THE UETA AND THE UECA – CANADIAN REFLECTIONS

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I. INTRODUCTION

Canada has kept up with the computerization of the world in the past generation and the more recent move to global electronic commerce. Canada, however, has not been immune from the legal concerns created by these developments. Canada's legal system[1] has

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1. Canada has a federal system much like that of the United States, but run on British Parliamentary lines rather than with a formal division of powers as in the U.S. The authority of the ten provinces, the three territories and the federal government is sometimes allocated differently than in the United States. Most provinces and the territories, and for many purposes the federal government, have what we call "Anglo-Canadian

shared some of the initiatives familiar in the United Nations and in the U.S., while in other respects it has gone its own way. This Article will provide an overview of the main thinking in the field in recent years, with particular reference to the parallel or divergent ideas found in the Uniform Electronic Transactions Act (UETA).[2]

II. THE GENERAL LAW

The legal concerns raised by electronic transactions generally arise from form requirements, or what could be called "medium" requirements, i.e., requirements that a particular medium of communication be used for legal effect. The law often presumes the presence of paper. What happens when one takes the paper away?

It is important to appreciate the border between legal requirements and prudent business practice. Many transactions are conducted with paper documents not because the law makes people do it that way but because people are accustomed to doing it that way, or because it makes sense to do it that way. The letter X in pencil on a document is capable in law of constituting a signature. Nevertheless most people would not accept a check (what we in Canada call a cheque) signed only with an X. Likewise, oral contracts are often enforceable, but for high value transactions, especially with strangers, most people want to "get it in writing."

Where a medium is chosen for prudence and not for legal reasons, the parties are generally free to choose an electronic medium as well. The concern at that point is to judge the reliability of the electronic documents for the transaction at hand. Most people do this with less confidence than with paper documents, since they count on centuries of experience in knowing what should or should not be done with writing on paper. There is a limit to how much the law can help settle questions of trustworthy practice, and a limit to how much the law should try to do so.[3]

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law" based on English common law as modified by our courts and our legislation over the years. The province of Quebec is a civil law jurisdiction. Much of its private law is governed by the Civil Code of Quebec, which was fundamentally revised and effective in 1994. Remarks in this paper about Canadian law should be taken with caution in their application to Quebec, unless specifically noted. Provincial laws vary across the country as well of course.

2. UNIF. ELECTRONIC TRANSACTIONS ACT (2000) [hereinafter referred to as UETA] was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July 1999. The text of drafts and the final version with commentaries is online at http://www.law. upenn.edu/bll/ulc/ulc.htm#ueccta. *See also* http://www.ueta online.com for a record of the discussions leading up to its adoption and a list of states that have adopted it, with links to electronic versions of their legislation.

3. *See* Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 585 (1999).

The courts can handle some of the legal challenges on their own as well. In *Rudder v. Microsoft Corp.*,[4] the Ontario Superior Court upheld a click-wrap contract choosing to submit disputes to Washington state courts (as have several American courts).[5] A more venturesome case, *In re Newbridge Networks Corp.*,[6] held that a corporation could send notice of a special meeting to some of the shareholders by electronic mail, although both the governing statute and the by-laws of the corporation were silent on the point.

That said, there are numerous legal rules in Canada that appear to require a document on paper. These are generally statutes or regulations, not rules of common law.[7] Many provinces have a Statute of Frauds that makes some kinds of transactions unenforceable without a memorandum in writing. However, British Columbia repealed its Statute of Frauds in 1958, Manitoba more recently. Parallel provisions sometimes appear in provincial Sale of Goods statutes, which are generally based on the English Sale of Goods Act of 1893.[8] Consumer protection legislation also tends to require executory contracts to be in writing.[9] These provisions can pose barriers to the appropriate use of electronic documents.

Statutes for more particular purposes may also demand writing, signature, original documents, or use other language that suggests similar use of paper, such as "prescribed form," "certified," "under hand and seal," or "publicly displayed."[10]

Over time the various jurisdictions (a compendious term to encompass the federal, provincial, and territorial governments) have enacted statutes and made regulations to resolve particular problems, or to permit particular uses of electronic documents. Ontario repealed writing requirements applicable to general sales contracts in 1994.[11]

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4. [1999] 2 C.P.R. (4th) 474 (Ont. Can.).

5. Skip Sigel et al., *The Validity and Enforceability of Web-Wrap Agreements and Assessing the Need for Legislation*, (written before the *Rudder* case) *at* the Uniform Law Conference of Canada website, http://www.ulcc.ca/alri/ulc/current/ewebwrap.htm. (last visited Mar. 12, 2001).

6. 2000 Ont. Sup. C.J. LEXIS 809.

7. The statutes of most Canadian jurisdictions can be found on line through http://www.acjnet.org/acjeng.html.

8. *See, e.g.*, Sale of Goods Act, R.S.O., ch. S-2, § 5.

9. *See, e.g.*, Consumer Protection Act, R.S.O., ch. C-31, § 19 (1990) [hereinafter referred to as Ontario CPA].

10. Department of Justice (Canada), *Consultation Paper on Facilitating Electronic Commerce: Statutes, Signatures and Evidence, available at* http://canada.justice.gc.ca/en/cons/facilt7.html. A review of the Ontario statutes and regulations online conducted for the author disclosed over 3000 uses of the term "writing" and over 1500 uses of the terms "signature" or "signed," and the same of "original."

11. S.O., ch. 27, §§ 54-55, (1994) (Can.).

The same province passed the Electronic Registration Act (Ministry of Consumer and Commercial Relations Statutes) in 1991,[12] under which filings under the Personal Property Security Act (Canada's version of UCC Article 9) have been done electronically for several years. Land registration is beginning to be done electronically in Ontario, using digital signatures, with the authority of legislation passed in 1994.[13] In 1998 British Columbia passed a statute to facilitate electronic filing of information with the provincial government[14] and Saskatchewan did likewise.[15] Many more examples could be given.[16]

Such piecemeal and local initiatives are widely recognized to be inadequate to resolve the concerns among business people, governments, and the general public about the state of the law applicable to electronic communications. Statutes are slow to draft and pass and do not necessarily reflect true priorities for the economy or even for the government. Moreover, solving individual problems with narrowly focused statutes risks creating a patchwork of inconsistent legal rules that will make communications harder rather than easier, even within a single jurisdiction. The rest of this Article will deal with more widely applicable measures to remove statutory barriers to electronic communications and to promote their use where appropriate.

III. UNIFORM ELECTRONIC COMMERCE ACT (UECA)

The international standard for removing statutory barriers to electronic commerce is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (Model Law), recommended by the General Assembly for adoption in all member countries of the United Nations in 1996.[17] The Model Law has influenced countries around the world, starting with Singapore and including Australia, India, Japan, Ireland, and many others.[18] Of course, the UETA follows the same influence.[19]

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12. S.O., ch. 44, (1991) (Can.).

13. Amendments to the Land Registration Reform Act made in S.O. 1994 ch. 27 § 85.

14. Business Paper Reduction Act, S.B.C., ch. 26, (1998) (Can.).

15. Electronic Filing Act, S.S., ch. E-7.21, (1998) (Can.).

16. *See* John D. Gregory, *Solving Legal Issues in Electronic Commerce*, 32 CAN. BUS. L.J. 84 (1999).

17. The text and the very useful GUIDE TO ENACTMENT are online at http://www.uncitral.org/english/texts/electcom/ml-ec.htm.

18. Useful sources of information on international developments in this field are: the Internet Law and Policy Forum at http://www.ilpf.org; the McBride Baker & Coles firm website at http://www.mbc.com/ecommerce/ecom-overview.asp; and the Baker & McKenzie firm website at http://www.bmck.com/ecommerce/.

19. *See* http://www.law.upenn.edu/bll/ulc/ulc.htm#ueccta.

Canada participated in the preparation of the Model Law and has taken steps to implement it. The Uniform Law Conference of Canada (ULCC) adopted the Uniform Electronic Commerce Act (UECA) as of September 30, 1999, and recommended it for enactment by the member jurisdictions of the Conference — all the provinces and territories of Canada and the federal government.[20]

A. Minimalism, More or Less

The Uniform Act can be considered a minimalist response to the quest for certainty about the legal status of electronic communications and electronic records. It is minimalist for several reasons. First, the current law — statutes and common law and private law based on contracts — is capable of resolving a large portion of issues on its own. Electronic messages, even on the Internet, do not present radically new questions in every field. Second, the technology underlying electronic records is changing rapidly, so attempts to prescribe specifically how to conduct legally effective communications risk obsolescence even before they come into force. Third, e-commerce is global in scope, and we do not want to take a seriously different approach from our major partners. The international consensus today favors minimalism, as shown by the Model Law itself.[21]

Even with a minimalist statute, there is a tension between legislating to remove a legal barrier or to cure a legal failing, on the one hand, and legislating to give greater certainty, on the other. How much detail is needed to achieve the statute's goals? Different individuals, and different legal systems, will give different answers. One sees the tension at work even in the Model Law, where some important principles are found in the Guide to Enactment and not in the model statutory text itself. For example, the Guide states that the Model Law does not compel anyone to use electronic communications ("data messages," in the language of the Model Law).[22] Both the American and the Canadian uniform statutes spell out this principle.[23] The UNCITRAL Working Group on Electronic Commerce often had vigorous debates on where a particular provision might best reside, based sometimes on principles of legislation of the speakers' le-

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20. UNIF. ELECTRONIC COM. ACT (1999), http://www.law.ualbertaca/alri/ulc/ current/euecafa.htm [hereinafter referred to as UECA]. *See also infra* note 102 and accompanying text.

21. *See* http://www.pkilaw.com for a list of minimalist statutes from around the world, along with those classified as more interventionist.

22. GUIDE TO ENACTMENT para. 43.

23. UETA § 5; UECA § 6.

gal system, and other times on a desire to keep the legislation simple so as not to risk unintended consequences of rulemaking.[24]

The line between what is necessary and what is merely desirable is not a matter of consensus either. It is fair to say that as we become more familiar with the legal issues of electronic communications, more of the issues seem resoluble under existing principles. More can be dealt with using some of the other tools of problem-solving:[25] the technology itself,[26] contracts among the parties to the communications,[27] and evolution of the common law.[28] The legislative wish list thus becomes shorter and simpler. One sees this process at work in the evolution of the Model Law from its early drafts in 1992-3 to its final form in 1996,[29]as well as the drafts of the UETA from 1997 to 1999.[30] Issues that seemed necessary to explore at the outset turned out to resolve themselves by the end of the process.[31] A review of the

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24. The author was a member of the Canadian delegation to the UNCITRAL Working Group on electronic commerce from 1997 to 2001. The views in this paper, however, are not necessarily those of the delegation.

25. George S. Takach, *Internet Law: Dynamics, Themes and Skill Sets*, 32 CAN. BUS. L.J. 1 (1999).

26. For example, the use of watermarking or trusted systems, combined with micropayment technology, can promote payment for electronic copying that might otherwise occur in violation of copyright law. However, "self-help" remedies can go too far and upset policy balances expressed in current laws. *See* LAWRENCE LESSIG, THE CODE AND OTHER LAWS OF CYBERSPACE (1999). Related writings may be found at http://www.lessig.org. NCCUSL moved in 2000 to restrict the right to self-help originally authorized in its Uniform Computer Information Transactions Act in 1999. UNIF. COMPUTER INFO. TRANSACTIONS ACT (2000 amendments), *at* http://www.law.upenn.edu /bll/ulc/ulc.htm#ucita [hereinafter referred to as UCITA].

27. The typical contract for these purposes is the trading partner agreement between parties to electronic data interchange (EDI). They typically deal with matters of evidence, receipt, and effective signature. *See, e.g.*, AMERICAN BAR ASS'N, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (June 1990); A.H. BOSS & J.B. RITTER, ELECTRONIC DATA INTERCHANGE AGREEMENTS: A GUIDE AND SOURCEBOOK (1993).

28. *See, e.g.* Rudder v. Microsoft, [1999] 2 C.P.R. (4th) 474 (Ont. Can.) (affirming the enforceability of click-through contracts); Newbridge Networks Corp., 2000 Ont. Sup. C.J. LEXIS 809 (approving the use of electronic signatures).

29. The working documents and reports for the Model Law on Electronic Commerce are online at http://www.uncitral.org/english/sessions/wg_ec/index.htm.

30. The drafts are online at the NCCUSL website at http://www.law.upenn.edu/ bll/ulc/ulc.htm#ueccta.

31. To be fair, sometimes the statutes left out topics because they were just too hard, or because they were beyond the scope of a comprehensive but generic statute. The creation of presumptions of attribution of electronic signature is an example of such a topic in the UETA. See in particular the account of the September 1997 and January 1998 meetings of the NCCUSL drafting committee, online at http://www.uetaonline.com. Much useful information about the development of the UETA is found at a private website that was first known as http://www.webcom.com/legaled/ETAforum and which is now known as http://www.uetaonline.com. Some of the earlier material can be accessed

UETA and the UECA will indicate some of the places where different judgments were exercised on these questions.

Another factor that influences the drafting even of a minimalist statute is its legislative context. Any statute has to fit into the array of laws that surround it, as well as the social and commercial customs of the enacting state. The Model Law is designed to be adapted to local conditions by the states that implement it. The purpose of the lengthy Guide to Enactment is to signal legislators how to do that.[32] Some differences between the UETA and its Canadian counterpart spring from this same factor. For example, the National Conference of Commissioners on Uniform State Laws (NCCUSL) had decided earlier in the 1990s to use the term and concept "record" for certain forms of information,[33] and it thereafter found its way into Articles 5 and 8 of the UCC as well. Naturally the UETA follows this practice. The Canadian conference wrestled with the terms "record" and "document" in both its electronic evidence and its electronic commerce statutes, and in fact went in opposite directions in each.[34] The UECA defines "electronic" and then uses the term "electronic document" without definition, while NCCUSL defines both "electronic" and "electronic record," along with its standard definition of "record." Because of the use of "authenticate" in the UCC,[35] NCCUSL spent some time trying to work the term into the definition of "electronic signature," though it finally desisted.[36] In Canada the term "authentication" has arguably very little meaning in law,[37] so the UECA could move more directly to stating that an electronic signature was created with the intention to sign the document.[38]

Canadian statutes seem to be less detailed in general than statutes in the U.S., perhaps because of the need for greater certainty in

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through the earlier URL but not through the more recent URL. Devoted researchers should check both cites.

32. GUIDE TO ENACTMENT para. 13. The Guide also cautions against deviating too far from the norm of the Model Law. *Id.* para. 9.

33. Patricia B. Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607 (1993).

34. "Record" does not translate readily into French, which added pressure to choose "document," since the Uniform Law Conference of Canada adopts its statutes in both English and French.

35. U.C.C. § 1-201(39) (2000) (defining "signed" to include any symbol executed or adopted with present intention to authenticate a writing).

36. UCITA does use "authentication," in section 102 and official comment to the definition. UCITA § 102.

37. John D. Gregory, *The Authentication of Electronic Legal Documents*, 6 E.D.I. L. REV. 277 (1999).

38. The principle behind that definition is discussed in the section on signatures. *See infra* Part III.E.2.

America's more litigious society or perhaps in the case of uniform statutes because of the prospect of their implementation by fifty or more diverse jurisdictions.[39] The UECA is not always "more minimalist" than the UETA, but in a number of places the differences seem to reflect a general drafting style rather than choices on the merits of the particular issue. Examples will be given in the detailed discussion of the statutes.

B. Process

NCCUSL and the ULCC began working on their respective electronic transactions Acts at roughly the same time, during the summer of 1996, following the final adoption of the Model Law. The Canadian delegate to UNCITRAL attended the ULCC meetings for the federal government. Similarly, one of the American delegates to UNCITRAL was a veteran of NCCUSL drafting committees on behalf of the American Bar Association (ABA) or the American Law Institute.[40] NCCUSL has a more formal process for creating uniform statutes than does the ULCC, as befits the larger organization.[41] Its drafting committee had seven members, with Professor Patricia Fry as the chair, and Professor Benjamin Beard as the reporter.[42] Outside the annual meetings of NCCUSL, the drafting committee met on seven separate occasions for at least two days each evaluating a fresh annotated draft for each meeting. Decisions were made by vote of the committee, after thorough discussions among committee members and up to forty outside expert observers.

The Canadian working group was established at the call of its chair, and met only in Toronto. It met six times for a day or, more often, a half day, but much of the work was done through an Internet mailing list provided through the federal government. The mailing list grew from an initial fifteen members to about 150 at the time of adoption of the UECA, representing private and public sector lawyers from across the country, with foreign members including the chair, the reporter and the ABA observer for the NCCUSL drafting commit-

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39. NCCUSL has fifty-four member jurisdictions: all the states, the District of Columbia, Puerto Rico, the Virgin Islands and Guam. NCCUSL *available at* http://www.nccusl.org.

40. The Canadian delegate was Joan Remsu of the Department of Justice (Canada). The American delegate was Professor Amelia Boss of Temple University in Philadelphia. In addition, the author attended the 1996 NCCUSL meeting as an observer from the ULCC, and ran the UECA project for the ULCC thereafter.

41. NCCUSL has about 350 Commissioners; the ULCC Civil Section attracts about fifty people to its annual meetings.

42. Professor Fry and Professor Beard are law school professors at the University of Missouri and the University of Idaho, respectively.

tee. The UECA drafting was done in English and French by professional drafters from the federal Department of Justice. The head of the UECA working group attended most of the meetings of the UETA drafting committee, and the chair of that committee attended the final meeting of the ULCC that adopted the UECA shortly after the adoption of the UETA by NCCUSL.

In short, the processes were closely related in time and in inspiration, with an unusually close collaboration between the ULCC and NCCUSL. The agenda to harmonize the national laws with the international standard was also shared, and the advantage of having similar legislation on electronic commerce for the world's two largest trading partners was obvious on both sides of the border. The following examines the results of these parallel processes.

C. Scope

Unlike the UETA, the UECA applies not only to commercial transactions, but to all rules of law that are not specifically excluded from it. That, of course, makes the list of exclusions important. Most of the exclusions are themselves a matter of international consensus, in that several of the laws that purport to enact the Model Law have similar exclusions.[43] The Model Law was aimed at commercial matters only,[44] and it further contemplated that enacting countries would exclude some laws from its rules but did not specify any itself.[45] Wills and testamentary trusts, for instance, are common exclusions (though statutes that apply only to transactions or only to commerce could apparently refrain from excluding them expressly). Canada has also excluded powers of attorney for personal care (which sometimes take the form of advance health care directives) and for the financial affairs of an individual.[46] The concern with these kinds of documents is

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43. Compare the exclusions in Singapore's Electronic Transactions Act § 4 (1998), http://www.cca.gov.sg/eta/framecontent.html with Australia's Electronic Transactions Act § 13 (1999), http://www.law.gov.au/ecommerce [hereinafter referred to as AETA], which leaves exclusions to regulations except that court procedure rules are excluded in the AETA itself, in section 13. However, the AETA applies only to commonwealth (federal government) laws. Many of the legal relations covered by the UETA and UECA are governed by state law in Australia as well. The state versions of the commonwealth statute also leave exemptions to the regulations, however.

44. A footnote to Article 1 indicates that "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." MODEL LAW art. 1. Notably this is said to apply to government as well as private transactions. MODEL LAW art. 1. *See also supra* note 17.

45. *See, e.g.*, MODEL LAW arts. 6-8, and GUIDE TO ENACTMENT para. 52.

46. Powers of attorney for the financial affairs of the corporation are within the scope of the Act, subject to consent being proved on all sides when they are used. The ex-

that they are often created by unsophisticated people, often without legal or technical advice. Some commentators thought that there was too much risk of undetectable fraud or loss of integrity of data unless more specific security measures were provided, more than a uniform and fairly generic statute could give.

The UECA excludes negotiable instruments and documents of title, negotiable or not. The UETA, conversely, does not exclude negotiable instruments as such – section 16 considers in detail "transferable records"[47] – but many of the main provisions of the UCC touching such documents are excluded. The problem for Canadians was the technical problem in creating a unique electronic document. So far as we knew, this could not be done with existing technology. One may immobilise a document and keep it from alteration, but one cannot technically prevent its copying, and one cannot reliably distinguish a copy from an original.

This points to another tension in drafting statutes like this: Does the legislature draft a legal standard as a kind of incentive to the technical experts? Or, should the legislature refuse to set the standard until it knows that its characteristics can be met, in order not to tie the hands of the technical experts or force their creativity down particular paths that may not turn out to be the best ones to solve the problem? Commercial law in particular tends to take the latter path, to give legal effects to what is, rather than to aspire to what is not yet. In this instance, the Canadian more-than-commercial UECA acted more cautiously than the American UETA commercial statute.[48]

The UETA does not exclude land transfers so electronic transfer documents for land can be effective between the parties. The drafting committee recognized that in order for a transfer to be maintainable against a third party, it would have to be registered. The rules for

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clusion has been criticized on the ground that a power of attorney is simply a special case of an agency contract, and agency contracts are not excluded. NEW BRUNSWICK DEPARTMENT OF JUSTICE, ELECTRONIC TRANSACTIONS LEGISLATION 9 (2000), *at* http://www.gnb.ca/justice/electronic-ev.doc (last visited Mar. 12, 2001) [hereinafter NEW BRUNSWICK PAPER].

47. UETA § 16.

48. Since the UETA and the UECA were adopted, some progress has been made at preventing copying of electronic records, largely by the efforts of copyright holders to protect their interests. Others more expert than the author will have to estimate whether these methods would satisfy the "uniqueness" tests of the transferable records provisions of the UETA. The NEW BRUNSWICK PAPER, *supra* note 46, at 9, recommends omitting any reference to negotiable instruments and documents of title on the ground that if commercial practice finds a particular technology suitable in the future, then the enabling statute should apply to it as to any other. Commercial practice will be the judge of the technology.

registration would be set by the governmental agency responsible for that process, as contemplated by sections 18 and 19 of UETA.[49]

The Canadian conference was more cautious on this point; it excluded transfers of land that would require registration in order to be effective. The qualification was intended to permit electronic transactions for short-term transfers, such as a lease of a cottage for a season or less. The ULCC took the same view for land transfers as it did for wills and powers of attorney, deciding that there was too much risk even between the parties without more detailed standards of security. Documents excluded from the UECA, however, are not completely restricted from being created electronically. The province of Ontario has a detailed scheme for electronic land transfers and registration, for example, but it rests on a particular set of statutory and regulatory rules to ensure party compliance.[50]

Both NCCUSL and the ULCC attempted to prevent their respective acts from authorizing electronic communications where to do so would be seriously repugnant to the principle of the existing law. While this was attractive in theory, neither drafting group was entirely successful in coming up with wording that did not seem to invite litigation and increase uncertainty.

In Canada the "scope" section does provide that the UECA yields to any other statute that expressly regulates, permits or prohibits the use of electronic communication.[51] The Conference thought it inappropriate to override legislated standards, even if the standards are considered out of date or inadequate. The point of the UECA is to remove barriers, not to reform the law where the barriers have already been addressed. In practice, attempting to amend statutes enacted for government departments across the province would lead to internal political and bureaucratic battles that would just have impaired necessary reform legislation. There was some debate whether to limit the exclusion to other laws that expressly governed, or rather to extend it to laws that might do so by implication. The more limited exclusion was chosen, again largely to promote certainty. In any event, the UECA provides that using words like "in writing" or "signed" does not constitute a prohibition against using electronic communications, be-

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49. UETA §§ 18, 19. This reasoning is set out in the report of the special committee that advised the drafting committee on exclusions. *See* TASK FORCE ON STATE LAW EXCLUSIONS, *REPORT* (Sept. 21, 1998), http://www.webcom.com/legaled/ETAForum/docs/report4.html.

50. *See* Land Registration Reform Act R.S.O., ch. L-4, as amended by S.O., ch. 27, § 85 (1994) (Can.), and associated regulations. Operational details are available at http://www.teranet.on.ca.

51. UECA § 2(5).

cause otherwise this exclusion would undermine the operation of the Act itself.

One purpose of the UECA is to permit the use of electronic documents without individually amending all the statutes that could bar their use in some way. In case a government learns after enacting the Act that some unnoticed statutory provision should not be subject to the general permission, the UECA allows the addition of exclusions by regulation.

D. Consent

The UECA does not require anyone to use or accept electronic documents.[52] Section 6 of the UECA makes that clear, as does the Australian Act.[53] The UECA is intended to remove barriers where people want to use this technology. Since most electronic communications, and certainly most commercial transactions, will be based on consent, this section does not undermine the Act, it simply confines it to appropriate circumstances. However, consent to use electronic documents may be inferred from conduct; an express agreement is not required. Otherwise there is too much risk of bad faith refusal.

The UETA has a similar provision,[54] possibly drafted in even stronger terms. It seems to call for an agreement, which must be bilateral, not just consent, which can be unilateral.[55] It also allows for an implied agreement, for the same reasons as those contemplated by the UECA. Unlike the Canadian and Australian statutes, however, the UETA makes consent an aspect of the scope of the Act itself.[56] If there is no consent, the Act does not apply to the transaction. This creates some difficulties in unilateral processes, such as record retention. Can someone not take advantage of the statutory permission to store records electronically unless the other party to the transaction recorded in the records consents to the storage? Can the sender of a message rely on the provisions concerning the time when a message is sent or received without the consent of the addressee to communicate electronically? The message may not have legal effect without con-

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52. As noted earlier, the Guide to Enactment of the Model Law states that the Model Law is not intended to compel the use of data messages, but the actual text is silent on the point. *See supra* note 17.

53. The consent rule is spread across several sections of the Australian Statute. *See* AETA §§ 1-16.

54. *See* UETA § 5(b) ("This [Act] applies only to transactions between parties each of which has agreed to conduct transactions by electronic means.").

55. *See* UETA § 5, cmts. 2, 4.

56. UETA § 5, cmt. 2.

sent, but it seems unduly limiting to say that the statute should not even deal with the timing in such a case.[57]

The need for consent to transact electronically is particularly important in a minimalist statute, which does not provide standards for the reliability or security of electronic records. What is reliable enough will vary among individuals and purposes. Parties to electronic communications can preserve themselves from insecure records by refusing to accept them. The power to say "No" is the power to say "Yes," if a suitably reliable technology is used. This puts some responsibility on parties to know the risks and to take steps to minimize them.

Limiting an act to consent – even as expressed in the UECA – makes it risky to create electronic records addressed to the world, like a power of attorney (if not excluded elsewhere). The person making the document may not know if the person who is called on to act in response to it will accept the electronic instruction. This is particularly problematic for something like a durable power of attorney, intended to operate after the maker has become incompetent. If an individual refuses to act on the electronic record, it is too late to create a paper version.

The Canadian conference thought that the power to consent implied the power to withdraw consent. The American conference did not; it spelled out in section 5(c) that consent may be withdrawn, and one cannot contract out of the right to withdraw consent.[58] It may be possible to consent for a fixed term, however, and limit an individual's right to withdraw before that time is up. Undoubtedly the term would have to be reasonable under the circumstances.

E. Functional Equivalents

Many rules of law use language that requires, or appears to require, the use of paper documents. When the UECA says "a requirement under [enacting jurisdiction] law," it covers not just statutes and regulations but any other source of law. It also covers permissions to use electronic documents, not just requirements.[59] The Model Law as

57. As we will see later, the UETA does not say when a message is received if sent to an address not designated or used by the addressee for messages of that type. The UECA has a rule for undesignated systems too. Designation is not the same as consent, however, though designation is likely to show consent. Lack of designation does not necessarily show lack of consent.

58. *See* UETA § 5(c).

59. UECA § 4. The Model Law has a formula stating that requirements are to be read to extend to a rule of law that imposes consequences if records are not in writing, or signed, or original. The Australian statute, followed by the Canadian, added permissions

well as the UETA and UECA expand these rules to cover documents in electronic form. They do so by creating "functional equivalents" to the paper documents. In other words, they do not simply define writing as including an electronic record, or define signature as including an electronic signature. This was thought too rigid an approach that risked including too many electronic records or allowing electronics in too many situations.

Instead, the law seeks to isolate the essential policy functions of the requirement and state how those functions can be achieved electronically.[60] The basic form of the rule in the Acts is therefore "where the law requires [paper], that requirement may be satisfied by an electronic record if [certain standards are met]."[61] The standards themselves vary but of course are stated in general terms.

The principal effect of this approach is to turn questions of capacity ("can I do this electronically?") into questions of proof ("have I met the standard?"). Since meeting the standards is often a matter of agreement, this seems to be a useful contribution.

1. Writing

The basic function of writing is memory. The Model Law and its progeny therefore state that a writing requirement can be satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference. This formulation rests on a fundamental principle of the Model Law: The electronic system does not have to be better than the paper system it replaces.[62] Just as a paper document may last a long time or be destroyed quickly, so too the Acts do not say how long the electronic information has to be usable. However, if there are other rules about the length of storage, for example in a record retention rule, then the electronic information would also have to satisfy that rule. That is addressed specifically in UECA section 13; though the UETA's section 12 on record retention does not address the required length of time.

In the U.S., the UETA deals with the policy function of writing, as discerned in the Model Law, through the use of the term "record." This term was adopted by NCCUSL some years ago as a media-neutral term for some kinds of information.[63] It is defined as "information that is inscribed on a tangible medium or that is stored in an

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to this list, to cover cases where particular legal effects are granted to records in writing, or signed, etc. *See, e.g.*, AETA §§ 9(2), 11(2).

60. Neither the UETA nor the UECA impose particular requirements on electronic signatures, for reasons described below.

61. *See* UETA § 12(d).

62. *See* GUIDE TO ENACTMENT para. 6.

63. *See* Fry, *supra* note 33.

electronic or other medium and is retrievable in perceivable form."[64] The last quality is what ties it to the Model Law.

The UETA and UECA deal with two other aspects of writing not touched on in the Model Law. If information must be delivered, in addition to being written, then section 8 in both the UECA and the UETA require that the information be capable of being retained by the addressee.[65] Just as I cannot deliver a paper document to you by simply showing it to you, I cannot deliver an electronic document by putting it on a web site. The addressee must be able to decide how long to keep the information, without risk that the person providing it will alter or delete it. The principle of this provision came out of the Canadian Conference; the current language originated with NCCUSL. The UECA borrowed from the UETA language requiring the information be "capable of being retained," and the proviso about the sender not inhibiting printing or storage of the information.[66]

In Canada, there has been some debate whether putting information on a website would satisfy the section 8 retention requirement. It may be possible to argue that the main part of the information may be on a web site if one gives direct notice, say by e-mail, that the information is there, and if the information can downloaded or printed. Consumer advocates in particular have argued that this should not be permitted, and that legislation to implement the UECA should spell this out.[67] Part of the problem arises because of the presence of the term "accessible", from the rule about writing. Is making the information accessible enough to provide it? The better answer may be negative. This is because the accessibility requirement relates to satisfying the writing rule, not the provision rule, and because statutes generally do not say "provide" – a generic term chosen by the ULCC working group – they use words of more active delivery.

The problem created by the "capable of being retained" language – that information placed on a web cite might satisfy the section 8 retention requirement – could have been solved by instead stating "un-

64. UETA § 2(13).

65. UETA § 8(a); UECA § 8(1)(a).

66. *See* UECA § 8(1)(a). In the UECA, rules regarding inhibiting printing or storage are found in section 12. *Id.* § 12. The UETA makes certain notices unenforceable if the sender inhibits printing or storage of the information. UETA § 8(c). Neither statute defines what "capable" means. It could mean capable in the hands of a computer engineer, capable for the technopeasant, or capable for the reasonably foreseeable user. Commentary to section 8 of the UETA raises this issue but does not dispose of it. UETA § 8 cmt. 3.

67. *See* Letter from Phillippa Lawson, Counsel, Public Interest Advocacy Centre, to Provincial Ministers Responsible for Consumer Affairs and Provincial Ministers of Justice (June 6, 2000) *at* http://www.piac.ca/uecalet.htm (last visited Mar. 12, 2001).

der the control of the addressee," which was the original language of the 1998 UECA draft.[68] would not have arisen under the wording of the draft UECA. The argument is also less open in the U.S.. The UETA speaks of providing a record, so it does not mix the term "retrievable" into the same set of words as "provide," and the text states not only "provided" but also "sent or delivered." This makes the section clearly contemplate transmission of the information, not merely making it available.[69]

Sometimes the law requires information to be provided in a particular form. An electronic document can satisfy this requirement if the information is laid out in substantially the same form under the UECA.[70] It is not the intention here to prevent the use of formatting codes, such as are common in electronic data interchange systems. Information can be transmitted as economically as possible by electronic means. However, the practical display of the information should be recognizable as being the form required by law — layout is part of content.

If the law requires a form of display or communication, then the electronic document also must satisfy it under UECA section 15. For example, the capacity of a public place may have to be posted conspicuously in that place. Another example is that a landlord's address may have to be displayed in the entry to a rental building. Also, information may have to be delivered by registered mail. While information in electronic form can meet these requirements — for example one could deliver a diskette by registered mail — the Act does not allow people to avoid the underlying substantive law by using electronic documents. This provision was directly inspired by section 8(b) of NCCUSL's UETA.

The New Brunswick paper argues that this is unnecessary since nothing in the uniform statute would prevent these rules from applying anyway.[71] The basic non-discrimination rule found in both UECA section 5 and UETA section 7(b), is that information is not denied legal effect merely or solely because it is in electronic form — the "merely" must mean something.[72] Again one sees at work the tension between legislating what is strictly necessary and providing additional explanations in the statute.

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68. *See* UECA § 5 (Draft 1998), http://www.ulcc.ca/alri/ulc/98pro/e98.htm.

69. Ontario has inserted a special section into its implementing legislation to deal with this issue. *See infra* notes 161, 177 and accompanying text .

70. UECA § 9. The Ontario and British Columbia acts say "organized in substantially the same way," for drafting reasons. *See also* UETA § 8(b)(3).

71. NEW BRUNSWICK PAPER, *supra* note 46.

72. *Id.* at 29.

2. Signature

In all its functional equivalence rules, the UETA and the UECA do not intend to change the substance of the existing law.[73] They aim only to make the law media neutral, meaning equally applicable to paper and to electronic documents.[74] The definition of "electronic signature," therefore, does not create a new legal phenomenon with this name. Instead, it determines what the essential functions of a signature are. The essence of a signature is the intention with which it was made. The UECA's definition states that the electronic information must be made or adopted "in order to sign a document."[75] Similarly, the UETA states it must be "with the intent to sign the record".[76] Neither Act defines the term "signature" itself. The existing law about the appropriate intention, and how one proves it, continues to be in effect.[77]

The purpose of defining electronic signature is to make clear that the electronic version does not have to "look like" a signature when it is displayed. It may be code or sound or symbol of any kind, if the intention is present. Likewise, a signature may travel apart from the document it signs, if the association with the document is clear. The signature may or may not be in the document. Also, the wording of the definition would allow one to contemplate an electronic signature applied to a document on paper, if the connection between the two was clear.

The UECA provides that a signature requirement can be met by an electronic signature.[78] Unlike the Model Law, it does not require that the electronic signature must be as reliable as is appropriate under the circumstances.[79] The UECA follows the UETA in this regard. At common law in Canada, and arguably in the Civil Law of Quebec as well, a method of signature on paper does not have to meet any test of reliability. If the association with a person is demonstrated and the intent to sign is demonstrated, the signature will be valid. Those elements will also have to be shown in order to meet the definition of

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73. *See* Jane K. Winn, *The Emperor's New Clothes: The Shocking Truth About Digital Signatures and Internet Commerce*, 37 IDAHO L. REV. 353, 379-82 (2001).

74. *Id.*

75. UECA § 1(b).

76. UECA § 1; UETA § 2(8).

77. *See* Chris Reed, *What is a Signature?*, *at* http://elj.warwick.ac.uk/jilt/00-3/reed.html (last visited Jan. 22, 2001) (stating that a signature is simply evidence, of a person and of an intention with respect to a text).

78. UECA § 10(1). *See also* UETA § 7(a) ("A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.").

79. MODEL LAW art. 7(1)(b).

electronic signature. As noted earlier, the uniform acts are not trying to make the law better, just neutral.

However, it is possible that the authority that imposed the signature requirement in the first place did have some degree of reliability in mind. In that case, UECA subsection 10(2) allows that authority to make a regulation imposing the reliability standards of the Model Law.[80]

There is also a distinction between basic legal requirements and prudent business practices. For instance, a name typed on the bottom of an e-mail may be a valid signature, but it may not be trustworthy enough for prudent business people to rely on it in practice. What individuals require in practice to satisfy themselves of the origin of a record and the intent of the originator will depend on many factors, including the context, the course of dealings of the parties, and the intended use for the signed document. Neither NCCUSL nor the ULCC thought that the legislation should set the standards for this kind of judgment.

3. Originals

When the law requires a document in original form, it is seeking assurance of the integrity of the document and confidence that it has not been altered. The UECA reproduces this function in section 11, the UETA in section 12.[81] The notion of "original" is hard to apply to electronic documents because of the way they are generated. A "copy" is identical in all respects to the "original," so the reasons for requiring an original may be hard to meet from status alone. The rule in the UECA regarding originals would apply whether the document was first created on paper and later became electronic by scanning or faxing to an e-mail system, or whether it was in electronic form at all times.[82] In Canada, the requirement for original documents under the "best evidence" rule is covered in the Uniform Electronic Evidence Act, a separate statute adopted in 1998.[83]

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80. UECA § 10(2)(a). *Cf.* Electronic Signatures in Global and National Commerce Act, , Pub. L. 106-229, §§ 102(a)(2)(A)(ii), (b), 114 Stat. 464 (June 30, 2000) [hereinafter referred to as E-sign] (disallowing a state government to impose any reliability requirements on electronic signatures to be effective, except where procurement by the state or its agencies is at issue).

81. UECA § 11; UETA § 12.

82. *See* UECA § 11.

83. UNIF. ELECTRONIC EVID. ACT § 4, http://www.law.ualberta.ca/alri/ulc/acts/eeeact.htm (last visited Jan. 22, 2001).

Ontario's version of this provision alters the language slightly but not the intent.[84] It also divides the treatment of originals into two subsections, one for where they originated on paper and the other for where they originated in electronic form.[85]

4. Copies

Copying electronic documents can be very easy. However, it is more difficult to understand how to comply electronically with a requirement to furnish a number of copies of a document. First, it is very difficult, as noted above, to distinguish between an original and a copy. Next, there are a number of ways in which one could for example, provide three copies: send the same e-mail three times, attach the same text three times to one e-mail, put three versions of the document onto a single diskette, or remit three diskettes with one version of the document on each. To avoid this rather sterile discussion, the UECA provides that where the law requires copies, only a single version of the electronic document need be furnished to a single address.[86] The recipient can decide how best to make the additional documents.[87]

F. Government Documents

The UECA contains a number of special provisions regarding documents sent to the government.[88] The concern is that governments receive a lot of information from a lot of people, many of whom are communicating involuntarily and with many of whom the government has no contract by which the methods of communication could be agreed. Therefore, to protect the government from an overwhelming variety of formats and hardware, the provisions on consent require express consent by government rather than implied consent.[89] Moreover, the rules on providing information, on forms, on signatures, and on originals say that governments may impose their own technical requirements in order to satisfy these sections.[90] Documents originating within the government, however, would have to meet the general standards of the Act.

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84. *See* Electronic Commerce Act, R.S.O. Bill 88 2000, § 12 (2000) (Can.) [hereinafter referred to as Ontario ECA].

85. *Id.*

86. UECA § 14.

87. *Id.* The UETA has no equivalent.

88. UECA §§ 8(b)(i), 10(3)(a), 11(1)(c)(i).

89. *Id.*

90. *Id.* §§ 8(b)(ii), 10(3)(b),11(1)(c)(ii), 16(1), (2).

A very similar structure is found in the Australian Electronic Transactions Act.[91] The UETA also has special provisions on government documents.[92] The Canadian Federal Act[93] requires a central register of designations and regulations for the use of electronic documents under federal law.[94] The UECA has no set requirement for communicating government choices, except that consent must be notified to people likely to be affected by it.[95]

Government is defined to include core government departments and agencies, but not Crown corporations (corporations owned by the government), which are thought to be more like commercial operations.[96] Each enacting jurisdiction will have to decide on the appropriate scope for this definition. Likewise, municipal governments may need the same kind of protection against multiple formats, but it may be thought that the risk of hundreds of inconsistent technical standards from hundreds of municipalities may require a more centralized solution. The UETA encourages standards for inter-operability but does not require their adoption.[97] The Canadian statute left exhortation to non-statutory media.

UECA section 16 provides for electronic forms, whether or not forms on paper are already prescribed (and whether or not the forms are used to submit information to government or between private parties).[98] Section 17 allows governments to use electronic communications for all their purposes.[99] Section 18 authorizes incoming and outgoing payments to be electronic if the main financial authority of the government consents.[100]

G. Contracts

The UETA and UECA follow the Model Law in providing some basic rules about electronic contracts.[101] The volume of electronic commerce conducted under the present law may suggest that busi-

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91. AETA § 11(1)(d).
92. UETA §§ 17-18.
93. Personal Information Protection and Electronic Documents Act, S.C. ch. 5 (2000) (Can.) *available at* http://canada.justice.gc.ca/en/lawsp-8.6/index.html [hereinafter referred to as Bill C-6].
94. *Id.* §§ 33, 35(1)-(2).
95. UECA § 6.
96. *Id.* § 1(c).
97. UETA § 19.
98. UECA § 16.
99. *Id.* § 17.
100. *Id.* § 18; *see also* NEW BRUNSWICK PAPER, *supra* note 46, at 33 (suggesting that most of the government powers rules of the UECA are unnecessary and also questioning the usefulness of the special consent and standards rules).
101. MODEL LAW art. 11.

nesses are not substantially impeded by doubt about validity of such contracts. Nevertheless, a few points are covered in the interest of greater certainty.

The main question regarding electronic contracts appears to be whether sending some kinds of electronic signals can show sufficient intent to be bound by contract. UECA section 20 says that an action in electronic form, including touching or clicking on an appropriately designed icon or place on a computer screen, is sufficient to express any matter that is material to the formation or operation of a contract.[102] Similarly, a voice-activated response would be effective.

UECA sections 21 and 22 provide for the use of electronic agents, in terms much influenced by NCCUSL's work.[103] Electronic agents are defined as computer programs used to initiate an action or to respond to electronic documents without human intervention at the time of response or action.[104] They are distinguished from the law of agency because they are machines that have no legal personality. The term, however, is widely accepted and not easily displaced by something clearer in law, such as "electronic device." Section 21 of the UECA makes it clear that contracts may be formed using electronic agents, on one side or on both sides.[105]

UECA section 22 provides a solution for the "single keystroke error," where a human being makes a mistake in communicating with an electronic agent.[106] Often, such agents are not programmed to recognize messages intended to correct an error, i.e., "I didn't mean 100 widgets, I meant 10." The section makes these mistakes unenforceable if the procedures set forth are followed, unless the owner of the agent provides a method of preventing or correcting such errors.[107] It is not the role of legislation to determine exactly what method must be used, as there may be many acceptable ways. Restating an order before processing it, however, with a note like: "This is what you are ordering. Are you sure?," would probably be enough.

The Canadian working group did not think it necessary to define both "electronic agent" and "automated transaction".[108] The UECA also does not contain a parallel to UETA section 10(a) regarding the failure to comply with agreed upon security procedures.[109] This rule in

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102. UECA § 20.
103. *Id.* §§ 21-22. *See* UETA § 2(6) (defining "electronic agent").
104. UECA § 19.
105. *Id.* § 21.
106. *Id.* § 22.
107. *Id.*
108. *But cf.* UETA § 2(2).
109. *See generally Id.; cf.* UETA § 10(a).

the view of the UECA working group simply stated the current law on breach of contract.[110] The UECA does not follow the UETA in spelling out that the error-correction remedy does not displace other remedies that the law already provides for in the event of mistake. Some commentators have argued that such a specification would be useful in Canada as well.[111]

H. Attribution of Documents

The Model Law provides that data messages may be attributed to those who create them or who authorize their creation.[112] This is of course the general law in both Canada and the U.S. The UETA and the Australian bill have similar provisions.[113] The Canadian Conference thought this was sufficiently clear that it did not need to be expressed.

The Model Law provides a rule where certain agreed upon security procedures are used on data messages. [114] NCCUSL attempted to devise similar rules, but they fell under severe criticism based partially on the fluidity of the technology available and partially on the likely sophistication of its users.[115] Canada did not follow the Model Law on this point. Some of the current work of UNCITRAL on electronic signatures aimed to give more substance to the provisions of Article 13, but those efforts have borne modest results.[116]

I. Sending and Receiving Electronic Documents.

The Model Law has influenced both the UETA and the UECA in determining where and when messages are sent and received.[117] The location question is quite simple. The basic rule of both Acts, subject to modification by agreement of the parties, is that messages are sent from and received at the place of business of the sender or recipient.[118] Subsidiary rules deal with multiple places of business or no place of business.[119] The rule helps separate the essence of the communication

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110. UETA § 10(a).

111. NEW BRUNSWICK PAPER, *supra* note 46, at 37 (discussing UECA § 22).

112. MODEL LAW art. 13(1), (2).

113. UETA § 9(b); AETA § 15.

114. MODEL LAW art. 3(3), (4). The Guide to Enactment calls it a presumption. GUIDE TO ENACTMENT para. 86.

115. NCCUSL, *supra* note 30.

116. UNCITRAL WORKING GROUP ON ELECTRONIC COMMERCE, OCT. 2000 REP., http://www.uncitral.org/english/sessions/wg_ec/index.htm (last visited March 12, 2001). MODEL LAW art. 6.

117. MODEL LAW art. 15; UECA § 23; UETA § 15.

118. UECA § 23; UETA § 15(a)-(b).

119. UECA § 23; UETA § 15(d)(1), (2).

from the incidental aspects, such as the location of the server, or the location of the sender or recipient when he or she actually deals with the message.[120] For instance, someone with a business in Toronto who has an e-mail account or a web site with "Sympatico.ca" does not have to worry about where Sympatico's server is, and the applicable law does not change relating to a transaction if a person sends or picks up messages while travelling out of the province.[121] While this makes sense in itself, it may create an anomalous situation where the same message is sent between the same people at the same time but by different media (an e-mail confirmed by a letter or phone call, for example), and the messages are considered in law to be sent and received in different places depending on the medium used.[122]

There may also be cases where the location of the server or other indicia of location remain important, such as in deciding if one has a permanent establishment for tax purposes.[123] Jurisdictional questions in electronic commerce are tricky.[124] The rules in the uniform acts will resolve a few, but far from all of these questions. One may also have different considerations in civil disputes, regulatory actions and criminal prosecutions.[125]

The rule on the time of sending is also relatively simple: The message is deemed sent when it leaves the control of the sender.[126] If the sender and the addressee are on the same system, the message is sent when it becomes accessible to the addressee.[127] The UETA adds two requirements not found in the UECA: (1) that the message be properly addressed; and (2) that the message be sent to a designated system.[128] The first requirement is either a matter of general law that does not need repeating, or is a new requirement for electronic media

120. UECA § 23; UETA § 15(d)(1), (2).

121. *See generally*, Tyler Anderson, Comment, *An Analysis of Personal Jurisdiction and Conflicts of Law in the Context of Electronically Formed Contracts*, 37 IDAHO L. REV. 477, 488-97 (2001) (analyzing similar provisions and their effect on choice of law under the UETA).

122. The anomaly is pointed out by the NEW BRUNSWICK PAPER, *supra* note 46, at 39-41.

123. A good deal of work has been done on such questions by the Organization for Economic Cooperation and Development (OECD), including a report published in January 2001. *See* http://www.oecd.org/daf/fa/_treaties/Clarif_e.pdf.

124. *See generally* Anderson, *supra* note 121 at 480-87 (analyzing personal jurisdiction in light of the UETA).

125. The ULCC has published a discussion of jurisdiction from a Canadian point of view. *See generally* http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm (last visited March 12, 2001).

126. UECA § 23(1); UETA § 15(a).

127. UECA § 23(1); UETA § 15(a).

128. UETA §15(a)(1).

that is hard to justify for those media alone. The commentary states that the properly addressed message prevents a broadcast mailing to a computer system meeting the requirement that something be sent to a particular person.[129] This seems to be a variant of a rule of law that would hold that sending a paper message to "occupant" does not satisfy a requirement to send something to a particular person.

The second requirement regarding sending to a designated system, reflects the provision on receiving electronic messages. It is not clear why this rule is necessary to show that a message was sent, though sending to an undesignated system would risk undermining any rule about when the message had been received. Perhaps the drafters of UETA wanted to mitigate the problems of the laws that require sending without specifying whether receipt is needed. The UETA rule would at least increase the chances of actual receipt.

The somewhat more difficult issue is time of receipt. The Model Law deems a message received when it reaches an information system in the control of the addressee.[130] The UETA, however, requires that the addressee have designated or used the system for the purpose of the kind of message in question before that rule applies, and that the message be in a processible form.[131] The UECA picks up the designation or use point, as well as the processible point, but makes receipt a presumption not a rule, contrary to the Model Law and the UETA.[132] It was widely thought among the Canadian working group that the receipt of electronic messages was not reliable enough to support a rule that cannot be rebutted.[133] The UETA makes the case of messages purportedly sent or received but not actually sent or received subject to rules of law outside itself.[134] It is thus arguable that this turns the rule into a kind of presumption in some circumstances.

The Model Law discusses cases where the addressee has designated a system and has sent the message elsewhere, and with cases where no system has been designated.[135] The UECA discusses cases of no designation, but not expressly with cases where a system is designated but the message is sent to another system.[136] The Model Law

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129. *Id.* § 15 cmt. 2.

130. MODEL LAW art. 15(2).

131. Again the statute is silent on whether capability of processing is subjective or objective.

132. MODEL LAW art. 15; UETA § 15(c).

133. *See* Letter from Cem Kaner, J.D., Ph.D., attorney at law, to Donald S. Clark, Sec'y, Fed. Trade Comm'n, *at* http://www.ftc.gov/bcp/icpw/comments/kaner.htm (April 30, 1999) (discussing the reliability of e-mail).

134. UETA § 15(g).

135. *See* MODEL LAW art. 15.

136. UECA § 23(2)(b). This section is at best ambiguous on this point and should arguably be amended or the point corrected in implementing legislation.

states that a message sent to an undesignated system, where another system is designated, is received when retrieved by the addressee. [137] The UECA, following the Australian Act,[138] provides that such a message is received when the addressee becomes aware of it. [139] The addressee cannot avoid legal receipt by refusing to retrieve a message known to be available. Under either the UECA or the Australian Act, there is no legal duty to check for messages on an undesignated system.[140] The UETA is silent on receipt by an undesignated system.[141]

The UETA and UECA make the rule of the place of sending and receiving electronic messages subject to contrary agreement by the parties.[142] The UETA does likewise for the time of sending and receiving while the UECA expressly provides only for the time of sending.[143] The difference arises because the UECA has only a presumption of the time of receipt, and the parties do not need to be given the right to rebut that presumption. They may agree on facts that effectively rebut it.

In the absence of a rule or presumption, the sender will have to demonstrate actual receipt. If a sender needs to ensure receipt before taking further steps, that sender may have to ask for acknowledgements. The Model Law and the UETA spell out the effect of acknowledgements.[144] They are in accord that the fact of receipt does not ensure that the message received corresponded to the message sent. The Canadian working group felt that all of the provisions on acknowledgement simply restated what would occur under current law, so the UECA is silent in that respect.[145] The UETA also deals with messages received when no one is aware of them[146] — an issue the UECA also did not address.

Neither the UETA nor the UECA address the legal effect of receiving a message. In its draft form, the UETA provided that the

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137. MODEL LAW art. 15.
138. AETA § 14(4).
139. UECA § 23(2)(b).
140. *But cf.* MODEL LAW, art. 15(2)(b). The Model Law states that a message to an undesignated system is received when it enters that system, if the addressee has not designated any system. *Id.* This effectively creates a duty on people to check all their systems regularly for messages with legal effect. In the alternative they can designate a system and then check only it. The UECA and UETA would impose a condition of consent on the legal effect of received messages, in any event.
141. *See generally,* UETA.
142. UETA § 15; UECA § 23.
143. *Compare* UETA § 15(a)-(b), *with* UECA § 23.
144. *See* MODEL LAW art. 14; UETA § 15(f).
145. UECA §§ 24-25.
146. UETA § 15(e).

mailbox rule was abolished for electronic messages.[147] However, the provision was discarded in the late stages of drafting, in part because it was a rule of substantive law in the UETA which is devoted to interpretation and media neutrality.[148] They also wanted to leave the argument open that the mailbox rule applied to electronic communications.[149] In Canada the Conference was invited to discuss the issue but declined to do so.[150]

J. Carriage of Goods

One of the last things that UNCITRAL added to the Model Law was a section on special transactions, namely those dealing with the carriage of goods.[151] The working group felt that these transactions are often international, and are subject to a number of special legal regimes and conventions. In particular, these transactions often rest on negotiable documents of title such as bills of lading. The general principles of the Model Law on non-discrimination because of medium apply here as well, but the working group believed that particular rules were needed for negotiability and because of the possibility that documents would be transferred from one medium to another when the document itself carried legal effect.

The UECA has picked up these provisions, though the UETA has not.[152] The UECA has not spoken of "unique" documents, however, as it is not clear how to create a unique electronic document (though one can immobilize and time-stamp an electronic document). Instead, the UECA speaks of a document intended for one person and not another. Representatives of transport organizations have favored enacting these provisions, even though it is not clear yet what technology may be available to satisfy the requirements. The UETA's provisions on transferable records may cover some of the same substantive area.[153]

IV. IMPLEMENTING THE UECA

Canadian jurisdictions have been actively enacting legislation on electronic communications, most of them by using the UECA.[154] Most

147. UETA § 114(e), cmt. 5 (January 1999 Draft).

148. *See* Winn, *supra* note 73.

149. *Id.*

150. *See* John D. Gregory, *Receiving Electronic Messages*, 15 BANKING & FIN. L. REV. 473 (2000) (arguing that the mailbox rule should not apply to electronic messages).

151. MODEL LAW arts. 16-17.

152. *See* UECA §§ 24-25; *see generally* UETA.

153. *See* UETA § 16. NCCUSL has established drafting committees on some of the UCC articles that would be affected by Part Two of the Model Law. *See* http://www.law.upenn.edu/bll/ulc/ulc.htm (listing the drafting committees).

154. *See generally* UECA. *See infra* Part IV.

have remained close to the UECA in text and principle. The following presents brief overview of the provincial and federal statutes.[155]

A. Provincial Statutes

A number of provinces have taken steps to implement the UECA. Saskatchewan passed its Electronic Documents and Information Act in June 2000.[156] The title was changed to account for the broader scope of the statute.[157] Manitoba passed its Electronic Commerce and Information Act in August 2000.[158] Ontario passed its Electronic Commerce Act 2000 in October of that year.[159] Nova Scotia's Electronic Commerce Act was passed in December 2000.[160] Yukon Territory adopted its Electronic Commerce Act in December as well.[161] British Columbia's Electronic Transactions Act was introduced in July 2000.[162] New Brunswick has similarly announced its intention to legislate.[163] Other provinces will be introducing implementing legislation in the next several months.[164]

In June, Quebec presented a draft bill not based on the UECA, but largely consistent with the Model Law. Public hearings were held in late summer. A somewhat revised version was reintroduced in the

155. No attempt is made to track the state enactments of the UETA and the variations that the states have made in doing so, or to account for the U.S. federal legislation.

156. Electronic Information and Documents Act, S.S. c.E-7.22 (2000) (Can.)(in force November 1, 2000), http://www.legassembly.skca/bills/HTML/bill038.htm [hereinafter referred to as Saskatchewan EIDA].

157. *Id.*

158. Electronic Commerce and Information Act, C.C.S.M. c.E55 (2000) (Can.) (Parts 1, 2, 4, 5, 7 in force October 23, 2000), http://www.gov.mb.ca/chc/statpub/free/pdf/b31-1s00.pdf (last visited March 5, 2001) [hereinafter referred to as Manitoba ECIA].

159. Ontario ECA, R.S.O. Bill 88 2000 (2000) (in force November 30, 2000), http://www.e-laws.gov.on.ca.

160. Electronic Commerce Act, S.N.S. c.26 (2000) (Can.) (in force December 1, 2000), http://www.gov.ns.ca/legi/legc/bills/58th_1st/3rd_read/b061.htm.

161. Electronic Commerce Act, S.Y.T. c.10 (2000) (Can.) (Royal Assent December 14, 2000 - in force on proclamation), *at* http://www.gov.yk.ca/leg-assembly/progress. html.

162. Electronic Transactions Act, B.C. Bill 32-2000, (2000) (Can.), http://www.legis.gov.bc.ca/2000/1st_read/gov32-1.htm [hereinafter referred to as B.C. ETA].

163. The consultation paper has been mentioned. *See* NEW BRUNSWICK PAPER, *supra* note 46.

164. *See* , DEPT. of JUS. CANADA, *Current Statutory Reform Initiatives in Canada* (modified January 30, 2001), http://canada.justice.gc.ca/en/ps/ec/sriec.html.

fall of 2000.[165] The Quebec statute places more emphasis than the UECA or the UETA on the need for reliability of electronic documents, which it calls "technological documents," thus avoiding debates about the scope of "electronic."[166] Quebec's approach is also more theoretical and systematic than the UECA. The bill goes into considerable detail on signatures – or rather the connection between a text and its source.[167] The bill picks up some provisions that originated in the UECA, like the provision on copies of electronic records,[168] and some provisions from the UETA, notably the error-correction section.[169]

Some commentators have criticized the Quebec bill both for its difficulty to follow and for its failure to harmonize with the rest of North America. It remains to be seen whether the provincial government will agree to any significant changes to its approach.[170]

Of all the common law provinces, Manitoba's statute diverges most from the UECA. Manitoba's functional equivalent provisions on writing, signatures, and the like apply only to designated provisions of law, not to the law in general. The statute does not say how designations are to be done; probably regulations will be made under it. The signature rules are even more hedged in: not only must the signature rule be designated so the statute can apply to it, but the parties must consent to the use of an electronic signature, and the electronic signature must meet the appropriate reliability standard of the Model Law.[171]

Ontario has made the most changes to the scope provisions of the UECA.[172] It has excluded election documents from its statute.[173] It also ensures that the Act does not apply to the use of biometric information as a personal identifier, unless there is express consent or specific statutory authority.[174] This provision was included in the Ontario Act because the Information and Privacy Commission was concerned about the protection of privacy of information.[175] If Ontario passes pri-

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165. National Assembly, Bill 161 (2000) (Can.), *at* http://www.assnat.qc.ca/eng/publications/Projects-loi/publics/00-a161.htm [hereinafter referred to as Quebec Bill].

166. *Id.* § 4.

167. *See id.* §§ 38-45.

168. UECA § 14; Quebec Bill, Bill 161, § 32 (2000).

169. UETA § 10(2); UECA § 22; Quebec Bill, Bill 161, § 35.

170. *See* D. McGowan, *Ouebec's Proposed Law in Information Technology should Never See the Light of Day*, 1 Internet & E-Commerce L. 89, 89-96 (2001).

171. Manitoba ECIA, C.C.S.M. c.E55, § 13 (2000).

172. *See* Ontario ECA, R.S.O. Bill 88 2000, § 26 (2000).

173. *Id* § 30.

174. *See id.* § 29.

175. Ontario, along with the other jurisdictions in Canada, has public-sector privacy legislation. *See* FED. PRIVACY COMM'R, http://www.privcom.gc.ca (last visited March 5, 2001) (providing links to provincial sites as well).

vacy legislation, these sections could be repealed. Legislation in other common law provinces is fairly consistent with the UECA.

Ontario's implementing statute includes municipalities as "public bodies."[176] British Columbia's bill does not contain special rules for government, except to permit electronic payments.[177] Saskatchewan's bill has a separate part for electronic communications with government, based on its 1998 e-filing statute referred to earlier.[178]

Ontario added conditions to the implied consent provision of the bill.[179] Persons relying on it must have reasonable grounds to believe the consent is genuine and relevant to the communications in question.[180] While these additions aim to relieve some concerns of consumer protection advocates, it is hard to imagine a serious businessperson relying on the implied consent provision without believing that the consent, even implied, had these characteristics.

Ontario also added a rule to deal with the point mentioned earlier regarding passive information.[181] Ontario's statute states that required information cannot be provided simply by giving access to it on a website.[182] There must be a real delivery of the information to the person to whom the provider is required to provide it. However, web-based e-mail delivery is acceptable. Particular rules on providing information may be satisfied by placing that information on the web – perhaps with direct notice to the addressee that it's there – but it was felt not to be appropriate to make such a rule across the board.[183]

With respect to the signature rule, Ontario has allowed for regulations spelling out particular signing methods for particular transactions or documents or persons.[184] Ontario does not expect to make a lot of regulations, but they felt that the power to be specific on occasion was valuable.[185] Ontario also made it clear that an electronic signature may constitute an endorsement, though an electronic

176. *See* Ontario ECA, R.S.O. Bill 88 2000, §§ 14-18 (2000).

177. B.C. ETA, B.C. Bill 32-2000, § 14(1)-(2) (2000).

178. Electronic Filing Act, S.S., ch. E-7.21, (1998) (Can.). *See also* Saskatchewan EIDA, S.S. c.E-7.22, §§ 29-30 (2000).

179. *See* Ontario ECA, R.S.O. Bill 88 2000, § 14.

180. *Id.* § 3(2).

181. *See id.* § 10.

182. *Id.* § 10.

183. *Id.* § 26(1). In Canada, as in the U.S., securities disclosure can be accomplished for consenting investors by posting material on the web. However, the form this rule has taken in Canada, a Policy Statement by the Canadian Securities Administrators, may not satisfy the Ontario Act unless it is given greater legal force. At that point the securities rule would fall outside the Act as a rule of law expressly authorizing the use of electronic documents. *Cf.* UECA § 2(5).

184. Ontario ECA, R.S.O. Bill 88 2000, § 11(4).

185. *See id.*

document has no "back", where an endorsement would usually be written[186]

Ontario added in the late stages of adoption a provision addressing electronic seals, an issue on which the UECA and the other provincial statutes are silent.[187] Seals are still used in several types of transaction in Canadian law. Because of the variety of situations and legal effects, the statute itself does not say how to use them, it merely gives the Executive power to make regulations to allow an electronic document to be considered sealed.[188]

Finally, Ontario has qualified the acceptance of electronic originals to avoid a possible conflict in its personal property security rules between a paper original and an electronic original of the same document.[189] Two competing originals should not exist, but if through inadvertence or misdealing this occurs, the e-commerce statute yields to the paper. When the personal property security legislation permits electronic chattel paper, such conflicts may be resolved in that statute.

B. Federal Legislation on Electronic Documents

In April 2000, the Canadian federal government passed the Personal Information Protection and Electronic Documents Act, known familiarly (and more economically) as Bill C-6.[190] Bill C-6 contains provisions on personal privacy, electronic documents and electronic evidence.[191] Here we are concerned with Part two of the bill that pertains to electronic documents and which came into force on May 7, 2000.[192] Part 2 resembles the August 1998 draft of the UECA, which then contained a special part for government documents.[193]

Part 2 of Bill C-6 applies to provisions of federal statutes and regulations that impose or seem to impose paper requirements.[194] In Canada, the federal government regulates interprovincial undertakings, like broadcasting, telecommunication, railways, and certain prescribed sectors of the economy like banks and some other financial institutions. Most smaller businesses are subject to provincial legisla-

186. *Id.* § 11.
187. *Id.*
188. *Id.* § 11(6).
189. *Id.* § 8(4).
190. Bill C-6, S.C. ch. 5 (2000) (Can.). The legislation is the same as Bill C-54 in the 1998-99 session of Parliament. Bill C-6 was given Royal Assent on April 13, 2000, as S.C.2000 ch. 5. *See* http://www.e-laws.gov.on.ca (last visited January 22, 2001). *See also supra* note 92.
191. Bill C-6 pt.2.
192. *Id.*
193. *See* UECA (Draft 1998),http://www.ulcc.ca/alri/ulc/98pro/e98.htm.
194. Bill C-6, S.C. ch. 5, pt.2 (2000).

tion. Bill C-6 will also apply to communications between members of the public – businesses or individuals – and the federal government itself.[195]

The legislation permits federal government departments and agencies to use electronic means to create, collect, receive, store, transfer, distribute, publish or otherwise deal with documents or information whenever a federal law does not specify the manner of doing so.[196] In other words, the general permission here yields to existing or future specific form legislation, just as the UECA does.[197] It also permits federal departments to make electronic payments as the Receiver General specifies.[198] Where forms are prescribed under federal law, electronic forms may be created or used for that purpose.[199]

Part 2 of Bill C-6 sets up an opt-in scheme, by which certain media requirements can be met by electronic documents - if the government department responsible designates the requirements to be covered by the statute, and if at the time of designation the regulations say how the electronic documents are to be created or dealt with.[200] The designated provisions will appear in schedules to the Act so the public has a central point of reference to learn what provisions are in or out of the scheme. This format applies, for example, to writing requirements,[201] signatures,[202] copies,[203] and the provision of information.[204]

The opt-in scheme of Part Two is "in force," although it does not apply to anything yet, and will not until designations and regulations are made. Such designations and regulations, however, are expected in the coming months. It is likely that the rules will be consistent with the principles of the Model Law and of the UECA.

However, the Canadian federal government has gone further than the UECA in one important aspect. Several sections of Bill C-6 Part Two contemplate the use of a "secure electronic signature."[205] For example, one can use a secure electronic signature to create a certificate signed by a minister or public official that is proof of a fact or

195. *Id.*
196. *Id.* § 33.
197. *Id.*; UECA § 2(2).
198. Bill C-6, S.C. ch. 5, § 34 (2000).
199. *Id.* § 35.
200. *Id.* §§ 33, 35(1), (2).
201. *Id.* § 41.
202. *Id.* § 43.
203. *Id.* § 47.
204. *Id.* § 40.
205. *See id.* §§ 39, 42, 44, 45, 48.

admissible as evidence.[206] A secure electronic signature may serve as a seal, if the seal requirement has been designated under the Act.[207] Affidavits may be made electronically if both deponent and commissioner of the oath sign with a secure electronic signature.[208] In similar circumstances, declarations of truth may be made with such signatures.[209] Witnesses may also sign under similar conditions.[210]

A "secure electronic signature" is not defined in Bill C-6, except as "an electronic signature that results from the application of a technology or process prescribed by regulations made under subsection 48(1)."[211] Subsection 48(1) sets out the usual provisions for signatures of this type (as originally designed by the National Institute of Science and Technology (NIST) in the U.S., and since adopted or adapted in California, Illinois, and other states, as well as by UNCITRAL in its new Model Law on Electronic Signatures).[212] Under subsection 48(2), the "Governor in Council may prescribe a technology or process" [for defining a secure electronic signature] provided it can be proved to the maker of the regulation that:

> (a) the electronic signature resulting from the use by a person of the technology or process is unique to the person;
>
> (b) the use of the technology or process by a person to incorporate, attach or associate the person's electronic signature to an electronic document is under the sole control of the person;
>
> (c) the technology or process can be used to identify the person using the technology or process; and
>
> (d) the electronic signature can be linked with an electronic document in such a way that it can be used to determine whether the electronic document has been changed since the electronic signature was incorporated in, attached to or associated with the electronic document.[213]

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206. *Id.* § 36.
207. *Id.* § 39.
208. *Id.* § 44 (requiring designation and regulations as above).
209. *Id.* § 45.
210. *Id.* § 46.
211. *Id.* § 31.
212. *Id.* § 48(1). *See generally* MODEL LAW. Similar language is found in the European Union, Directive on Electronic Signatures, *available at* http://www.europa.eu.int/comm/internal_market/en/media/sign/Dir99-93-ecEN.pdf (last visited March 5, 2001).
213. Bill C-6, S.C. ch. 5, § 48(2) (2000).

The intention is that in the first instance the only technology to be designated is that of digital signatures certified through the Government of Canada Public Key Infrastructure (GOC PKI), or that of systems cross-certified with the GOC PKI.[214] Some provincial governments are developing public key infrastructures as well, and they hope to be cross-certified with the GOC PKI. This would help extend the reach of Bill C-6, because most provincial systems will probably issue digital signature certificates to a number of people in the private sector who could use them in dealing with the federal government (depending on the terms of the provincial implementation).

In short, the federal approach is a cautious one, but it does remove the major statutory barriers to electronic commerce. It does so by empowering the government to make regulations when and as appropriate. The law contains no encouragement to adopt harmonized standards across governmental entities, though federal officials assert that market forces and central planning of technology requirements will tend to harmonize the departments' approaches in any event. The UECA itself does not purport to harmonize the standards applicable to incoming documents among government departments or agencies.[215] Outgoing electronic documents would be subject to the general rules of functional equivalence.

V. CONSUMER PROTECTION

Consumer protection in electronic commerce has attracted some attention in Canada. The Public Interest Advocacy Centre (PIAC), a national consumer protection organization, made a submission to all Attorneys General and all Ministers of Consumer Affairs in the country in June 2000, urging them to insert a list of consumer protection provisions into their versions of the UECA.[216] To date, none of the implementing provinces have picked up PIAC's proposals, though Ontario's rule against "providing" legally required information on websites and arguably the refined wording on implied consent reflect a few of the same principles.[217]

In November 1999, a business/consumer taskforce published guidelines on this subject, promoting education of all parties and standards for vendors and consumers engaging in online transac-

214. Government of Canada Public Key Infrastructure Initiatives, *available at* http://www.cio-dpi.gc.ca/pki/Initiatives/initiatives_e.html (last visited March 5, 2001) (providing additional information on PKI).

215. *See generally* UECA.

216. http://www.piac.ca/uecalet.htm (last visited March 5, 2001).

217. *See supra* note 57 and accompanying text.

tions.[218] They are similar to, but not directly influenced by, the ABA guidelines for "safe shopping" published in October 1999.[219] They are also intended to be consistent with consumer protection rules about to be promulgated by the Organization for Economic Cooperation and Development (OECD).[220]

To date, the consumer protection rules are only guidelines. It is expected that some form of relatively light-handed legislation will be developed as well. Legislative principles were developed by a federal-provincial-territorial working group and adopted by Ministers from all jurisdictions in December 1999. That group has made efforts to ensure that its proposals will be consistent with the UECA and designed to supplement rather than to displace it.

Here are the main legislative principles:

* Consumer law should accept the use of electronic signatures where it requires that contracts be signed.

* Electronic contracts should contain the prescribed disclosures [such as location of merchant, delivery and warranty terms, return and refund policies, and a "30-day delivery rule" by which if goods not delivered within 30 days, the contract can be rescinded]. The contract (including all required disclosures) and supporting documentation should be given into the custody and control of the customer, (e.g. by fax or file download) and be printable.

* Agreement to the terms of a contract should be a clear process that a consumer cannot perform unknowingly.

* Sellers should provide consumers with receipts as soon as possible after payment has been made. Receipts should be printed or in a printable form.

* Purchasers should be able to cancel contracts for non-compliance with disclosure terms or for late delivery (as set out in the "30-day rule discussed later).[221]

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218. The guidelines are available at the Industry Canada e-commerce website. *See* Consumer Protection for Electronic Commerce, *available at* http://strategis.gc.ca/SSG/ca01182e.html (last visited March 5, 2001).

219. ABA Safe Shopping, *available at* http://www.safeshopping.org (last visited March 5, 2001).

220. http://www.oecd.org/subject/e_commerce/ (last visited March 5, 2001).

221. MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS, ONTARIO CONSUMER PROTECTION FOR THE 21ST CENTURY (August 2000) [alteration of original] *available at* http://www.ccr.gov.on.ca/pdf/EnconsProt.pdf (last visited March 5, 2001).

The point of these legislative principles is that consumer's rights, including disclosure and remedies, would be substantially the same online as for transactions by traditional means. However, the provincial and territorial consumer protection statutes are not uniform for traditional commerce, though some sets of rules, such as those for direct selling, are fairly standard.

Manitoba's electronic commerce legislation contained several non-uniform provisions to protect consumers.[222] These provisions apply to disclosure and cooling-off periods. However, there are also rules for "Internet transactions" that require credit card issuers to reverse consumer transactions in certain cases. To date, these provisions do not seem to have drawn attention or criticism from anyone, including financial institutions.

Ontario released a consultation paper on general consumer protection reform in the summer of 2000.[223] The paper included a section on electronic commerce measures that primarily focused on disclosure rather than on regulation.[224] The paper suggested that the province may introduce comprehensive legislation early in 2001.[225]

Alberta's Fair Trading Act[226] makes provision for regulations to protect consumers in electronic commerce. Section 42 states that the Minister may make regulations respecting the marketing of goods and services through forms of electronic media.[227] In particular, regulations may be made regulating and prohibiting specific activities involved in electronic marketing, as well as setting out rights and remedies of consumers who enter into transactions wholly or in part through a form of electronic media. Draft regulations were sent to stakeholders for comment by the end of October 2000. The final version has not yet been released.

One expects such legislation and regulations to spread across the country, ideally in conformity with the principles adopted in December 1999 by all jurisdictions, but so far the practice has not been uniform. Some further negotiation is being conducted among all the provincial governments to arrive at a "template" of consistent wording, at a level of application more practical than that of the 1999 agreement.

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222. Ontario CPA, R.S.O., ch. C-31, § 127-35 (1990). These sections were enacted by section 35 of the electronic commerce statute.

223. *See* http://www.ccr.gov.on.ca/pdf/EnConsProt.pdf (last visited March 5, 2001).

224. *Id.*

225. *Id.*

226. S.A. ch. F-1.05 (1998) (Can.).

227. *Id.* § 42.

It should be noted that none of these proposals involve limiting the types of transactions or messages for which electronic communications may be used. In this they differ from the consumer protection measures in the U.S. federal E-sign legislation, which bars electronic messages for certain sensitive classes of message.[228] The field is subject to evolution, and no doubt to further harmonization over time.

VI. CONCLUSION

Canada and the U.S. have been on similar paths in legislating for electronic transactions, preferring minimalist, technology neutral laws. Since the UETA and the UECA have a common ancestor in the Model Law, it is not surprising that the uniform statutes resemble each other as much as they do. The collaboration in their development assisted in this result. As the economies of the two countries are closely linked, and as electronic communications lessen the significance of borders around the world, the similarity should prove advantageous for businesses in both countries. Consumers will benefit from the certainty of the rules in the statutes, but will have to await further efforts of harmonization before having the same array of protection on both sides of the border.

Meanwhile the different choices on some of the policy issues, and the different approach to drafting points of detail, will provide matter for reflection, and no doubt work for lawyers, as everyone becomes more comfortable with the legal impact of electronic commerce.

228. E-sign, 15 U.S.C. § 7003 (2000).