

Evolving B2B Legislation

BY GABE TAKACH



Recent changes have been made to the laws governing the way we do business over the Internet. Here's an update.

Few would disagree that commercial activities over the Internet are creating challenges for lawyers and legislators, who must try to keep up. Some significant legislative progress has been made and some new challenges have been created.

On the progress side, the introduction of new statutes to facilitate electronic commerce is a most notable achievement. Without legislative change, the enforceability of contracts in a B2B transaction could be questioned. Here is why.

In Canada, it is the provinces that have jurisdiction over laws governing contracts. All of the provinces have laws requiring contracts of certain types and size to be "in writing" and in some cases to have "signatures". Case law exists that recognizes faxed communications as meeting the "in writing" requirement, but none of the cases is on all fours with a contract between parties who communicate entirely through the exchange of electronic messages.

As of this June, all ten provinces have legislation facilitating electronic commerce. The various provincial statutes are generally based on the model Uniform Electronic Commerce Act, developed by the Uniform Law Conference of Canada. As you might expect with any statute that purports to amend general principles contained in other statutes, these e-commerce statutes are highly technical in nature. The following are the principal features.

Any requirement for documents "in writing" is satisfied through an electronic document, but only if the electronic document is accessible and is capable of being retained so as to be usable. If the person supplying the document inhibits its printing or storage, it will not qualify as a compliant document. Similar rules provide that any requirement for a signature is satisfied by an electronic signature,

but the definition of electronic signature varies from province to province.

No one is forced to use or receive information electronically without consent, but consent can be implied from behaviour, with the exception of the Government, for which express consent is needed. The Government may also prescribe technical standards for the communication.

These rules generally do not apply to wills and trust documents and transfers of land, although, for the latter, a number of provinces have initiatives under way to enable remote linking to the land-transfer system for the purpose of on-line recording transfers.

Similar provisions were enacted by the Federal Government as part of the Personal Information Protection and Electronic Documents Act.

The full potential of B2B e-commerce will only be realized if the enforceability of on-line contracts can be relied upon as a certainty. These new statutes should go a long way towards that predictability.

Changes to Competition Law

Another hot topic in the B2B arena revolves around competition law in Canada. The U.S. equivalent is antitrust law.

Competition issues with B2B portals include: the impact of rapid access to information, especially by market participants who participate in the ownership and operation of the portal; the creation of buyer-side market power; exclusionary practices which discriminate against or overtly exclude rivals of owner participants, and overall exclusivity arrangements designed to eliminate rival B2B portals.

Before the dot-com meltdown, online B2B business ventures enjoyed exponential growth. Many observers predicted an inevitable clash between competition regulators and the portals. U.S. regulators obliged the call for action by opening a

formal inquiry into a plan by the Big Three car-makers for an online venture.

Things now seem to have settled down on the competition front. No significant pronouncements have been made in Canada or the U.S. on the legality of B2B portals. In October 2000, The U.S. Federal Trade Commission issued a staff report on the effects on competition of B2B market places. It concludes that the antitrust concerns that arise with B2Bs are not new and are amendable to traditional antitrust analysis. In September 2000, the Federal Trade Commission advised that it closed its investigation into the Big Three car-makers' online venture on the basis that the investigation was premature.

Confusion Over Privacy

Since the enactment of the Canadian federal privacy legislation, a Privacy Commissioner has been appointed and his office is in the process of being staffed up. Judging from early pronouncements, the Commissioner will treat personal privacy as a near "human right." The full application of the federal Act is three years away and will only occur in provinces that fail to enact equivalent legislation.

Questions have been raised in the European Union whether Canada's statute meets the European Union's requirements for reciprocity. The irony of this will not be lost on those who recall that the European Union directive was cited as one of the principal reasons for the Canadian legislation. The Americans are, for the moment, banking on market-driven self-discipline. All of this confusion and uncertainty is a bad omen for e-business, and only time will tell how much chaos we are in for before order emerges, and at what cost.

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