *NLCPBPA*, *supra* note 83, ss. 29(1)(a), 24(1)(g); *NSISCR*, *supra* note 179, s. 3(g).

	under the contract including shipping charges and taxes. Elements taken into consideration: accessibility and accuracy of the information.
7	Before the contract was entered into, did the merchant disclose the currency in which amounts under the contract are payable, if not in Canadian dollars? ²⁰⁷ When the currency was not specified, businesses received a point only if the total amount disclosed matched the credit card statements (on which purchases appear in Canadian currency). When the amounts differed, and no extra charge was added, it was concluded that the business had failed to disclose the currency in which prices were expressed on the website. Elements taken into consideration: accessibility of the information and accuracy of the information.
8	Before the contract was entered into, did the merchant disclose the date when the goods are to be delivered or the services are to begin? ²⁰⁸ To comply with this obligation, businesses had to disclose the date by which, or the time within which their contractual obligations were to be performed. In certain instances such as sales of products protected by digital rights management systems (DRM), ²⁰⁹ or services available for a limited period of time and subject to automatic renewal, this requirement meant that businesses had to explain when the subscription to a certain service would start and end. Businesses failed to comply with this requirement if the information provided did not allow the average consumer to understand the scope of their obligations. ²¹⁰ In other cases,

²⁰⁷ *BCBPCPA*, *supra* note 76, s. 46(1)(d); *AISCR*, *supra* note 98, s. 4(1)(a)(viii); *SCPR*, *supra* note 132, s. 7(h); *MIAR*, *supra* note 159, s. 3(1)(h); *OR 17/05*, *supra* note 166, s. 32(13); *QCPA*, *supra* note 53, s. 54.4(h); *NLCPBPA*, *supra* note 83, s. 29(1)(d); *NSISCR*, *supra* note 179, s. 3(h). The *Template*, British Columbia, Alberta, Manitoba, Nova Scotia and Newfoundland require that businesses disclose the currency in which amounts owing under the contract are payable. The other provinces — Saskatchewan, Ontario and Quebec — presume that the currency displayed on websites is in Canadian dollars. Thus, they only require that businesses disclose the currency when it is not displayed in Canadian dollars. Since businesses' compliance was tested from Quebec and Ontario, their version of this requirement was adopted.

²⁰⁸ *BCBPCPA*, *supra* note 76, s. 4; *AISCR*, *supra* note 128, s. 4(1)(a)(x); *SCPR*, *supra* note 132, ss. 7(j), (k); *MIAR*, *supra* note 159, s. 3(1)(k); *OR 17/05*, *supra* note 166, s. 32(8); *QCPA*, *supra* note 53, s. 54.4(i); *NLCPBPA*, *supra* note 83, ss. 29(1)(a), 24(1)(j-k); *NSISCR*, *supra* note 179, s. 3(j).

²⁰⁹ Digital rights management systems, also known as technological protection measures (TPMs), allow content owners to use technological resources, instead of contract terms, to prevent users from enjoying a particular product that otherwise they could legally enjoy. For example, some online rental websites prevent consumers from accessing a selected movie 48 hours after it has been rented. The consumer cannot try to save the movie and watch it later. When 48 hours have elapsed since the rental occurred, the movie simply becomes unavailable. For a discussion of digital rights management systems in contract law, see Radin, "Regulation by Contract, Regulation by Machine", *supra* note 132; Michael Risch, "Virtual Rule of Law", (2009) 112:1 W Va L Rev 1; Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and The Rule of Law* (New Jersey: Princeton University Press, 2013) at 46; Gabriel-Arnaud Berthold, *L'influence des mécanismes électroniques de gestion des contrats (MEGC) sur le modèle traditionnel* (forthcoming).

	businesses had to provide consumers with an approximate delivery date in order to comply with this disclosure requirement. ²¹¹ Elements taken into consideration: accessibility and accuracy of the information.
9	<p>Before the contract was entered into, did the merchant provide the consumer with the mode of delivery, the name of the carrier and the place of delivery?²¹²</p> <p>Businesses were given a point if they provided consumers with all the relevant information concerning delivery such as the mode of shipping, the place of delivery and/or the name of the carrier. For businesses selling tangible products, this requirement meant that in addition to mentioning the place of delivery, businesses had to specify the method of transportation and provide the consumer with the name of the shipping agent. For businesses selling intangible products or offering services, this requirement meant that the website had to specify the place where consumers could access the products or services. For example, to comply with this requirement, the website had to indicate that the virtual calling card would be delivered to the email address provided by the consumer,²¹³ or that the consumer could access the purchased item on the website's virtual platform.²¹⁴</p> <p>Elements taken into consideration: accessibility and accuracy of the information.</p>
10	<p>Before the contract was entered into, did the merchant provide the consumer with the applicable cancellation, rescission, return, exchange and refund policies?²¹⁵</p> <p>This disclosure requirement can be fulfilled any time before the transaction is completed. This means that businesses requiring acceptance of their terms and conditions prior to granting access to their website,²¹⁶ as well as those demanding</p>

²¹⁰ For example, Skype was coded as having failed to comply with the time of delivery requirement. Skype sells access for 24 hours to its premium service. Nowhere does the website indicate when the 24 hours' access starts. Is it upon purchase, or once the consumer uses the service for the first time? Can the 24 hours be used over a long period of time, such as one hour per day for 24 days, or is the service available for 24 consecutive hours? Only once the transaction was completed did the consumer receive a message stating that for the next 24 hours, the consumer had access to Skype Premium, online: < www.skype.com > .

²¹¹ Given that all transactions were cancelled before products could be received, whether or not the estimated delivery dates were accurate could not be tested.

²¹² *BCBPCPA*, *supra* note 76, s. 46(1)(e); *AISCR*, *supra* note 98, s. 4(1)(a)(xi); *SCPR*, *supra* note 132, ss. 7(l), (m); *MIAR*, *supra* note 159, s. 3(1)(l); *OR 17/05*, *supra* note 166, ss. 32(9-10); *QCPA*, *supra* note 53, s. 54.4(j); *NLCPBPA*, *supra* note 83, s. 29(1)(e); *NSISCR*, *supra* note 179, s. 3(k).

²¹³ Nobelcom indicated that the virtual phone card number would be sent to the email provided by the consumer, online: < www.nobelcom.com > [see Appendix B].

²¹⁴ Secondlife informed the consumer that the virtual product would be accessible through the virtual platform only, online: < www.secondlife.com > [see Appendix C].

²¹⁵ *BCBPCPA*, *supra* note 76, s. 46(1)(f); *AISCR*, *supra* note 98, s. 4(1)(a)(xii); *SCPR*, *supra* note 132, s. 7(n); *MIAR*, *supra* note 159, s. 3(1)(n); *OR 17/05*, *supra* note 166, s. 32(11); *QCPA*, *supra* note 53, s. 54.4(k); *NLCPBPA*, *supra* note 83, s. 29(1)(f); *NSISCR*, *supra* note 179, s. 3(l).

²¹⁶ Some businesses require consumers to register and accept the terms and conditions

	acceptance of their terms and conditions just before consumers completed their purchases, were considered as having complied with this disclosure requirement. Elements taken into consideration: accessibility and accuracy of the information.
11	Before the contract was entered into, did the merchant provide the consumer with an express opportunity to accept or decline the contract and to correct errors? ²¹⁷
	Immediately before consumers complete their purchases, businesses must meet one last requirement, which is to provide consumers with an express opportunity to accept or decline the contract and to correct any errors. To secure a point with regard to this requirement, businesses had to give consumers a chance to review their order and to correct errors concerning the product, delivery and billing.

Table 2: Requirements that must be fulfilled after contract formation

The following table describes the three obligations businesses must satisfy after consumers complete their purchases. Businesses obtained one point for each requirement they fulfilled.

12	Did the merchant transmit a copy of the contract in writing in a manner that ensures that the consumer is able to retain it? ²¹⁸
	To secure a point with regard to this requirement, businesses could either send a copy of the transaction to the email provided by the consumer or provide them with a printable/downloadable copy of the agreement on the website's interface.
13	Was the copy delivered to the consumer within 15 days of the contract conclusion? ²¹⁹
	To comply with this obligation, businesses had 15 days from the conclusion of the contract to deliver a copy of the agreement or to provide consumers with a printable/downloadable copy of the contract. This could be done by email to an email address that the consumer had given the supplier; by fax to the fax number that the consumer had given the supplier; or by mail to an address that the consumer had given the supplier for providing information related to the agreement.

before having access to their website. Consumers who subscribed to these websites today can purchase a product years later and still be subject to the same terms and conditions.

²¹⁷ *BCBPCPA*, *supra* note 76, s. 46(2)(b); *AISCR*, *supra* note 98, s. 4(1)(b); *SCPBPR*, *supra* note 102, s. 3-6(1)(b)(ii); Manitoba and Nova Scotia do not require businesses to provide consumers with an express opportunity to accept or decline the contract and to correct any errors; *QCPA*, *supra* note 85, s. 38(2); *QCPA*, *supra* note 53, s. 54.5; *NLCPBPA*, *supra* note 83, s. 30(2)(b).

²¹⁸ *BCBPCPA*, *supra* note 76, s. 48(3); *AISCR*, *supra* note 98, s. 5(3); *SCPBPR*, *supra* note 102, s. 3-7; *OR 17/05*, *supra* note 166, s. 33(3); *QCPA*, *supra* note 53, s. 54.7; *NLCPBPA*, *supra* note 83, s. 31(3); *NSISCR*, *supra* note 179, s. 5(2).

²¹⁹ *BCBPCPA*, *supra* note 76, s. 48(1); *AISCR*, *supra* note 98, s. 5(1); *SCPBPR*, *supra* note 102, s. 3-7; *OR 17/05*, *supra* note 166, s. 33(1); *QCPA*, *supra* note 53, s. 54.7; *NLCPBPA*, *supra* note 83, s. 31(1); *NSISCR*, *supra* note 179, s. 5(2).

14	Did the copy of the contract include the consumer's name, the date at which the contract was entered into and all the previously disclosed information? ²²⁰
	In addition to including all the information required under the disclosure obligations in the contract (requirements 1 to 10), businesses had to include the consumer's name and the date on which the contract was entered into in the copy of the agreement.

Upon receiving the cancellation notice, businesses were required to treat the contract as cancelled.²²¹ Some businesses have implemented automated cancellation systems on their websites.²²² These types of systems enable consumers to cancel their transactions, at their discretion, directly online within a given period of time. The time allotted to use the automated cancellation generally varies between one hour²²³ and one month.²²⁴ Having said that, in 14 different instances, businesses' response to cancellation requests based on their noncompliance could not be evaluated because cancellations had to be processed through an automated system.²²⁵

²²⁰ *BCBPCPA*, *supra* note 76, s. 48(2); *AISCR*, *supra* note 98, s. 5(2); *SCPBBPR*, *supra* note 102, s. 3-7; *OR 17/05*, *supra* note 166, s. 33(2); *QCPA*, *supra* note 53, s. 54.6; *NLCPBPA*, *supra* note 83, s. 31(2); *NSISCR*, *supra* note 179, s. 5(1).

²²¹ *BCBPCPA*, *supra* note 76, s. 49(1); *AISCR*, *supra* note 98, ss. 6(1), 8; *SCPBBPR*, *supra* note 102, s. 3-10(1); *MCPA*, *supra* note 36, ss. 129(1), 132(1); *OCPA*, *supra* note 85, s. 94; *QCPA*, *supra* note 53, s. 54.12 al.1; *NLCPBPA*, *supra* note 83, ss. 32, 33; *NSCPA*, *supra* note 106, s. 21AB.

²²² These are the businesses that offer automated cancellation services on their websites: Netflix, Hightail, Sugarsync, Ancestry, Fishpond, Abebooks, Barnes and Noble, SafariBooksonline, Hotel.com, Booking.com, Ncix, Chapters/Indigo, Sammydress, Zazzle, LittleTikes, Mattel, Dx.com, LeFigaro, LeapFrog and Asos.

²²³ Before purchasing a product from Leapfrog.com, it was learned that orders for merchandise can be canceled within one hour of being placed. After the one hour window has expired, the order cannot be canceled. This information appears on Leapfrog's Online Order FAQs webpage, online: < http://www.leapfrog.com/en_ca/support/order_FAQs.html >. Although the instructions to cancel the purchase online were followed immediately after completing the transaction, it was no longer possible to use the automated cancellation process. When Leapfrog's consumer support was contacted, they said that once an order is submitted, it is immediately sent to their warehouse to be picked. Most orders are shipped the same day they are received. This information seemed contradictory with their one-hour window cancellation policy. This being said, Leapfrog's defective automated cancellation process allowed me to test its compliance with the three cancellation obligations.

²²⁴ Netflix and SugarSync.com offer free trials that last between 14 days and one month during which the subscription can be cancelled at any time. LeFigaro.fr also offers a free trial period and the possibility to cancel the subscription for seven days from the date of registration. Although a cancellation request was submitted immediately after the registration, the full amount was charged and the company refused to refund the purchase because LeFigaro claimed that the request was never processed. The fact that LeFigaro's automated cancellation system did not function properly enabled me to test LeFigaro's compliance with the three cancellation requirements.

Table 3: Requirements that flow from the cancellation of the contract

The following table details the three obligations that arise after a consumer requests the cancellation of the contract.

15	<p>Did the merchant cancel the contract after receiving the consumer's cancellation notice, and refund the consumer when applicable?²²⁶</p> <p>Businesses had to acknowledge the cancellation request and cancel the contract upon receiving the notice from the consumer. As required by law,²²⁷ the notice indicated an intention to cancel the agreement.²²⁸ The notice also included the legal reasons why the business had to cancel the transaction and refund the consumer, although there is no such obligation under Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Newfoundland legislation.²²⁹</p>
16	<p>Did the merchant refund to the consumer any payment made under the agreement or any related agreement, within 15 days after the day the consumer gave notice to the supplier cancelling the contract?²³⁰</p> <p>Within 15 days after receiving the cancellation notice, businesses had to refund all sums previously paid by the consumer under the contract, including the initial shipping fees. If the business does not refund the consumer within 15 days of the cancellation notice, it incurs the risk of having to pay additional fees if the consumer requests a chargeback.²³¹</p>

²²⁵ These are the 14 businesses that had an operational automated cancellation system: Netflix, Hightail, Sugarsync, Ancestry, Fishpond, Abebooks, Barnes and Noble, SafariBooksonline, Chapters/Indigo, Sammydress, Zazzle, LittleTikes, Mattel, and Asos.

²²⁶ *BCBPCPA*, *supra* note 76, s. 49(1); *AISCR*, *supra* note 98, ss. 6(1), 8; *SCPBPR*, *supra* note 102, ss. 3-12(1), 3-12(1); *MCPA*, *supra* note 36, ss. 129(1), 132(1); *OCPA*, *supra* note 85, ss. 40, 94; *QCPA*, *supra* note 53, s. 54.12 al.1; *NLCPBPA*, *supra* note 83, ss. 32, 33; *NSCPA*, *supra* note 106, s. 21AC.

²²⁷ *BCBPCPA*, *supra* note 76, s. 54; *AISCR*, *supra* note 98, s. 8(2); *SCPBPR*, *supra* note 102, s. 3-10(2); *MCPA*, *supra* note 36, s. 132(3); *OCPA*, *supra* note 85, s. 92(2); *QCPA*, *supra* note 53, s. 54.11; *NLCPBPA*, *supra* note 83, s. 32; *NSCPA*, *supra* note 106, s. 21AA, *NSISCR*, *supra* note 179, s. 7.

²²⁸ Considering that the goal was to replicate consumers' experiences online, even though the legal basis for the cancellation request was mentioned, the cancellation notice was very brief [see Appendix D].

²²⁹ Only British Columbia requires that the notice state the reason for cancellation. See *BCBPCPA*, *supra* note 76, s. 54(2).

²³⁰ *BCBPCPA*, *supra* note 76, s. 50; *AISCR*, *supra* note 98, s. 10(1); *SCPBPR*, *supra* note 102, s. 3-12(1); *OCPA*, *supra* note 85, s. 96(2); *MCPA*, *supra* note 36, s. 133(1); businesses have 30 days after the cancellation notice to refund consumers; *OR 17/05*, *supra* note 166, s. 79(1); *QCPA*, *supra* note 53, s. 54.13 al.1; *NLCPBPA*, *supra* note 83, s. 33; *NSCPA*, *supra* note 106, s. 21AC.

²³¹ See MasterCard "Chargeback guide (2013)", online: < www.mastercard.com/us/merchant/pdf/TB_CB_Manual.pdf > .

17	Did the merchant charge the consumer for returning the products or for cancelling the agreement? ²³²
	Businesses were not allowed to charge a cancellation fee to consumers and had to assume the reasonable return costs of a cancelled purchase. Businesses that asked consumers to pay for returning the products had to refund the return postage.

Table 4: Requirements regarding businesses' terms and conditions

As a complement to the global compliance study, businesses' terms and conditions were analyzed to determine whether they took into consideration the fact that some Canadian provinces prohibit certain types of clauses or render them null.²³³ While most common law provinces empower courts to void or alter consumer agreements through the doctrine of unconscionability,²³⁴ Quebec courts do not share the same latitude. Quebec's statutes and regulations expressly proscribe certain types of clauses and render them automatically void. Assuming that courts apply the statutory language in a consistent manner, this type of legislation has the advantage of establishing precisely what is permissible and what is not. On the other hand, the unconscionability doctrine requires the examination of the circumstances surrounding the contract formation, and calls for a case-by-case analysis of the parties' situation. Hence, even an analysis of how courts in common law provinces view certain types of clauses in consumer contracts would not offer a definite answer as to their validity. Furthermore, since businesses offering their products online generally have a nationwide reach, testing their terms and conditions against the strictest rules appears legitimate, since complying with the strictest standard assures compliance with all Canadian rules.

For the purposes of this analysis, six types of clauses were targeted: class action waiver, arbitration clause, applicable law clause, choice of forum clause, exclusion of liability clause, and penalty clause.²³⁵ For this section, every business started with six points. For each prohibited clause a business included in its terms and conditions, one point was deducted.

²³² *BCBPCPA*, *supra* note 76, ss. 50, 51(5); *AISCR*, *supra* note 98, s. 10(5); *SCPBPR*, *supra* note 102, ss. 2, 3-12(1), 3-12(5); *MCPA*, *supra* note 36, s. 133(5); *OCPA*, *supra* note 85, ss. 95-96(1)(a), *OR 17/05*, *supra* note 166, s. 81(4); *QCPA*, *supra* note 53, s. 54.13 al. 3; *NLCPBPA*, *supra* note 83, s. 34(5); *NSISCR*, *supra* note 179, s. 21AC(5).

²³³ While some provinces render arbitration clauses, class action waivers, and choice of forum clauses in consumer contracts void, other provinces give these clauses full effect. See *Rudder v. Microsoft Corp.*, 1999 CarswellOnt 3195, 47 C.C.L.T. (2d) 168, 40 C.P.C. (4th) 394 (Ont. S.C.J.), additional reasons 1999 CarswellOnt 3570, 106 O.T.C. 381; *Kanitz v. Rogers Cable Inc.*, 2002 CarswellOnt 628, 58 O.R. (3d) 299, 21 B.L.R. (3d) 104 (S.C.J.).

²³⁴ See e.g. *Unconscionable Transactions Act*, R.S.A. 2000, c. U-2, ss. 2, 3.

²³⁵ A penalty clause requires consumers to pay a fixed sum in case they breach the business' terms and conditions.

In 2009, the Quebec legislature discussed the impact of prohibited clauses in consumer contracts and came to the conclusion that, in their terms and conditions, businesses should indicate before each prohibited clause that this particular stipulation is inapplicable in Quebec.²³⁶ With s. 19.1 of the *Consumer Protection Act*,²³⁷ Quebec opted for a compromise between a requirement that businesses draft contracts specifically for Quebec consumers, and an industry proposal to add a mention at the beginning or at the end of the contract stating that some clauses might not apply to all consumers.²³⁸ Businesses were granted one point for every prohibited clause followed by a statement indicating that such a clause is inapplicable in Quebec.

1	<p>Is there a class action waiver in the contract?²³⁹</p> <p>Example: “You agree that any and all disputes, claims, and causes of action arising out of, or connected with, the Program shall be resolved individually, without resort to any form of class action.”²⁴⁰</p>
2	<p>Is there an arbitration clause in the contract?²⁴¹</p> <p>Example: “All disputes arising under or relating to this Agreement shall be resolved by final and binding arbitration conducted before a single arbitrator pursuant to the commercial arbitration rules of Resolute Systems, Inc. that were in force as of April 30, 2008.”²⁴²</p>
3	<p>Is there an “applicable law” clause in the contract?²⁴³</p> <p>Example: “This agreement is governed by the laws of the United States of America and the State of California, as applicable notwithstanding any conflict of laws provision.”²⁴⁴</p>

²³⁶ Quebec, National Assembly Journals des débats de la Commission des relations avec les citoyens (Hansard), 39th Leg., 1st Sess., Vol. 41, No. 10 (4 November 2009), online: < www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CRC-39-1/journal-debats/CRC-091104.html#debut_journal > .

²³⁷ *QCPA*, *supra* note 53, s. 19.1: “A stipulation that is inapplicable in Quebec under a provision of this Act or of a regulation that prohibits the stipulation must be immediately preceded by an explicit and prominently presented statement to that effect”.

²³⁸ See Louis Borgeat (President of the Quebec Consumer Protection Office) at 10 in Quebec National Assembly Journals des débats de la Commission des relations avec les citoyens (Hansard), 39th legislature, 1st Sess., Vol 41 No. 10 (4 November 2009), online: < www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CRC-39-1/journal-debats/CRC-091104.html#debut_journal > .

²³⁹ *QCPA*, *supra* note 53, s. 11.1.

²⁴⁰ Example taken from Hotels.com terms and conditions, online: < ca.hotels.com > .

²⁴¹ *QCPA*, *supra* note 53, s. 11.1.

²⁴² Example taken from Justcloud.com terms and conditions, online: < www.justcloud.com/terms > .

²⁴³ *QCPA*, *supra* note 53, s. 19.

4	<p>Is there a choice of forum clause in the contract?²⁴⁵</p> <p>Example: “Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in San Jose, California and the parties hereby irrevocably consent to the personal jurisdiction and venue therein.”²⁴⁶</p>
5	<p>Is there a stipulation whereby the merchant is liberated from some or all of the consequences of his own acts?²⁴⁷</p> <p>Example: “To the maximum extent permitted by applicable law, in no event shall Sugarsync or its suppliers be liable for any special, incidental, indirect, punitive, or consequential damages whatsoever (and with respect to free accounts and Sugarsync suppliers, for any direct damages), including, but not limited to, damages for: loss of profits, loss of confidential or other information or data, business interruption, personal injury, loss of privacy, failure to meet any duty, negligence, and any other pecuniary or other loss whatsoever, arising out of this agreement or in any way related to the use of or inability to use the software or the service even if Sugarsync or any supplier has been advised of the possibility of such damages.”²⁴⁸</p>
6	<p>Is there a stipulation requiring the consumer, upon the non-performance of his obligation, to pay a fixed amount or percentage of charges, penalties or damages, other than the interest accrued?²⁴⁹</p> <p>Example: “Your Early Termination Fee will be \$14.95 for failure to complete your contract term.”²⁵⁰</p>

Factors that might have an impact on businesses’ degree of compliance

One hundred and one businesses were classified in the data set according to three characteristics that were hypothesized as likely to influence businesses’ degree of compliance with consumer protection laws. While factors such as skills, resources, and national culture²⁵¹ affect businesses’ behavior (including their

²⁴⁴ Example taken from Leapfrog.com terms and conditions. See online: < www.leapfrog.com/en/home/legal/legal.html > .

²⁴⁵ *QRCPA*, *supra* note 175, s. 25.8.

²⁴⁶ Example taken from Justcloud.com terms and conditions. See online: Justcloud < www.justcloud.com/terms > .

²⁴⁷ *QCPA*, *supra* note 53, s. 10; *QRCPA*, *supra* note 175, s. 25.4.

²⁴⁸ Example taken from Sugarsync.com terms and conditions, online: < www.sugarsync.com/terms > .

²⁴⁹ *QCPA*, *supra* note 53, s. 11.1; *QRCPA*, *supra* note 175, s. 25.7.

²⁵⁰ Example taken from Justcloud.com terms and conditions, online: < www.justcloud.com/terms > .

²⁵¹ The values of the society in which businesses operate reflect on the way business is conducted. For a discussion on Germany’s Mittelstand companies, see Jack Ewin, “Eluding the Debt Trap: German Small Businesses Reflect Country’s Strength”, *The*

degree of compliance with legal requirements),²⁵² they are difficult to measure. The following observable and quantifiable characteristics were therefore identified and investigated to determine whether there is a relationship between these characteristics and businesses' degree of compliance: (1) place of incorporation,²⁵³ (2) size,²⁵⁴ and (3) types of products offered²⁵⁵. These characteristics were used as independent variables.

New York Times (14 August 2012) B1; Joanna Heath, "Germany's road to success", *Australian Financial Review* (14 December 2013) at 16.

²⁵² Graeme Salaman, *Understanding business: organisations* (New York: Routledge, 2001); Colin Gray, *Enterprise and Culture* (New York: Routledge, 1998); Jose M. Barrutia & Carmen Echebarria, "A New Internet Driven Internationalisation Framework" (2007) 27:7 *The Service Industries Journal* 923 at 937; Gregory N. Mankiw and Benoît Pépin, *Principes de microéconomie* (Laval: Beauchemin, 2004); Hervé Defalvard, *Fondements de la microéconomie*, (Bruxelles: De Boeck, 2003).

²⁵³ The information regarding businesses' place of incorporation was validated with websites such as Industry Canada, Registraire des entreprises du Québec (REQ), and Million Dollar Database. Given the amount of regulation imposed on Canadian-incorporated businesses, they were expected to have a greater understanding of the Canadian legal environment than businesses incorporated elsewhere and, consequently, to have higher compliance scores. Businesses were given one of two codes based on whether they are [1] registered in Canada; or [0] are not.

²⁵⁴ Considering that selling goods over the internet potentially subjects sellers to a myriad of jurisdictions, each with its own consumer protection laws, this exposure was expected to widen the difference between small and large businesses' financial resources and therefore to be reflected in businesses' compliance scores. See Industry Canada, "Online Consumer Protection: A study on Regulatory Jurisdiction in Canada", by Roger Tassé and Maxime Faille (Ottawa: Office of Consumer Affairs, 2001) at 33 [Tassé & Faille, "A study on Regulatory Jurisdiction in Canada"]. Businesses were given one of two codes based on their size: [0] for businesses with fewer than 100 employees and [1] for businesses with 100 or more employees.

²⁵⁵ The physical connection required by tangible products and real world services circumscribes businesses' activities within a defined territory; whereas businesses that offer only virtual products are not geographically constrained because the products they offer are accessible from practically any place with internet connection. See Susanne Royer, *Strategic Management and Online Selling: Creating Competitive Advantage with Intangible Web Goods* (New York: Routledge, 2005), at 6-7. Businesses offering tangible products and real world services were expected to have a better control and understanding of their legal obligations and thus a higher compliance score. Business that offered tangible products or real life services were coded as requiring a physical connection [1] even if they also sold intangible products. To be coded as not requiring a physical connection [0], businesses had to exclusively offer products or services entirely consumable online. Reference to "online services" refers mostly to data storage and database usage, and excludes all types of services that involve the physical shipping of products, such as tailor-made suits; and all types of services that would normally entail a meeting between the consumer and the service provider, such as house cleaning or hotel booking services. In contrast with online services, real world services cannot be directly consumed online even if they are arranged via the internet. In this study, real world services make reference to hotel booking, car rental or vacation planning. Intangible or virtual products refer to products that do not require physical transportation, and that

To determine which types of businesses are more or less likely to comply with their legal obligations, businesses in each category were compared against the scores obtained from (1) their compliance with the disclosure requirements; (2) their compliance with the opportunity to review the contract requirement; (3) their compliance with requirements regarding the copy of the contract; (4) their compliance with the cancellation requirements; and (5) their compliance with the requirements regarding their terms and conditions. The independent t-test was used to compare the scores of businesses selling tangible products or real life services and those of businesses selling only virtual commodities or offering online services; the scores of large and small businesses; and the scores of businesses incorporated in Canada and those incorporated abroad.

Statistically significant results suggesting that relationships exist between characteristics of businesses and their degree of compliance were expected. Determining whether such relationships exist was crucial to the underlying objective of this research: to advance solutions that address the reasons why businesses do not comply with consumer protection requirements.

2.3 Results

Data analysis began with a general assessment of businesses’ compliance. Businesses’ scores as a whole were considered to determine how many businesses fully complied with their online obligations. The first finding was striking: not a single business complied fully with its legal obligations. Since all businesses failed to comply with at least one of the first fourteen requirements, they all triggered the consumer’s right to cancel the contract.

Businesses’ scores based on the three characteristics identified above (independent variables) were compared to determine whether there was a relationship between these characteristics and the degree of businesses’ compliance. The following sections provide an analysis of the findings as well as descriptive and inferential statistics for the five groups of legal requirements analyzed.

Table 5: Compliance with disclosure requirements

1	Did the merchant disclose its name and any other name under which it conducts business?
	Of the 101 businesses in the data set, 63 displayed their names in a prominent manner on their websites or in their terms and conditions. The analysis shows that for at least one purchase out of three (37.6%), the consumer could not easily identify the business with whom she was contracting.

consumers can enjoy directly over the internet or on electronic devices. Reference to such products includes e-books, mobile apps, anti-malware software, and virtual phone cards. Unlike virtual commodities, tangible products are commodities consumers could purchase from physical stores. Tangible products purchased for this study range from toys and appliances to electronics and apparel.

2	Did the merchant disclose the address of the premises from which it conducts business?
	More than three-quarters of all businesses (76.2%) did not provide consumers with an address. And yet, this information is essential to determine in which country a business is located. ²⁵⁶ This being said, the obligation of providing consumers with a fixed address can seem counterintuitive for businesses that value mobility and flexibility. Businesses selling online do not necessarily see themselves as being attached to a particular location. Their consumer support office might be located in country A, their warehouse in country B, and their headquarters in country C.
3	Before the contract was concluded, did the merchant disclose its telephone number and, if available, any other contact information?
	58 businesses (57.4%) disclosed their telephone number. If the disclosure requirement would have read “or any other contact information”, the percentage would have been much higher since almost all of the businesses provided an email address. However, the statutes expressly require a telephone number.
4	Before the contract was entered into, did the merchant provide the consumer with a detailed description of the products or services?
	The percentage of businesses that complied with this requirement was very high. 92 businesses (91.1%) offered a detailed description of the products or services they were offering. Moreover, the four cancellation requests based on the lack of information relating to the products and services were welcomed positively by businesses. ²⁵⁷
5	Before the contract was entered into, did the merchant provide the consumer with an itemized list of prices for the products and services to be supplied to the consumer, including taxes and shipping charges, customs duties or brokerage fees?
	Despite the fact businesses selling intangible products or offering online services had a less onerous obligation because they did not have to mention shipping charges, customs duties or brokerage fees, the percentage of businesses that fulfilled this disclosure requirement was lower (62.16%) than that of businesses

²⁵⁶ Prices displayed in Canadian currency and .ca domains are no guarantee that a business is located in Canada. As a matter of fact, a .ca domain does not automatically mean that a business is located in Canada (nor, for that matter, does it guarantee that the business is a Canadian-registered corporation). Since November 8, 2000, persons who wish to register a .ca domain name or sub-domain name must meet certain Canadian Presence Requirements. Only corporations under the laws of Canada or any province or territory of Canada can obtain a .ca domain. If a foreign corporation registers a trade-mark in Canada, it can also obtain a .ca domain. This being said, the Canadian Internet Registration Authority does not verify systematically whether applicants meet these criteria. The Authority sets the policies, rules and procedures to obtain a .ca domain, and conducts random verifications of applicants. See CIRA, online: <www.cira.ca > .

²⁵⁷ Refunds for the purchased products and services were requested in these four online stores: TriveniSarees, Skype, Gamersgate and Staples.

	selling tangible products (87.5%). Overall, more than the three quarters of businesses (78.2%) complied with this requirement.
6	<p>Before the contract was entered into, did the merchant provide the consumer with a detailed statement of the terms of payment: total amount to be paid/amount of instalments/applicable rate/total cost of credit/etc.?</p> <p>Nearly one business in ten (8.9%) provided the consumer with one price and actually charged a different price, without obtaining the consumer’s consent. Businesses that did not mention the total amount to be paid by consumers neglected to include taxes or other shipping charges. However, the two cancellation requests based on this requirement were accepted promptly.²⁵⁸</p>
7	<p>Before the contract was entered into, did the merchant disclose the currency applicable to the transaction, if not in Canadian dollars?</p> <p>83.2% of businesses disclosed the currency in which the amounts were payable, if not in Canadian dollars. Since many businesses did not disclose the currency used for their pricing, it was necessary to wait until receiving a credit card statement to confirm that those prices were in fact in Canadian dollars.</p>
8	<p>Before the contract was entered into, did the merchant disclose the delivery date?</p> <p>A total of 39 businesses (38.6%) did not mention when the products would be delivered to the consumer or when the services would start. Almost 60% (23/39) of the non-complying businesses were selling exclusively intangible products or online services, so low compliance might be due to the fact that virtual products generally become available to consumers immediately after their purchase, as in the case, for example, of mobile phone applications. Within this industry, only 14.28% of businesses disclosed the delivery time. Among the complying businesses, fourteen (37.83%) offered exclusively virtual products,²⁵⁹ while 48 (75%) businesses offered exclusively tangible products or real life services.</p>
9	<p>Before the contract was entered into, did the merchant provide the consumer with the mode of delivery, the name of the carrier and the place of delivery?</p> <p>Most failures to comply with this requirement were due to the fact businesses did not identify the carrier, or did so only after the transaction was concluded. A total of 61 businesses (60.4%) neglected to mention at least one of the following: mode of delivery, name of the carrier or place of delivery.</p>
10	<p>Before the contract was entered into, did the merchant provide the consumer with the applicable cancellation, rescission, return, exchange and refund policies?</p> <p>Even if 84 businesses (83.16%) posted the applicable cancellation, rescission, return, exchange and refund policies on their website, only 41 businesses (40.6% of all 101 businesses, and 48.80% of the 84 businesses that had terms and</p>

²⁵⁸ Gasbijoux and iTunes were the two merchants that accepted cancellation requests.

²⁵⁹ SecondLife is a game that offers a complex virtual playground. Consumers who become players can purchase sophisticated products for their avatar, such as land, clothes, furniture, hair products, etc. The delivery mode and time of these items is always specified.

	conditions) brought the terms and conditions to the attention of the consumer with sufficient prominence and clarity as to comply with this requirement.
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Disclosure requirements seemed to create frustration among e-businesses. Many did not see how their failure to comply with a disclosure requirement could result in the consumer's right to request the cancellation of the transaction. Frequently, they refused to refund the purchase on this basis.²⁶⁰ One business representative claimed that the cancellation request based on the business' failure to disclose its address was done in bad faith.²⁶¹ Another business refused to refund the purchase, claiming that its website complied with all regulations,²⁶² and that even if the link leading to the terms and conditions appeared among other links at the bottom of the web page, consumers bore the responsibility of finding the link and reading the terms and conditions before following through with the online transaction.

Place of incorporation

Although businesses incorporated in Canada obtained a better average score than businesses incorporated elsewhere,²⁶³ the t-test results revealed that this difference was not significant. One cannot therefore conclude that businesses incorporated in Canada are more or less likely to comply with their disclosure obligations than businesses incorporated abroad.²⁶⁴ These results were surprising since the first laws dealing with online consumer transactions in Canada were enacted more than 15 years ago. One would have expected that Canadian merchants would have incorporated the disclosure requirements into their business practices by now.

While size did not appear to matter,²⁶⁵ the type of product sold had an impact on the degree of compliance. The t-test showed that businesses selling tangible products were significantly more likely to comply with their disclosure obligations than businesses offering only intangible products or online services.²⁶⁶

²⁶⁰ These are all the businesses that refused to refund a purchase on this basis: Travelocity.ca, Hotel.com, Voyagesaprixfous.ca, Debenhams.com, LeapFrog.com, Thebay.com, Cicicallingcard.com, Googleplay, Samsungapps, Transunion.ca, Dropbox.com, Threattracksecurity.com, Careeraim.com, Consumerequifax.com, Signature.ca, ToysRus.ca, Leon.ca, Thebrick.com, Sears.ca, Beyondtherack.com, Forever21.com, Ettika.com, Cityleases.com, mesaieux.com, Bestbuy.ca.

²⁶¹ Cicicallingcard.com [see Appendix E].

²⁶² Signature.ca.

²⁶³ Score of businesses incorporated in Canada: 6.48/10. Score of businesses incorporated outside Canada: 6/10.

²⁶⁴ $t(99) = -1.373$, $p > .05$.

²⁶⁵ Score of small businesses: 6.09/10. Score of medium/large businesses: 6.38/10; $t(99) = .786$, $p > .05$.

²⁶⁶ Score of businesses selling tangible products (physical merchants): 6.63/10. Score of

The results also revealed that certain disclosure requirements are complied with more than others. For example, while few businesses disclosed their address (10.8% of virtual businesses and 31.1% of physical businesses), nearly all of them (94.6% of virtual businesses and 89.1% of physical businesses) provided consumers with a detailed description of the products and services offered. Given the limitations of this study, it is not possible to attribute motivations to merchants. However, businesses' compliance with disclosure requirements could be linked with their perception of what they see as relevant information considering the type of products or services they offer.²⁶⁷

Table 6: Compliance with the requirement to give an opportunity to review the contract

11	<p>Before the contract was entered into, did the merchant provide the consumer with an express opportunity to accept or decline the contract and to correct errors?</p> <p>Only 35 businesses (34.7%) offered consumers the opportunity to review the entire contract before completing the transaction. Some businesses offered the express opportunity to accept or decline the contract but did not provide the consumer with the opportunity to correct errors, thus they failed to comply with this requirement.</p>
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Businesses that complied with this requirement tended to use a template covering all aspects of this obligation. A representative example looked like this:²⁶⁸

Review and place your order. We want you to be happy with your order so please review your delivery and payment options and check everything in your shopping cart.

Use the “**Edit**” buttons if you want to change your order.

Click “**Place Order**” to complete your purchase.

We will confirm your order when it’s successful and provide you with a reference number. This will also be sent to your email address.

Figure 1: Opportunity to review the contract

businesses offering virtual products or online services (virtual merchants): 5.70/10. $t(99) = -2.633, p < .05$.

²⁶⁷ While information regarding address and telephone number could be seen as essential in the brick and mortar world, the disclosure of these elements appears to be irrelevant in the online environment.

²⁶⁸ Nike virtual store, online: < http://help-en-eu.nike.com/app/answers/detail/a_id/27889/p/3897 > .

The place of incorporation did not appear to have any impact on the degree of compliance with respect to these requirements.²⁶⁹ However, the t-test revealed that small businesses are significantly less likely to comply with this requirement than medium or large businesses.²⁷⁰ This result supports the hypothesis that smaller businesses lack or are unwilling to spend the necessary resources to ensure effective implementation of the required instruments to properly fulfill their online legal obligations. Similarly, businesses offering online services and virtual products were significantly less likely to comply than those offering tangible products and real life services.²⁷¹ This result may be due to the fact that trial periods have become common in online consumer transactions, especially for virtual products and online services. While most trial periods require that consumers submit their payment information at the beginning of the trial, the contract is formed and the client is billed only once the trial is over. As a result, consumers are not provided with the express opportunity to review their subscription, or to accept or decline the contract right before the transaction is concluded. In fact, most of the time, they are automatically enrolled if they do not manifest their intention to unsubscribe during the trial period.

Table 7: Compliance with requirements regarding provision of a copy of the contract

12	Did the merchant transmit a copy of the Internet agreement in writing or in a manner that ensures that the consumer is able to retain, print and access it for future reference?
	The highest compliance rate goes to this requirement. Of the 101 businesses in the data set, 94 businesses (93.06%) provided the consumer with a copy of the contract in a printable and retainable format.
13	Was the copy delivered to the consumer within 15 days of the contract conclusion?
	94.62% of the 94 businesses that provided consumers with a copy of the contract sent by email within the 15 days following the contract conclusion. This means that, after displaying a copy of the contract or their webpage, 6.38% of businesses never transmitted the copy to consumers or did so after the specified timeframe. Overall, 87.1% of businesses (88/101) fulfilled this requirement.
14	Did the copy of the contract include the consumer's name, the date at which the contract was entered into and all the previously disclosed information?
	No other requirement was overlooked as much as the obligation to include the consumer's name, the date at which the contract was entered into and all the

²⁶⁹ $t(99) = -.510$, $p > .05$. Score of businesses incorporated in Canada: .37/1. Score of businesses incorporated outside Canada: .32/1.

²⁷⁰ $t(99) = 2.964$, $p < .05$. Score of small businesses: .15/1. Score of medium/large businesses: .44/1.

²⁷¹ $t(99) = -2.118$, $p < .05$. Score of physical merchants: .42/10. Score of virtual merchants: .22/1.

	previously disclosed. Only 19 businesses (18.81%) included all the required information in the copy of the contract.
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While the place of incorporation and the size of businesses did not seem to have an impact on their degree of compliance,²⁷² the t-test revealed that businesses selling tangible products or real-life services are significantly more likely to comply with these three obligations than virtual businesses.²⁷³

Table 8: Compliance with cancellation requirements

15	Did the merchant cancel the contract after receiving consumer's cancellation notice?
	Of the 101 businesses in the data set, 62 businesses (61.38%) cancelled the contract as per the consumer request. It needs to be noted that twenty businesses offered an automated cancellation service online or offered a free trial during which the consumers could cancel at anytime without the need to give any reason. ²⁷⁴ Of these 20 businesses, six had defective automated cancellation services. ²⁷⁵ As a result, 14 cancellations were obtained without the need to submit a cancellation request based on businesses' failure to comply with consumer protection legislation. ²⁷⁶
16	Did the merchant refund to the consumer any payment made under the agreement or any related agreement, within 15 days after the day the consumer gave notice to the supplier cancelling the contract?
	All of the businesses that accepted the cancellation request refunded the purchase price in a timely manner. Therefore, the 62 businesses that complied with the previous requirement also complied with this one.
17	Did the merchant charge the consumer for returning the products or for cancelling the agreement?
	Not all the businesses that agreed to refund the purchase price were willing to pay for the shipping fees or administrative charges associated with the cancellation. Of the 62 businesses that complied with the previous requirements, thirteen (20.9%) charged a cancellation fee or refused to refund the shipping charges. In

²⁷² Score of businesses incorporated in Canada: 2/3. Score of businesses incorporated outside Canada: 1.95/3; $t(99) = -0.370$, $p > .05$; $t(99) = 1.097$, $p > .05$. Score of small businesses: 2.03/3. Score of medium/large businesses: 1.88/3.

²⁷³ $t(99) = -2.719$, $p < .05$. Score of physical merchants: 2.11/3. Score of virtual merchants: 1.76/3.

²⁷⁴ Netflix, Hightail, Sugarsync, Ancestry, Fishpond, Abebooks, Barnes and Noble, Safaribooksonline, Hotel.com, Booking.com, Ncix, Chapters/Indigo, Sammydress, Zazzle, LittleTikes, Mattel, Dx.com, LeFigaro, LeapFrog and Asos.

²⁷⁵ Hotel.com, Booking.com, Ncix.com, Dx.com, LeFigaro.fr and Leapfrog.com.

²⁷⁶ Compliance of the following businesses could not be tested because the cancellation was processed through their automated system: Hightail, Sugarsync, Ancestry, Abebooks, Barnes and Noble, Safaribooksonline, Chapters/Indigo, Sammydress, Zazzle, LittleTikes, Mattel, Dx.com, Netflix and Asos.

	addition to these 13 businesses, 26 businesses that refused to refund the purchase imposed payment of the cancellation fee or the shipping charges on the consumer. In total, 39 businesses (38.6% failed to comply with this requirement.
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Businesses' average score for the cancellation obligations is 1.84/3 (61.3%). In other words, for almost two purchases out of five (38.6%), businesses refused to refund the entire purchase price or charged a cancellation fee. Approximately 60% of businesses refunded the payments made under the contract but 20% of these businesses charged a cancellation fee or refused to pay for returning the products. As a result, only 48.51% of all purchases made pursuant to this study did not incur extra costs for the consumer. With regard to the cancellation obligations, none of the categories revealed a significant difference between businesses' compliance scores.

Table 9: Compliance with requirements regarding businesses' terms and conditions

1	Is there a class action waiver in the contract?
	20 businesses (19.80%) included a class action waiver in their terms and conditions.
2	Is there an arbitration clause in the contract?
	27 businesses (26.73%) included an arbitration clause.
3	Is there an "applicable law" clause in the contract?
	74 businesses (73.26%) included an "applicable law" clause.
4	Is there a choice of forum clause in the contract?
	62 businesses (61.38 %) included a choice of forum clause.
5	Is there a stipulation whereby the merchant is liberated from the consequences of his own acts?
	76 businesses (75.24 %) included a clause excluding all liabilities.
6	Is there a stipulation requiring the consumer, upon the non-performance of his obligation, to pay a stipulated fixed amount or percentage of charges, penalties or damages, other than the interest accrued?
	10 businesses (9.90 %) included a "penalty" clause.
7*	Before each prohibited stipulation, did the business include a clause stating that this particular stipulation is inapplicable in Quebec?
	Only one business (0.09%) included a clause stating that the applicable law clause, the choice of forum clause and the exclusion of liability clause in the contract were all inapplicable in Quebec.

With respect to businesses' terms and conditions results, the average score was 3.30/6 (55.11%). Three businesses included all the prohibited clauses in their terms and conditions, while 12 businesses achieved a perfect score of 6/6. However this last finding must be treated cautiously, as 11 of these 12 businesses had no terms and conditions to begin with.

While the place of incorporation²⁷⁷ and the size of businesses²⁷⁸ did not appear to affect their compliance, the t-test revealed that physical businesses are significantly less likely to include prohibited or regulated clauses in their terms and conditions than virtual businesses.²⁷⁹

In Sum: The current legal framework does not provide consumers with a predictable marketplace

The findings of this study cast doubt on the effectiveness of the current legal framework to provide consumers with a predictable marketplace. The results reveal that businesses transacting with consumers online tend to disregard legal requirements.

Bearing in mind that all cancellation requests were made on the basis that online businesses had failed to fulfill one or more of their legal obligations,²⁸⁰ the fact that even once aware of this failure 51.48% of businesses still refused to refund the purchase price or charged a fee upon cancellation, is at least surprising. The non-compliance of businesses resulted in extra costs: in more than 50% of the purchases made for this study, the consumer was required to pay for the shipping charges, or the exchange rate costs, or the taxes, or pay a cancellation fee to the online merchant.

With respect to businesses' terms and conditions, 99% of businesses included at least one prohibited or regulated clause. The terms businesses include in their contracts have the potential to confuse consumers with respect to their rights.²⁸¹ For example, after purchasing a product from a British supplier, a refund was requested based on the business' failure to comply with Ontario consumer protection legislation. The business denied the cancellation request and made reference to its terms and conditions stating that "the contract must be construed and governed according to English law and the English courts shall have

²⁷⁷ $t(99) = -1.798, p > .05$. Score of businesses incorporated in Canada: 3.53/6. Score of businesses incorporated outside Canada: 2.98/6.

²⁷⁸ $t(99) = -.255, p > .05$. Score of small businesses: 3.36/6. Score of medium/large businesses: 3.28/6.

²⁷⁹ $t(99) = -2.226, p < .05$. Score of physical merchants: 3.56/6. Score of virtual merchants: 2.86/6.

²⁸⁰ Failure (1) to comply with their disclosure obligations; (2) to give an express opportunity to review the contract; or (3) to provide a copy of the contract in the specified time frame.

²⁸¹ Justin Malbon, "Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms" (22 November 2013) *Social Science Research Network*, at 2, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413289> [Malbon, "Developing Fair Standard Form Contract Terms"].

exclusive jurisdiction”. When the credit card company was contacted to obtain a reversal of the charges that were initially charged to the credit card account, company representatives said that because the company was incorporated in England, English law applied to the contract and there was nothing they could do to help me.²⁸² Even if the consumer could recover the consideration from the merchant as an action in debt, the fact that the credit card company rejected the chargeback application, together with the fact that the contract stipulates that English law applies to the contractual relationship, make it unlikely that an average consumer would pursue a claim beyond this point. The chargeback mechanism remains interesting in theory, but for it to be truly useful, consumers must know where they stand with regards to their rights. The presence of prohibited or regulated clauses in consumer contracts does not allow this.

The data gathered did not permit me to conclude that a relationship exists between businesses’ place of incorporation and their level of compliance. While a complete explanation of this result would require additional studies, the analysis of consumer protection legislation suggests that, since consumer protection varies from province to province,²⁸³ the fact that a business is incorporated in Canada is not a guarantee that it will be familiar with all 10 provinces’ legislative frameworks.

Similarly, size does not seem to matter when comes time to compare businesses’ overall degree of compliance with their online requirements. That said, it is worth noting that with respect to businesses’ obligation to provide consumers with the express opportunity to review the contract, there was a significant difference between small and medium to large businesses. Small businesses’ lower scores could be explained by the fact that their websites do not follow a particular template. Most small businesses send a personalized confirmation email before processing the order, whereas medium to large businesses tend to have an automated system that cannot be easily stopped once the consumer presses ‘I Agree’.

The results also revealed a significant difference in the way that virtual and physical businesses respond to their legal obligations. The comparatively low scores of businesses selling intangible products shows virtual businesses’ tendency to depart from what is expected from them under the *Template*.²⁸⁴ Given the limitations of this study, it is impossible to identify with certainty the reasons behind this difference, but one could speculate that the result is due to the fact that the *Template* was not originally drafted with virtual businesses’ particularities in mind. As a result, practices adopted by businesses selling intangible products or offering online services conflict with the approaches

²⁸² Call made to MasterCard consumer service on July 24, 2013.

²⁸³ Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 42.

²⁸⁴ Disclosure score: 5.70/10 (compare to 6.63 for businesses selling tangible products); Opportunity to review the contract score: 0.22/1 (compared to 0.42/1); Copy of the online contract: 1.76/3 (compared to 2.11/3). However, the cancellation obligation did not reveal a significant difference between businesses.

encouraged by the *Template*. For example, only 45.9% of virtual businesses disclosed their phone number, yet they all disclosed their email address and most of them offered consumer support via live chat. Similarly, a high percentage of virtual businesses failed to disclose the time of delivery (62.2%), but since the majority of products that are entirely consumable online are made available to consumers immediately after the transaction is completed, to require that these businesses specify the time of delivery does not appear necessary. Accordingly, any modification and improvement to the actual rules should take into consideration the attributes that are particular to virtual merchants.

PART III: Recommendations — Harmonization and Compulsory online dispute resolution

Modern technology contributes to the greater mobility of entrepreneurs. Online merchants can conduct their business and provide online products and services across jurisdictional lines while on the move. They are no longer tied down to a particular location. For their part, consumers have the ability to shop from anywhere with internet access via their electronic devices. Canadian legislatures must take action if they are to keep up with the rapid pace of change in online commerce, and establish a predictable marketplace for both consumers and businesses.

Canadian provinces need to address jurisdictional issues and substantives rules applicable to e-commerce. Substantive online consumer protection legislation cannot be effective if the law applicable to a particular online transaction cannot be ascertained with certainty or if national courts cannot exercise effective jurisdiction over online merchants.

With respect to the substantive rules applicable to e-commerce, online protection measures and obligations need to be reviewed, as their suitability largely depends on technology. Considering that much has changed since the time the *Template* and provincial laws were drafted, current internet shopping practices are no longer reflected in the legislation. While relying on domestic courts and credit card companies appeared to be the only ways to deal with online consumers' disputes 10 years ago, this is no longer the case. Online dispute resolution is no longer a fiction. Several online dispute settlement mechanisms have been tested across the world.

Finally, and crucially, Canadian legislatures should consider implementing a national compulsory online dispute resolution platform or support private online alternative dispute resolution initiatives, such as arbitration, that would render the legal process more accessible to online consumers and merchants.

3.1 Changes to private international rules: Harmonization and Targeting Approach

Most Canadian provinces have yet to adopt specific jurisdictional rules to determine which court should hear a dispute and which laws should apply to

consumer transactions concluded over the internet. Various approaches have been considered to address jurisdictional issues in e-commerce. These include: the country-of-destination approach, which would allow consumers to always access courts in their home jurisdiction and rely on the protection of their own laws;²⁸⁵ the country-of-origin approach, under which businesses would only be subject to the laws and courts of their own jurisdictions;²⁸⁶ the contractual choice of law and forum approach, which would allow businesses to designate a competent forum and applicable law for disputes arising from its consumer transactions; the deference approach — a variation of the country of origin approach — which would require courts to determine whether the law designated in the contract is applicable to the consumer transaction by considering if the laws selected by businesses provide adequate protection or take away consumers' essential protection; and finally the targeting approach, according to which businesses would have to submit to consumers' home courts and laws if they actively target consumers in that jurisdiction.²⁸⁷

The Uniform Law Conference of Canada combined the deference approach and the targeting approach to develop a method that would help settle private international law issues.²⁸⁸

Rules governing Choice of Forum in consumer contracts

1. In circumstances where:

²⁸⁵ See Innovation, Science and Economic Development Canada, “The Determination of Jurisdiction in Cross-border Business-to-Consumer Transactions”, Office of Consumer Affairs (Ottawa: OCA, 6 September 2002) at 9, online: < www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca01862.html > [OCA, “The Determination of Jurisdiction”].

²⁸⁶ Solution supported by The International Chamber of Commerce (ICC), see International Chamber of Commerce, “Jurisdiction and applicable law in electronic commerce (2001)” at 5, online: < www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2001/Jurisdiction-and-applicable-law-in-electronic-commerce/ > [ICC, “Jurisdiction and applicable law”].

²⁸⁷ This last approach was adopted under section 15 of the *Brussels Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001 of 22 December 2000). The Hague Conference on Private International Law also considered the targeting approach to determine when consumers should be entitled to sue in their home jurisdiction. See Hague Conference on Private International Law, *Electronic Commerce and International Jurisdiction* (2000) at 7, online: < www.hcch.net/upload/wop/jdgm12.pdf > . See more generally OCA, “The Determination of Jurisdiction”, *supra* note 285 at 9-10.

²⁸⁸ It was inspired by art. 3117 CCQ and by the preliminary draft convention to replace the *1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments*. The Hague Conference was unable to reach consensus on the preliminary draft convention, specifically in the area of e-commerce and jurisdiction for consumer contracts and employment contracts. There were recommendations to proceed with an informal process starting with a discussion of a “core area” of possible grounds of jurisdiction. As of 2014, the Working group continues its work towards the preparation of draft provisions for inclusion in a possible future instrument. See online: < www.hcch.net/index_en.php?act=text.display&tid=152 > .

- (a) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction; or
 - (b) the consumer's order was received by the vendor in the consumer's jurisdiction; or
 - (c) the consumer was induced by the vendor to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor;
- the consumer has the option to bring proceedings against the vendor either in the courts of consumer's jurisdiction or in the courts of the vendor's jurisdiction.
2. For the purposes of subsection 1(a), if a vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with consumers resident in a particular jurisdiction, it is deemed not to have solicited business in that jurisdiction.
 3. A vendor may bring proceedings against the consumer only in the courts of the consumer's jurisdiction.
 4. The provisions of section 1 may be varied by agreement only if the agreement:
 - (a) is entered into after the dispute has arisen; or
 - (b) allows the consumer to bring proceedings in courts other than those provided for in section 1.

Rules governing Choice of Law in consumer contracts

1. The parties to a consumer contract may agree that the law of a particular jurisdiction will apply to the consumer contract.
2. No agreement as to the law applicable to the consumer contract will deprive a consumer of the protection to which he or she is entitled under the law of the consumer's jurisdiction provided that:
 - (a) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction; or
 - (b) the consumer's order was received by the vendor in the consumer's jurisdiction; or
 - (c) the consumer was induced by the vendor to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor.
3. If there is no agreement as to the applicable law in a consumer contract, the law of the consumer's jurisdiction shall apply provided that at least one of the conditions set out in section 2 is met.
4. For the purposes of subsection 2(a), if a vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with consumers resident in a particular jurisdiction, it is deemed not to have solicited business in that jurisdiction.

The method put forward by the ULCC specifies the situations where online businesses would have to submit to the laws and to the courts of the consumer's jurisdiction. Since the ULCC's proposed legislation requires interpretation and characterization of various legal concepts, this method would not bring more predictability to the online marketplace, and would risk leading to divergent results.

For instance, there is no general consensus among provinces as to what is to be considered a "solicitation of business in the consumer's jurisdiction", or what are the "necessary steps" for contract formation. Even if all provinces were to adopt the method proposed by the ULCC, outcomes would likely continue to differ among provinces.

Although the proposed legislation would not be ideal,²⁸⁹ inaction would perpetuate legal uncertainty for both online consumers and businesses since the provinces' private international rules do not appear to naturally come into line with one another. Greater predictability and fairness can be achieved through the adoption of harmonized jurisdictional rules across Canada. These rules should take into consideration the purpose of consumer protection laws as well as businesses' concerns regarding the wide array of differing regulatory schemes, so that consumer protection does not result in unreasonable burdens on businesses. Also, to ensure consistency and predictability, the rules should provide objective factors to determine both courts' jurisdiction and the applicable law with respect to online consumer contracts.

When online businesses carry on activities in the consumers' jurisdiction, regardless of whether the activities are to be performed online or offline, Canadian consumers should not be forced to bring their claims in foreign states and they should always benefit from the protection of their home laws. By the same token, businesses that make reasonable attempts to avoid connection with a particular jurisdiction should not be required to submit to its courts or to comply with its laws.

Online merchants should be able to decide whether they wish to conduct business under a particular jurisdiction's legal framework. Failure to clearly express such intention on their website should be interpreted as a sign that they intend to carry on business in the consumer's state. Whenever sellers are deemed to have solicited business in the consumer's jurisdiction, they should be subject to its legal system.

While it is true that consumer protection laws across Canada vary, there are no significant inconsistencies or incompatibilities between provinces' regulatory schemes. Hence, if businesses were to adhere to the highest provincial standards, they would thereby ensure compliance with all Canadian standards without incurring undue additional costs. Since online businesses have the technological means to geographically restrict their activities,²⁹⁰ if they wish to avail themselves

²⁸⁹ See e.g. Tassé & Faille, "A study on Regulatory Jurisdiction in Canada", *supra* note 254 at 29-30.

²⁹⁰ Although technology should facilitate businesses' ability to geographically restrict their

of the commercial opportunities created by the internet, they must also anticipate having to respond to regulatory requirements of other jurisdictions, not just their own.

3.2 Changes to substantive consumer protection rules: Review disclosure obligations; shorten delays; re-evaluate cancellation responsibilities; and develop a redress mechanism applicable to all types of online transactions

Over the last five years, growth in online commerce has been exponential and is expected to continue rising.²⁹¹ However, the quality of the consumer experience in Canada might worsen if provincial legislatures do not intervene. Letting the online marketplace self-regulate is not an option given the wide range of online businesses' practices and activities. It is unlikely that the private sector would develop industry guidelines, model contracts and codes of conduct while taking into account the interests of all internet users.

Canadian provinces should consider the adoption of a national online code of conduct that would provide businesses with a comprehensive picture of their online legal obligations. The code should reflect the current standards of e-commerce regarding delays and technology, and concentrate on the particularities of virtual businesses since they appear to be less inclined to comply with the current consumer protection legislation. For example, the code should address new virtual businesses' trends such as free (or reduced price) trials that automatically convert to a paid subscription at the end of the trial period unless the customer expresses the intention to unsubscribe before the end of the trial,²⁹² or websites that require consumers to register all their payment

marketing and sales activity, online businesses should also consider listing the jurisdictions they wish to exclude, or the jurisdictions they want to direct their products or services to. For example, see the BCBG online store: <www.bcbg.com>, which restricts its shipping to the United States, and the Wells Fargo website: <www.wells-fargo.com>, which specifies that its products and services are intended only for United States residents.

²⁹¹ In 2012, the value of Canadian online shopping reached \$18.9 billion, which constitute growth of 24% since 2010. See Statistics Canada, "Individual Internet use and e-commerce" (Ottawa: Statistics Canada, 2012), online: <www.statcan.gc.ca/daily-quotidien/111012/dq111012a-eng.htm>. Also see EMarketer projection of retail ecommerce sales in Canada 2012-2017, online: <www.emarketer.com/Article/Smaller-Firms-Startups-Boost-Canadas-Ecommerce-Market/1010483>.

²⁹² See Le Figaro, online: <http://boutique.lefigaro.fr/abonnement#xtor=AD-10197-[-][-][le_figaro]-[03052014]>; The New York Times, online: <www.inyt.com/subscriptions/inyt/lp873K7.html?campaignId=46FH8&adxc=246245&adxa=372170&page=homepage.nytimes.com/index.html&pos=TopRight&campaignId=46FH8>; Grammarly, online: <www.grammarly.com/?q=brand&utm_source=google&utm_medium=cpc&utm_campaign=Brand&utm_content=28976363406&utm_term=-grammarly&matchtype=e&placement=&network=g&gclid=CKbo0M7okL4C-Fa19OgodLGC4A>.

information upon their first visit so that subsequent purchases are straightforward and take no more than a few seconds. These practices have a negative impact on businesses' degree of compliance. For instance, in both cases, virtual businesses inevitably fail to provide consumers with an express opportunity to correct errors or decline the transactions.

The code should also include an annual review process to ensure that any discrepancy between the code's requirements and the online reality is quickly addressed. The online code of conduct could also propose fair standard terms developed by lawyers representing consumers' and industry groups' interests, and encourage online businesses to incorporate these balanced terms into their standard consumer contracts.²⁹³ The code of conduct could also provide online businesses with website templates that comply with every aspect of the disclosure requirements. By using one of the proposed website templates, online merchants would ensure that they provide all the required information prominently and in a clear and comprehensible manner. Provinces might also consider requiring that online merchants targeting Canadian consumers post a link or an icon on their main webpage leading consumers to a website that provides them with an overview of their rights under Canadian law as well as information with respect to the redress mechanisms available to them.

Since the *Template* was elaborated more than 14 years ago, one should not expect that its provisions remain fully adequate for the fast-changing online environment. Many provisions must be improved to meet the needs of online consumers and address the particularities of modern online merchants before they are integrated in the online code of conduct.

3.2.1 Review the disclosure of information

Some requirements in the *Template* are outdated, broad, and vague. For example, the "disclosure of information" section does not specify what is meant by a "fair and accurate" description of a product, or what an "express opportunity to accept or decline the contract and to correct errors" entails. This last requirement is the final step before the contract formation. Beyond this point, consumers can no longer change their minds (unless businesses have a policy to this end), since the concept of a "cooling-off" period applicable to most direct sales in Canada was not incorporated in online consumer transaction legislation.²⁹⁴ It is therefore absolutely necessary that provincial legislatures clarify this requirement, so that consumers have the opportunity to fully evaluate their purchases before following through with transactions. Similarly, while the *Template* requires that the "supplier's delivery arrangements" be disclosed, it does not explain what is encompassed by these "arrangements". Accordingly, provinces such as Quebec and Ontario left this requirement out, since they

²⁹³ Malbon, "Developing Fair Standard Form Contract Terms", *supra* note 281 at 17-23.

²⁹⁴ Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 2 at 69-70.

already required the disclosure of the mode of delivery, the name of the carrier, and the place of delivery. Unfortunately, they left out other “delivery arrangements” that are just as important as the place of delivery. Online consumer protection legislation should require that businesses disclose the carrier’s delivery policies, such as the delivery hours, any fees related to unsuccessful delivery attempts and the location of the carrier offices if pick up is necessary. Some major delivery companies will refuse to leave the parcel without a signature but will also refuse to provide consumers with a reasonable range of hours for the delivery.²⁹⁵

For example, Canpar informs consumers that delivery may take place anytime between 8AM and 6PM from Monday to Friday, if after two delivery attempts the consumer is not available to receive the shipment, the parcel will be redirected to the closest Canpar office, which is sometimes located in a different city. Also, in the event that the consumer would like the carrier to attempt another delivery, a fixed fee will be charged to his credit card. Suffice it to say that as convenient as online shopping might initially seem, problems with the delivery can rapidly turn the experience into a costly nightmare. Consumers should be provided with all the essential delivery information before the contract’s conclusion.²⁹⁶

3.2.2 Shorten delays

Delays under the *Template* no longer reflect the standards in e-commerce. Very often, the shipment process starts immediately after the purchase order is sent, and services are scheduled to start shortly after the transaction is concluded. Since the copy of the contract should contain all the relevant information regarding the transaction, it would make sense that the businesses be forced to send a copy within the hours following the formation of the contract. As for the delays regarding delivery, granting businesses 30 days from the delivery date specified in the contract (or from the conclusion of the transaction if no date was specified) to actually deliver the purchased item seems overly generous. For starters, businesses should always be required to give an approximated delivery date or commencement date (one physical business out of four did not disclose a delivery or commencement date). Consumers should not have to wait a month to cancel a transaction when they are not provided with the service or the product

²⁹⁵ See Purolator, online: < www.purolator.com/en/campaigns/smb/purolator-courier-services-shipping-rates.page? > , and Canpar, online: < www.canpar.ca/en/home.jsp > .

²⁹⁶ It is worth noting that according to PricewaterhouseCoopers’s 2013 annual global survey of online shoppers, fast and reliable delivery is a major driver of consumer spending. Hence, more information regarding delivery could enhance consumer confidence in online shopping and result in revenue growth for online merchants. See John Maxwell, “Demystifying the online shopper: 10 myths of multichannel retailing”, PricewaterhouseCoopers (2013) at 32, online: < www.pwc.com/et_EE/EE/publications/assets/pub/10_myths_multichannel.pdf > [Maxwell, “Demystifying the online shopper”].

they ordered. Considering all the circumstances, businesses' grace period should reflect online shopping standards, which tend to vary according to what is purchased, given that purchasing online is also about enjoying a service or a product within a predictable time frame.

3.2.3 Re-evaluate cancellation responsibilities

Once consumers transmit a cancellation notice, the *Template* creates two independent and simultaneous obligations: merchants must refund the purchase price, and consumers must return the contractual subject matter (if tangible products were delivered). While consumers can benefit from two types of recourse, civil action and chargeback, merchants can only turn to civil action when consumers do not comply with their obligations. Although consumer protection laws were not designed to protect merchants, it would be more equitable to request that consumers provide businesses with proof that the purchased item was shipped back before businesses have to issue a refund. In any event, a consumer could turn to the chargeback procedure if the merchant subsequently fails to refund all sums paid in relation to the online transaction.

3.2.4 Develop a redress mechanism applicable to all types of online transactions

Pioneers in the field of online consumer contracts have written that: “the rights given to consumers by [. . .] the *Template* would, in many cases, be hollow consumer protections without some consumer redress for credit card transactions.”²⁹⁷ Since E-wallets are expected to be the most popular payment method globally in 2021, with 46% share of the overall payments market²⁹⁸ current online consumer protection legislation might well become worthless for most online purchases. Notwithstanding the development of a national compulsory online dispute resolution mechanism, provincial legislatures must address other forms of payments and develop a redress mechanism that would apply equally to all online consumer transactions regardless of the type of products, technology and payment method used. Since not all online disputes lend themselves well to online mediation or arbitration, for example when the online business is no longer reachable, the creation of a compensation fund for financial losses sustained by online consumers could serve as an alternative redress mechanism. Unlike chargebacks, such a compensation fund would not be limited to purchases made with credit cards and the amounts granted would not be determined by a commercial party involved in the disputed transaction.

If implemented by all Canadian provinces, these recommendations would enhance the level of consumer protection and would foster a more stable and predictable online environment.

²⁹⁷ Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, supra note 2 at 50.

²⁹⁸ *Global Payments Report 2017*, supra note 133.

3.3 Changes to dispute resolution mechanisms: Adoption of online dispute resolution

Effective consumer protection in electronic commerce requires a redress mechanism applicable to all types of online transactions. Since redress through chargebacks is limited to purchases made with credit cards, and litigation in domestic courts can be time consuming, expensive, and uncertain for both consumers and businesses, as well as raising technical difficulties when the parties are not located in the same jurisdiction, as is common in online commerce, provinces should work toward the development of an online dispute settlement platform.²⁹⁹

Considering that the relationship between the parties to an internet transaction originates online, it would make sense to enable consumers and businesses to resolve disputes arising from their contractual relationships online.

While mediation can be an effective tool to achieve settlements, in cases where businesses and consumers cannot come to an agreement, an online dispute resolution platform should also offer arbitration so that an adjudicator can render an enforceable award. In any event, online mediation should always be compulsory. Given that most consumers tend to shop with a surprisingly small number of online merchants — 2 to 5³⁰⁰ — businesses might be willing to be serious about the mediation process to remain in the circle of preferred retailers. In cases where the value of the services or products purchased is substantial,³⁰¹ arbitration should be presented as an alternative to court. In all other cases, arbitration should be compulsory.

There will be a question as to whether arbitral awards in consumer disputes should be confidential; however, a few observations are in order. First, provincial legislatures should consider the importance of precedents. If most online disputes end up being adjudicated by arbitrators, reported cases about consumer protection may become even scarcer.³⁰² As a result, the advancement of consumer law through the courts will be limited. Second, publishing arbitral awards might serve as an incentive for businesses to comply with their legal obligations up front, and might also have the effect of discouraging vexatious litigants since their names would appear on the record.

As of the time of writing, two Canadian provinces have developed online dispute settlement platforms.³⁰³ However, private companies and governments have increasingly been exploring online dispute resolution schemes.³⁰⁴ For

²⁹⁹ OECD, “Report on Consumer Protection in Online and Mobile Payments”, Digital Economy Papers (2012), at 27, online: < <http://dx.doi.org/10.1785/5k9490gwp7f3-en> > [*OECD Report on Consumer Protection*].

³⁰⁰ Maxwell, “Demystifying the online shopper”, *supra* note 296 at 30-31.

³⁰¹ In determining what is a substantial amount, provinces could consider the maximum monetary limits of small claims courts in Canada to agree on an average amount of approximately \$20,000.

³⁰² Quicklaw LexisNexis reported only 22 judgments in cases involving online purchases by consumers in 2013.

example, in 2001, the European Commission launched FIN-NET, a network of online dispute resolution schemes in the European Economic Area that handles disputes between consumers and financial institutions. In the event that a consumer of one state has a dispute with a business from another jurisdiction, FIN-NET offers to put the consumer in contact with the relevant online dispute resolution scheme and provide him with necessary information.³⁰⁵ Similarly, in March 2013, the European Union Parliament adopted two new legislative instruments making it mandatory for online retailers to post a link on their website redirecting the consumer to a platform from where online dispute resolution services are accessible. Consumers who encounter problems with respect to online purchases will be able to submit a complaint through the dispute settlement platform, in any of the European Union official languages. The online dispute resolution platform is expected to be operational by the end of 2015.³⁰⁶ In Mexico, a public-private partnership developed Concilianet, an online redress system, which has been in operation since 2008.³⁰⁷

These different online dispute settlement schemes could serve as inspiration for Canadian provinces when implementing their own online dispute resolution platforms. Close attention should also be paid to other projects of the Cyberjustice Laboratory, which was established in 1996 at the Université de Montréal. When the Cyberjustice Laboratory established its CyberTribunal project in 1999, it was the world's first experiment in online dispute resolution.³⁰⁸ This project led to the development of software used to set up a website offering dispute resolution services to European consumers. During the course of the project (1999-2001), more than 500 disputes from over 50 countries were resolved. This work provided a socio-cultural and economic analysis of alternative dispute resolution in Europe and led to the establishment of the first online dispute platform: ECODIR (Electronic Consumer Dispute Resolution).

Today, the Laboratory develops software structures to facilitate the online processing of disputes, digitalize files and share them electronically, and establish systems to assist in rendering decisions. The Cyberjustice working groups also research new ways of reengineering the judicial process, and on the integration of alternative dispute resolution methods. The work of the Cyberjustice Laboratory

³⁰³ As mentioned in Part II, British Columbia, through the CRT, provides online dispute resolution services to its consumers and businesses, online: < www.civilresolutionbc.ca > . Quebec also provides online dispute resolution services through PARLe, online: < www.opc.gouv.qc.ca/a-propos/parle/ > .

³⁰⁴ *OECD Report on Consumer Protection*, *supra* note 299 at 27.

³⁰⁵ *Ibid.*, at 26.

³⁰⁶ European Commission, Health and Consumers, Alternative Dispute Resolution, online: < http://ec.europa.eu/consumers/redress_cons/adr_en.htm > .

³⁰⁷ See Profeco website (official consumer protection institution of Mexico), online: < www.profeco.gob.mx > .

³⁰⁸ Cyberjustice Laboratory, online: < <http://site.cyberjustice.ca/en/Presentation> > .

already provided a successful platform, PARLe, which, in collaboration with British Columbia's Online Dispute Resolution (ODR) initiative, could serve as a starting point from which to build a national online dispute resolution system.

CONCLUSION

To a certain extent, the advent of online commerce has virtually brought consumers back to the 1950s, when they were dependant on the integrity of those with whom they contracted for goods and services, and were consequently targets for exploitation.³⁰⁹ As this study shows, protections in the current legislation are too often illusory, especially with respect to transactions concluded with businesses selling virtual goods.

Unfortunately, given the current state of consumer laws in Canada, most consumers who unwittingly sold their souls to GameStation are condemned to perpetually wander soulless. While consumers who paid with their credit cards might get some sort of refund, those who purchased with Bitcoins are definitely not getting their souls back, as there are no existing redress mechanisms designed for this type of payment.³¹⁰

Since all Canadian provinces provide that the rights or benefits granted by consumer protection legislation cannot be waived, Canadian consumers are entitled to assume that Canadian law will apply to their transactions with online merchants like GameStation. However, Canadian courts' jurisdiction remains uncertain in most provinces. As a result, lodging a lawsuit against a British business before a Canadian court might not be possible in all cases. What is more, if consumers purchased a low-value gaming product, they might lose any protection they could have had under consumer protection legislation, since half of the provinces limit the application of their consumer protection laws to sales in which the consideration exceeds \$50.

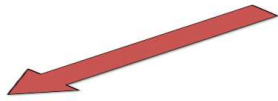
In sum, the current legal framework does not bode well for the future of consumer e-commerce. While Canadian provinces' harmonization attempts must be recognized, much work needs to be done to achieve a sufficient degree of uniformity regarding private international law and substantive consumer protection legislation. Legislative intervention is also required to ensure adequate enforcement of consumer laws. The same technology that fuels online commerce, if used to its full potential, makes possible new approaches to protect online consumers from unscrupulous merchants while also providing a predictable legal environment for merchants who want to follow the rules.

³⁰⁹ See Ziegel, "The Future of Canadian Consumerism" *supra* note 9.

³¹⁰ The Bitcoin payment solution—introduced in 2009 as a peer-to-peer payment system (not controlled by a central entity)—is not regulated by Canadian law. As a result, chargebacks are impossible for purchases made with Bitcoins. See Alan Wong, "Placing Their Bets on Bitcoin", *The New York Times* (20 March 2014) B1.

APPENDIX A: FAILURE TO PROVIDE INFORMATION IN A PROMINENT MANNER

The screenshot displays the Signature Vacations website interface. At the top, there is a navigation bar with the company logo and links for 'Home', 'About Us', 'Contact Us', 'FAQ', 'Privacy Policy', and 'Terms & Conditions'. Below this is a search bar with a dropdown menu for 'Change Your Departure City: Montreal'. The main content area features a large banner for 'Everlasting Honeymoons' with a couple embracing on a beach. Below the banner are several promotional boxes, including 'All Inclusive Vacation Deals' and 'Advance Seat Selection'. A central section titled 'Hot Resorts' lists various vacation packages with prices and 'Book Now' buttons. At the bottom, there is a grid of destination categories such as 'Caribbean', 'Central America', 'Cuba', 'Mexico', and 'Hawaii'.



APPENDIX B: DELIVERY INFORMATION — EMAIL

NOBEL.COM
Prepaid Online Phone Cards

1. Shopping Cart 2. Account & Billing 3. Confirm Order 4. Thank you

Welcome Back Jane Doe
Marked fields are mandatory

Place Order Using

Promotion Code: ← Check Code

Select a Stored Billing Profile:

Stored Billing Profile: My account 1

CVV: [What is this?](#)

This order will be shipped to:
Email Address: mmont008@uottawa.ca

APPENDIX C: DELIVERY INFORMATION — DELIVERY FOLDER

Thank you for your recent purchase. Please find your purchase details below:

Order number: 1326631053
Invoice number: fcf12f8d-cfbf-acbf-6244-b623db259493

Item: *Goddess* White Filigreed mask (Wear Me)
Quantity: 1
Price: L\$100

[Delivery Folder: Received Items](#)

Total Payment: L\$100

Thank you for using the Second Life Marketplace

Have a question or need assistance?
* If you have an issue with your purchase, please contact the seller first. If you cannot resolve the issue, visit support for additional assistance.
* Marketplace FAQs: <http://marketplace.secondlife.com/redirect-to-knowledgebase/Shopping-in-the-Marketplace/ta-p/700195>

APPENDIX D: CANCELLATION NOTICE

<http://secure1.ncix.com/message/?uuid=601FAAC8-E43B-49D5-97CD9D3069988449>

Ticket # 2042965 Message(s) - RE: Cancellation notice

Dated Aug 06, 2013 at 07:39 PM composed by you

Hello there.
I wish to cancel order No: 3016577, because I was not provided with the express opportunity to accept or decline the agreement and to correct errors immediately before entering into it.
Best,

If you have trouble accessing your NCIX.com account. If you are having trouble logging into NCIX.com to retrieve your message, please call 1-877-NCIX-777.

Thanks for your interest in NCIX.com!

APPENDIX E: CANCELLATION BASED ON THE BUSINESS' FAILURE TO DISCLOSE ITS ADDRESS

 North America Phone Cards (support@northamericaphonecards.com) [Ajouter aux con](#) [Actions](#) ▼
À : idoueensu@outlook.fr ▼
support@northamericaphonecards.com

Company name and GST number, amount of GST/HST have been clearly shown on order confirmation page.

GST#: 84510 9719 RT0001, North America Phone Cards Inc.

It may be clear that you are act not in a good faiths (looking for a reason not to pay), and you charge back will be categorized as chargeback spoof.

Thank you,
Vlad.

 J. D. 2013-08-05 [Actions](#) ▼
À : North America Phone Cards ▼

Dear consumer support representative,

I am glad that you prosecute credit card fraud to the full extent of Canadian and United States Law. Thank you for highlighting that to me. This purchase was not a fraud. I was not provided with the adequate information. As an online business. You have to provide the consumer with your name and any other name under which you conduct business. You also have to provide the consumer with the address of the premises from which you conduct business. In addition to this, you ought to provide the consumer with an itemized list of prices for the goods and services to be supplied to the consumer, including taxes.

Cicicalling.com did not provide me with this required information. Therefore, I have the right to request a cancellation and a full refund. Please act accordingly.

Best,