ONLINE CONSUMER PROTECTION : A STUDY ON REGULATORY JURISDICTION IN CANADA

PREPARED FOR THE OFFICE OF CONSUMER AFFAIRS,
INDUSTRY CANADA

JULY, 2001

ROGER TASSÉ, O.C., Q.C.
MAXIME FAILLE

GOWLING LAFLEUR HENDERSON LLP

GOWLINGS

Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity.

- *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, *per* La Forest J.

The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however is a virtually meaningless construct on the Internet.

- *Am. Libraries Assn. v. Pataki* 969 F. Supp. 160 (S.D. N.Y.)

INTRODUCTION

The benefits of e-commerce, for consumers and business alike, have been oft-recognized. The public policy trend in Canada, both federally and provincially, has been to encourage the growth of e-commerce, by modernizing a legal infrastructure created in an era of, and designed for, paper transactions, brick-and-mortar storefronts, and itinerant salesmen. Public policy also recognizes the dangers associated with electronic commerce, and to consumers in particular, and there are commensurate initiatives to seek to modernize consumer protection laws.

One of the distinctive characteristics of electronic commerce is its borderless nature. Although mail-order and telemarketing transactions have been employed for some time, the rise of electronic commerce has exponentially increased the number of cross-border transactions. International trade, once largely the preserve of businesses, has now come to the consumer.

The ability to market and sell products and services from a single site to an unlimited geographic market, and to do so at a low cost, is one of the great advantages flowing from online commerce. It is also one of the major challenges it poses to businesses, consumers and policy-makers.

From a consumer's perspective, transacting with a business situated outside one's jurisdiction raises the concern that the consumer may not benefit from the protection he or she has come to expect when purchasing something through more traditional means, within one's jurisdiction. Many businesses, on the other hand, are strongly opposed to the suggestion that they must be familiar with and expected to comply with a patchwork of regulatory schemes and varying requirements of all the jurisdictions in which their various clients or potential clients may be located. The result is legal uncertainty, for both consumers and businesses, undermining confidence in the Internet as a mode of conducting business.

For policy makers, the challenge is therefore to restore a measure of certainty to the marketplace, and to do so in a way that properly balances the interests of consumers and businesses. One of the key issues in this regard is developing a practicable and reasonably predictable set of rules to determine what jurisdiction's laws will apply to consumer contracts and what courts will have

the authority to adjudicate and enforce disputes in this regard. This issue, in turn, may be sub-divided into two aspects, namely the private and the public. First, consideration must be given to what *private law* rules will apply to cross-border electronic consumer contracts, and what jurisdiction's courts will assert jurisdiction to determine parties' rights and obligations. Second, consideration must be given to what jurisdiction's public regulatory authority will apply in relation to cross-border business-to-consumer (B2C) transactions and activity.

For the purposes of this paper, the issue under review is referred to as "regulatory" or "prescriptive" jurisdiction. Prescriptive jurisdiction has been defined as "the authority of a state to make its law applicable to persons or activities."[1] Put simply: when a consumer in Manitoba is victimized by a vendor in Ontario, can Manitoba's consumer protection authorities apply the norms and investigative and prosecutorial powers under that province's *Consumer Protection Act*? If so, are those powers exercised through the Manitoba or Ontario courts? Should those powers be exercised at all, or should Ontario's *Consumer Protection Act* apply and be enforced directly by Ontario authorities? What are the legal and practical impediments to this and how can they best be overcome?

These questions have received relatively little attention in the literature and policy debates relating to e-commerce. While the literature on the jurisdictional challenges of e-commerce is voluminous, it is largely focussed on *private law* aspects of this issue, namely whose courts and whose laws will apply in relation to private disputes arising out of e-commerce. Yet the private law aspects of consumer contracts, while important, will often be quite academic: the value of consumer contracts, particularly those consummated over the Internet, tends to be quite small, while the cost of pursuing private lawsuits is high. Even on-line Alternative Dispute Resolution

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[1] U.S. "Restatement (Third) of Foreign Relations Law of the United States" § 401(a).

may be a losing investment for an aggrieved consumer. Questions of where proceedings may be brought and whose law applies will, as a result, not often arise.[2]

The low value of most e-commerce transactions is, however, likely reflective of consumer apprehension vis-à-vis this new shopping medium.[3] Concomitantly, the ability of B2C e-commerce to grow – in value and in volume – will no doubt depend in substantial part on the experience consumers have with those lower-value purchases. It is therefore critical that the experience be a happy one for as many consumers as possible, if confidence in e-commerce is to increase.

Given that consumers' remedies in relation to e-commerce problems will often amount to Phyrric victories even where successful, consumer protection authorities may have a particularly important role in ensuring that fair business practices are being followed online, and in imbuing consumers with the sense that they can practice safe e-shopping. As stated by the Australian Federal Bureau of Consumer Affairs, "The successful enforcement of laws relating to trading practices and fraud is crucial to establishing a favourable environment in which consumers can do business."[4]

It is hoped that this paper can also contribute to the discussions on these important topics by focussing on another neglected aspect of these broader issues, namely their application to Canada's federal system of government. Pursuant to its mandate, and while informed by the

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[2] Consumer class action suits, however, represent a significant exception to the general rule that the cost of consumer litigation outweighs likely recovery.

[3] In one survey, 75% of respondents indicated that concerns about the reliability of e-commerce businesses was a significant factor in their unwillingness to purchase online: *E-Commerce Survey: Business Reliability Ranks Near Transaction Security in Public Trust in Online Purchasing*, (1998) Rep. Elec. Comm, Feb. 10, 1998 at 3.

[4] Australian Federal Bureau of Consumer Affairs, *Untangling the Web: Electronic Commerce and the Consumer* (1997).

broader international context, the paper is largely devoted to discussion of regulatory jurisdictional issues within Canada as between the Canadian provinces and territories.

1. THE LEGISLATIVE CONTEXT IN CANADA

Substantive Protections

The existing legislative framework relating to consumer protection consists of a host of federal and provincial statutes. Federally, the primary instrument relevant to consumer protection is the *Competition Act*, which prohibits misleading advertising and deceptive marketing (including telemarketing) practices, as well as regulating multi-level marketing plans, pyramid schemes, double-pricing and other practices that are offensive to fair competition among businesses and to the interests of consumers. In addition to the *Competition Act*, the *Criminal Code*, the *Food and Drugs Act* and the *Trade-Marks Act* all contain provisions that are designed to, or have the effect of, ensuring consumer protection from false advertising, fraud and similar practices.

The provinces have enacted such legislation as Sales of Goods Acts, Consumer Protection Acts, Unfair Business Practices or Fair Trading Acts, Direct Sales Acts, Prepaid Services Acts, and Unconscionable Transactions Acts. Many provinces also have legislation dealing with credit transactions, as well as sector-specific legislation (including in the areas of travel agencies, motor vehicle sales, real estate agents etc.) that provide additional consumer protection. Legislation generally provides for both private law rights – such as contractual warranties, writing requirements, and rights of rescission – as well as regulatory prohibitions of proscribed practices and commensurate regulatory investigative and enforcement powers. This study focusses on the latter, "public law" or regulatory matters, and, in particular, the jurisdictional issues that arise within Canada.

A comprehensive review of these statutes is beyond the scope of this study. It is fair to say, however, that there are significant disparities in the scope and protection afforded across Canada.[5]

Applicable Law

While contractual terms allow parties to identify the applicable law governing a contract through a "choice of law" clause, such clauses cannot have the effect of ousting regulatory authority of state actors in relation to proscribed conduct such as unfair business practices, misleading advertising and fraud.[6] The reach of a public statute regulating conduct is largely a legislative matter, within the limits of the Constitution, and as ultimately interpreted by the Courts.

In this regard, consumer protection laws in Canada are generally not drafted in such a way as to limit their application to either the protection of consumers within the province or to the regulation of businesses/vendors within the province. The recent *Electronic Sales Contract Regulation* under the Alberta *Fair Trading Act*,[7] is specific in its broad scope. It provides, for example, that it applies to:

> (a) a contract in which the supplier or consumer is a resident of Alberta;
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> (b) a contract in which the offer or acceptance is made or is sent from Alberta.

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[5] For a detailed examination of Canadian consumer protection legislation in the context of electronic commerce, see R. Tassé and K. Lemieux, *Consumer Protection Rights in Canada in the Context of Electronic Commerce* (1999), Office of Consumer Affairs. Available at http://strategis.ic.gc.ca/SSG/ca01031e.html.

[6] *R. v. Trudel, Ex parte Horbas and Myhaluk*, [1969] 3 C.C.C. 95 (Man. C.A.); *R. v. McKenzie Securities Ltd.*, [1966] 4 C.C.C. 29 (Man. C.A.), cited with approval in *R. v. Libman, infra*.

[7] S.A. F-1.05. These provisions under the Electronic Commerce regulation relating to its application mirror the wide scope of application under the legislation itself, including in relation to unfair trading practices generally.

Similarly, Saskatchewan's *Consumer Protection Act*[8] specifically provides that its authorities may take authorized action "against a supplier in Saskatchewan on behalf of a consumer where the unfair practice occurred outside Saskatchewan."[9] Section 69 of the Saskatchewan *Act* also specifically provides that its "consumer products warranties" provisions and the private remedies provided for therein apply to consumers who buy or use consumer products purchased in Saskatchewan and to manufacturers, retail sellers or warrantors "who carry on business in Saskatchewan,"[10] and that they are subject to the jurisdiction of the courts of that province.

Quebec's *Civil Code* provides that the applicable law to a consumer contract is generally that of the "place where the consumer has his residence," but allows parties to designate their choice of law by contract. However, Article 3117 also provides that a consumer cannot be deprived of "the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence" subject to certain limitations. Thus, while general contractual matters in a consumer contract may be governed by conflict of law rules, the protections afforded by the consumer protection laws of the consumer's jurisdiction cannot be waived.[11]

In most cases, the relevant laws are silent as to their reach. In such cases, it falls to the courts to determine whether or not, as a matter of statutory interpretation, the legislation was intended to

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[8] S.S. 1996, Chap. C-30.1.

[9] *Ibid.*, s. 29.

[10] The definition of "carrying on business in Saskatchewan" is provided and is broad. The specific criteria suggest the need for a physical presence or representative in the province, but these are supplemented by the broader criteria of any business, manufacturer etc. that "directly or indirectly markets consumer products in Saskatchewan" or "otherwise carries on business in Saskatchewan." These broader criteria would arguably apply in relation to cross-border e-commerce from outside the province.

[11] Furthermore, Article 3149 of the *Civil Code* provides that the Quebec courts have jurisdiction to hear an action involving a consumer contract, despite any prior waiver by the consumer.

apply to conduct outside the jurisdiction but having effects within the jurisdiction and/or to conduct originating within the jurisdiction but having effects beyond its borders.[12]

In this regard, it appears likely that courts will be willing to apply provincial consumer protection laws both (1) where the affected consumer is within the province and the offending vendor or marketer is outside the province, and (2), conversely, where the affected consumer is located outside the province and the offending vendor or marketer is located within the province.

Indeed, even where, as in British Columbia, the relevant legislation contains some wording that might suggest that the law is territorially confined, the courts may not readily limit the application of its protections and prohibitions. For instance, in *Director of Trade Practices v. Ideal Credit Referral Services Ltd.*[13], the British Columbia Court of Appeal ruled that the province's Director of Trade Practices could seek an injunction against a corporation registered in and operating from British Columbia, in relation to an "advance fee loan" scheme directed at residents in the United States and whose victims were apparently all Americans. The advertisements promised consumer and business loans in spite of bad credit history or prior bankruptcy but required a $300 processing fee. In most cases the loan applications were rejected. Injunctive relief against the defendants was sought under B.C.'s *Trade Practice Act*. The defendants argued that the B.C. legislation only applied in relation to matters that involved consumers "in the Province" (a phrase used in the remedy provisions), and that to apply it in relation to U.S. consumers was to give the law improper extraterritorial effect.

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[12] The potential constitutional problems relating to the extra-territorial application of provincial legislation are discussed below. As will be seen, those problems are likely to be more perceived than real.

[13] (1997), 145 D.L.R. (4th) 20 (B.C. C.A.).

The Court rejected that defence, and ruled that the "pith and substance" of the legislation was directed at prohibiting certain proscribed activities or engaging in deceptive or unconscionable acts or practices. As such,

> ...the legislation is not being given extra-territorial application if it is applied in the Province to prohibit acts of engaging or participating in deceptive or unconscionable acts or practices in the Province, in relation to transactions or practices in the Province, in relation to transactions defined by the Act as "consumer transactions," wherever they occur.[14]

Historically, there has been a legislative presumption against the extra-territorial application of public law statutes, as a matter of statutory interpretation. This is based on a historical concern not to infringe on the sovereignty of other states (or provinces) by purporting to regulate conduct that occurs wholly within the boundaries of another jurisdiction. As noted by La Forest J. in *R. v. Libman*:

> It took some time before English criminal law became sufficiently developed to deal with more sophisticated methods of getting the gullible or unwary to part with their property, by means of false pretenses for example. And it was later still, in the late 19th century following the organization of postal, telegraph and telephone systems that practitioners of this gentle art of persuasion were able to extend their talents to the international plane.[15]

At that point, His Lordship notes, the law began to develop and the courts began to eschew rigid principles of territoriality. Initially, the courts began to develop various tests for the application of criminal laws (generally in the area of fraud and misrepresentation), based on shifting, divergent and often contradictory principles to fit the needs of each case: in some instances, the place where the act was planned or initiated would establish jurisdiction. In others, the touchstone was where the effect of an offence was felt, where it was initiated, where it was completed, or where the "gravamen," or essential element, of the offence took place.[16]

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[14] *Ibid.* at p. 25.

[15] *R. v. Libman*, [1985] 2 S.C.R. 178 at 185.

[16] *Ibid.* at 185-186

The modern approach, however, recognizes that governmental authorities have a legitimate interest in regulation and enforcement in relation to activities that take place abroad but have an unlawful consequence within their jurisdiction, as well as in activities that take place within their jurisdiction but have unlawful consequences elsewhere. In *Libman*, the Supreme Court summarized the modern approach to territoriality thus:

> ...all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test that is well-known in public and private international law.[17]

Although a case derived from the criminal law, it is clear that the principles in *Libman* have equal application to quasi-criminal and regulatory matters.[18]

Quebec's *Civil Code* provides detailed conflict of law rules and, in this regard, establishes the general rule that "Quebec authorities have jurisdiction when the defendant is domiciled in Quebec."[19] The *Code* also provides that Quebec authorities may hear matters even in the absence of jurisdiction if the matter has a "sufficient connection with Quebec" and where proceedings cannot be instituted elsewhere, or it would be unreasonable to require that they be instituted elsewhere (article 3136). Provision is also made under the *Code* for Quebec authorities to grant interim or "conservatory" relief, even where the authority has no jurisdiction over the merits of a particular dispute (article 3138) and for measures to be taken by Quebec authorities "as they consider necessary for the protection of the person or property of a person present in Quebec," in cases of urgency (article 3140). Although this regime has elements of the "real and substantial connection" test applicable in common law jurisdictions, it appears that a more

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[17] *Ibid.* at 212-213

[18] Indeed, the Supreme Court in *Libman* followed the approach taken by the Manitoba Court of Appeal in a case involving the extra-territorial application of Manitoba's securities legislation: *R. v. W. McKenzie Securities Ltd., supra* note 5.

[19] *Quebec Civil Code*, article 3134.

stringent test applies where the defendant is not resident in Quebec; in such cases, it must also be established that it would be impossible or unreasonable for proceedings to be held in another jurisdiction.

Conclusion regarding the Current Legislative Framework

The current Canadian legislative framework, therefore, lends itself to unequal protection and legal uncertainty for consumers and businesses alike as to what province's legislative jurisdiction will apply to a given transaction or practice.

The application of regulatory laws to cross-border transactions is in any context often difficult, and can be particularly so when attempted to be applied to online conduct. Reference to territory and location are inevitably problematic on the Internet, due to has been called that medium's "geographic indeterminancy."[20] However, many commentators have pointed out, the difficulty is not insurmountable. Although connectivity and transmission of data may take place within multiple jurisdictions, and computer servers on which information is hosted or from which it emanates or is received may be located separate from the actual parties to a particular dispute, the parties themselves ultimately are always located in some real, territorially-defined location. Difficulties in ascertaining that particular location, in general or at any particular time, do create practical obstacles. These difficulties can not, however, either legally or practically justify abdication of regulators' role and authority to protect consumers within their jurisdiction.

Clearly, the "real and substantial link" test for the proper assertion of prescriptive jurisdiction will often result in more than one, and perhaps many, jurisdictions being capable of properly asserting authority over conduct that has effects in more than one jurisdiction. It is this fact that suggests the need for clearer prescriptive jurisdictional rules. It should be noted, however, that

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[20] See J. Rothchild, "Making the Market Work: Enhancing Consumer Sovereignty Through the Telemarketing Sales Rule and the Distance Selling Directive" (1998), 21 J. Consumer Policy 279.

there is no need, and it would probably be undesirable and perhaps unconstitutional, to establish rules that will strictly determine what jurisdiction's authorities are capable of asserting jurisdiction in relation to a particular matter. Rather, the preferred approach is to come to a common understanding of determining which, of the authorities that are capable of asserting jurisdiction, will in fact do so, and which authorities will defer to the other, given a particular set of facts.

Furthermore, there may be circumstances in which limiting different authorities' jurisdiction may not be appropriate. The Supreme Court in *Libman* recognized that, in applying so broad a basis for prescriptive jurisdiction, there was a danger that individuals could be subjected to multiple prosecutions in multiple jurisdictions for the same acts. In *R. v. Van Rassel*, however, the Supreme Court noted that the general rule that a person should not be liable twice for the same delict or action does not apply to offences involving different victims. In that case, an R.C.M.P. officer and member of an international drug enforcement team was arrested in Florida on charges of soliciting and accepting bribes for information given to him by U.S. authorities, and was charged in Canada with breach of trust in relation to the same incident. The Supreme Court noted that there were "multiple victims" affected by his conduct, in that the officer "had a general duty of loyalty to the Canadian people and a temporary duty of loyalty to the United States, based on the trust placed in him."[21]

Similarly, it is clear that multiple jurisdictions may have a legitimate interest in regulation and enforcement of conduct that involves victims within each of their respective jurisdictions.

2. THE CONSTITUTIONAL CONTEXT

Attempts to rationalize and harmonize the means of determining legislative jurisdiction must, of course, be consistent with the Canadian Constitution. Because the issues under review concern

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[21] *R. v. Van Rassel*, [1990] 1 S.C.R. 225 at 238

cross-border transactions and practices, this raises the fundamental question of the provinces' extra-territorial competence. Succinctly put, the Canadian Constitution, in theory, may limit the provinces' ability to make laws of extra-territorial effect.[22] As will be seen, however, those limits are likely more perceived than real under the modern approach to this issue. Nevertheless, consideration of this issue must inform policy decisions relating to the provinces' attempts to streamline the application of consumer protection laws to cross-border activity.

Constitutional Limits on Provinces' Power to Regulate Extra-provincially

The proposition that provinces are limited in their ability to make laws that have extra-territorial effect arises from the wording of the *Constitution Act, 1867*, the terms of which impose a territorial limitation on the provincial legislatures' legislative authority: sections 92, 92A, 93 and 95 all open with the words "in each province," and many of the classes of subjects listed under s. 92 as being within provincial legislative jurisdiction are limited by the words "in the province" or "within the province"[23] This limitation has also been recognized in the case law although, as will be seen, there has been an evolution from a more rigid to a more flexible standard.

A Rigid Approach

One of the early cases to recognize a constitutional limit on the provinces' power to legislate in a way that affected rights outside the province was *Royal Bank of Canada v. The King*, [1913] A.C. 283, in which the Privy Council struck down an Alberta law which had purported to expropriate the proceeds of a bond issue made by an English railway company. The Court held that the effect of the legislation was to preclude bondholders from pursuing a right of recovery in

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[22] This limit is in contradistinction to the federal Parliament's express "full" constitutional power "to make laws having extraterritorial application": s. 3, *Statute of Westminister, 1931* R.S.C 1985, Appendix II, No. 27, (which provision is not applicable to the provincial legislatures).

[23] See P. Hogg, *Constitutional Law of Canada* (1998: Toronto, Carswell), at 13-4.

Quebec, where the Court found the proceeds of the bond to be held. The Court ruled that the statute was not confined to property and civil rights within Alberta and not"solely" directed to matters of a merely local or private nature within the province, and that it purported to affect a "civil right outside the province." As such, it was constitutionally impermissible and *ultra vires* the authority of the Alberta legislature.

Similarly, in *Credit Foncier Franco-Canadien v. Ross*, [1937] D.L.R. 365 (Alta. A.D.), a depression-era Alberta statute designed to reduce or eliminate interest payable on certain debts was ruled invalid because it affected creditors outside Alberta. This reasoning was also applied in *Beauharnois Light, Heat and Power Co. v. Hydro-Electric power Commission*, [1937] O.R. 796 (C.A.), in which the Ontario Court of Appeal found invalid an Ontario statute that sought to cancel a contract between Ontario's power commission and a Quebec power company. Although the contract was made in Ontario, the statute was found to run afoul the Constitution by "affecting" rights outside Ontario.

This reasoning is obviously highly problematic in terms of ensuring cross-border consumer protection: arguably, if a provincial statute purports to regulate a cross-border consumer contract it would likely be found to run afoul the Constitution. If the law purports to extend protection to the consumer within the jurisdiction, it would clearly affect the contractual and property rights of the vendor located outside that jurisdiction. Conversely, if the law seeks to regulate a vendor within the jurisdiction of the province that enacted it, it could be found to extend protection to consumers outside the province and likewise be beyond the legislature's territorial competence. As Professor Hogg notes, "These cases suggest that provincial modification of debt or other contractual rights is effective only if both parties to the contract are resident within the province."[24]

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[24] *Ibid*. at 13-7

Some of the caselaw in relation to provincial public welfare/regulatory statutes also gives pause. In *Interprovincial Cooperatives v. The Queen*, [1976] 1 S.C.R. 477, the Supreme Court of Canada struck down a Manitoba law that purported to create a right of action against extra-provincial companies whose contamination of rivers flowed into Manitoba, causing damage in Manitoba. For three of the Justices in the majority, the fact that the introduction of pollutants into the rivers occurred outside Manitoba rendered that province powerless to regulate. The majority rejected the minority's view that the legislation ought to be upheld since its main purpose was to redress injury suffered in Manitoba. Again, this line of reasoning presents an ominous obstacle to the regulation of cross-border transactions, in suggesting that the protection of residents within a province from harm initiated outside the province is constitutionally impermissible.

The More Modern Approach

There is, however, a contrasting line of cases which suggests a much less rigid approach to limiting the provincial legislatures' extra-territorial competence, and it would appear that the case law in recent years supports a growing trend in this direction.

In *Ladore v. Bennet*, [1939] A.C. 468, the Privy Council upheld an Ontario law amalgamating four municipalities and created the city of Windsor. The Court accepted as constitutionally permissible the fact that the legislation retired the former municipalities' debts and vested creditors (including those situated outside the province) with debentures at a lower rate of interest. The approach taken in this case, and later endorsed by the Supreme Court of Canada in the *Upper Churchill Water Rights* case[25], appears to be to permit the incidental impairment of rights outside the province where the "pith and substance" of a statute relates to matters within the province and within a class of subjects assigned to the provincial legislatures under s. 92 of the *Constitution Act, 1867*, and so long as extra-provincial effects of the statute are merely

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[25] [1984] 1 S.C.R. 297.

"collateral or incidental." Likewise, in *The Queen v. Thomas Equipment*, [1979] 2 S.C.R. 529, a New Brunswick supplier of farm equipment that had sold machinery to an Alberta retailer was held to be bound by an Alberta law that required the company to buy back unsold stock at the termination of the supply agreement. The decision of the majority is instructive, in ruling that the New Brunswick company's deliberate decision to supply the Alberta market resulted in the supplier being subjected to the "rules of the game" in force in Alberta. Such an analysis would similarly support the assertion of jurisdiction by a provincial legislature over extra-provincial merchants who deal with consumers within the province. In *A.G. (Quebec) v. Kellogg's Co.*, [1978] 2 S.C.R. 211, the majority of the Supreme Court, albeit in *obiter*, endorsed the notion that provincial consumer protection laws may extend beyond a province's borders to regulate conduct that originates outside the province.[26]

Likewise, it also appears clear that provinces can regulate businesses within their borders in relation to activities having their effects on consumers outside the province. Analogy can be drawn, in this regard, to cases upholding provinces' ability to discipline or regulate professionals within the province in relation to conduct that occurred outside the province: see *Re Underwood McLellan & Associates and Ass'n of Professional Engineers of Saskatchewan* (1979), 103 D.L.R. (3d) 268 (Sask. C.A.).

Finally, it should be noted that it has been suggested that provincial regulation of cross-border electronic commerce could be regarded as a matter relating to interprovincial or international trade and commerce, a matter of exclusive federal jurisdiction pursuant to s. 91(2) of the *Constitution Act, 1867*. However, the federal power over interprovincial trade has received a restrictive interpretation. As confirmed by the *Labatt Breweries v. A.G. Canada*, [1980] 1 S.C.R. 844, for instance, the imposition of standards without regard to movement across provincial

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[26] *Ibid.* At p. 226. Note that Laskin C.J., for the minority, addressed the point directly, also in *obiter*, and indicated that it would not be constitutionally permissible for Quebec's *Consumer Protection Act* to reach into extra-territorial activity and regulate "a telecast originating in another Province but seen in the legislating Province": *ibid.*, at p. 217.

boundaries is not sufficient to permit federal exercise of jurisdiction. The ability of provinces to enact in a way that has extra-provincial effects has, as seen, been regarded as fairly wide.

Based on the above, it would appear that the application of provincial consumer protection law to conduct that either affects or originates in another province is a matter within provincial jurisdiction, and having only permissible, incidental effects on interprovincial trade and commerce.

Enforcement of Extra-territorial Judgments pursuant to Statute

It is important to distinguish between the power to legislate extra-provincially and the power to enforce a provincial statute or judgment extra-provincially through extra-provincial courts. The ability to legislate extra-provincially remains, in theory, constitutionally impermissible, although the rule is applied in such a way as to permit incidental extra-territorial effects of an otherwise permissible provincial statute. Similarly, early jurisprudence limited the provinces' courts to adjudication of matters within the territory of the province. The law has now evolved such that it is sufficient that there be a "real and substantial connection" to the province's court for it to be able to assert jurisdiction in relation to a matter.[27] Likewise, it is clear that the courts in one province may be used to enforce judgments rendered in another province.[28]

Historically, however, there is an important legal distinction to be drawn between enforcement of foreign judgments in relation to *private* matters (e.g., torts and contractual matters), and foreign judgments in enforcement of certain public-law "foreign" statutes. The latter has traditionally been viewed as inimical to state sovereignty. Put at its highest, the principle stands for the proposition that the courts "have no jurisdiction to entertain an action: 1. For the enforcement,

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[27] *Moran v. Pyle (Canada),* [1975] 1 S.C.R. 393, *De Savoye v. Morguard Investments,* [1990] 3 S.C.R. 1077.

[28] *De Savoye v. Morguard Investments, ibid.*

either directly or indirectly, of a penal, revenue or *other public law* of a foreign state" (Dicey & Morris, *The Conflict of Laws*, 12th ed. (London: Stevens & Sons, 1993).

Thus, in *New Zealand (A.G.) v. Ortiz*, [1984] A.C. 1 (C.A.), Lord Denning M.R. held that the English courts could not enforce a New Zealand statute providing for the forfeiture of "historical articles" exported or attempted to be exported from New Zealand to the United Kingdom, allegedly in violation of the statute. The learned judge relied on "the principle that laws will not be enforced if they involve an exercise by a government of its sovereign authority over property beyond its territory."

The precise class of foreign laws that fall within the category of those that will not be enforced locally has been the object of considerable judicial debate. In *A.G. v. Heinemann Publishers Australia Pty. Ltd* (1988), 165 C.L.R. 30, the High Court of Australia noted that the question of "whether the principle extends to proscribe enforcement of foreign public laws as well as foreign penal laws has been a contentious question."

The leading case in Canada is *Laane v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, in which the Supreme Court of Canada refused to give effect in Canada to an expropriation decree of the Estonian Soviet Socialist Republic purporting to expropriate an Estonian ship that had run aground in Canada.

Just as the principle that foreign civil judgments would not be enforced in courts was initially imported into Canadian confederation to preclude enforcement of judgments as between sister provinces, so too was the principle against enforcing "foreign" penal, revenue or "other public laws" initially held to apply within Confederation. In *De Savoye v. Morguard Investments*, the Supreme Court of Canada definitively rejected the premise that Canadian "sister provinces" be treated as foreign states as between one another in the context of the enforcement in one province of civil judgments obtained in another. Similarly, the "penal, revenue and other public laws" of another province are unlikely to continue to be regarded as "foreign" and therefore unenforceable

in another province. So long as the extra-provincial statute sought to be enforced was properly applicable to the matter (and subject to the limitations of extra-territoriality discussed above), and so long as judgment was properly obtained, the extra-provincial courts are likely to give such judgments "full faith and credit," to use the American constitutional parlance, and to enforce them.

Furthermore, the rule against enforcement of foreign penal, revenue or public laws itself appears to have lost much of its force and breadth, and would not appear to apply generally to enforcement of all "public laws," broadly defined, even in the case of truly "foreign" laws. Indeed, Canadian courts have enforced truly "foreign" public laws, and the rule appears to be confined to a refusal to enforce foreign laws that are inimical to Canadian public policy. Thus, in *United States of America v. Ivey*,[29] the Ontario courts enforced a judgment obtained by the United States of America against a Michigan defendant to recover environmental clean-up costs pursuant to the *Comprehensive Environmental Response, Compensation and Liability Act, 1980* 42 U.S.C., s. 9607(a). The case also re-affirmed the principle that the greater severity of the U.S. law, procedurally and substantively, than that of the equivalent legislation in Ontario, did not act as a defence to enforcement of the harsher U.S. law by Ontario's courts. Courts will enforce foreign judgment even if they are contrary to local law. Courts will only refuse to enforce foreign judgments on grounds of public policy "where fundamental values are at stake."

A similar result was attained in Quebec, in *Auerbach v. Resorts International Hotel Inc*, [1992] R.J.Q. 302 (C.A.), in which the Court ruled that a gambling debt incurred in a jurisdiction in which gambling was permissible could be recovered in Quebec by way of exemplification of judgment.

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[29] (1995), 26 O.R. 533 (Gen. Div.), aff'd 30 O.R. (3d) 370 (C.A.), leave to appeal S.C.C. ref'd [1997] 2 S.C.R. x.

Based on this trend in the case law, therefore, it appears likely that a court having a "real and substantial" connection to a matter can be used to enforce an extra-provincial judgment arising from the enforcement of an extra-provincial regulatory statute.

The principle that permits the courts of one province to assert jurisdiction in relation to a matter to which the province has a "real and substantial connection" has, in fact been elevated to a constitutional principle.[30] Although this widens the power of the aggrieved party and of provinces to enforce more broadly, this constitutional elevation of the principle also operates to impose constitutional restrictions on the ability of a province to preclude the courts of another province from adjudicating matters. As summarized by Professor Hogg, the jurisprudence stands for the principle that

> No province [has] the power to deny citizens of other provinces their normal rights of access to their own courts to resolve the disputes that would inevitably arise out of interprovincial activity. No province [has] the power to insist, in effect, that its residents be sued only in the courts of their own province.[31]

Conclusions regarding the Constitutional Context

Possible constitutional limitations on the ability of provinces to exercise regulatory authority over cross-border activity must continue to be borne in mind in developing a coherent jurisdictional policy framework. In this regard, however, we are in agreement with Professor Hogg, when he notes as follows:

> The general rule of constitutional law is that a law is classified by its pith and substance, and incidental affects on subjects outside jurisdiction are not relevant to constitutionality. No one would quarrel with the proposition that a provincial statute whose pith and substance is the destruction or modification of a right outside the province must be unconstitutional. But where the cases go wrong, as it seems to me, is in refusing to

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30 *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289.

31 Hogg, *supra* note 23 at 13-22.

> recognize that a statute whose pith and substance in a matter inside the province may incidentally destroy or modify rights outside the province.[32]

For the purposes of both legislating and enforcing, therefore, the touchstone principle in relation to prescriptive jurisdiction that has emerged in Canadian law appears to be the existence of the "real and substantial connection." Although some of the factors in determining whether a "real and substantial connection" exists for the purposes of prescriptive jurisdiction will differ from those relevant to private law jurisdictional issues (choice of law, forum and personal jurisdiction), the underlying premise is essentially identical.

3. THE POSITION IN THE UNITED STATES

Federal Legislation

As in Canada, prescriptive jurisdiction is essentially a matter of statute and its interpretation:

> Unlike personal jurisdiction, venue, and choice of law, which are defined largely by constitutional constraints and decisional law, jurisdiction as it refers to the substantive authority of a state or federal agency is largely a creature of legislative design.[33]

Federally, U.S. anti-trust laws provide a broad base for assertion of jurisdiction, which permit jurisdiction over foreign activities that have "a direct, substantial, and reasonably foreseeable effect" on commerce in the United States.[34]

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[32] *Ibid.* at 13-7 to 13-8.

[33] Testimony of D. Jean Veta, Deputy Associate Attorney General, United States Department of Justice, before the U.S. House of Representatives Subcommittee on the Courts and Intellectual Property, June 29, 2000, available at http://www.cybercrime.gov/vetatst.htm.

[34] *Sherman Act*, 15 U.S.C. § 6a (1994); *Federal Trade Commission Act*, 15 U.S.C. § 45(a)(3) (1994).

The general position in the United States in its foreign relations law, however, is that a state has extra-territorial regulatory jurisdiction in relation to "conduct outside its territory that has or is intended to have substantial effects within its territory,"[35] so long as the exercise of jurisdiction is "reasonable," a test that is quite similar to the "real and substantial connection" test applicable in Canada.

The "reasonableness" of the exercise of jurisdiction, in turn, depends on a number of factors, including:

- the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory of the regulating state;
- whether the person or thing sought to be regulated is present within the state;
- connections between the regulating state and the person responsible for the activity in question or those the exercise of prescriptive jurisdiction is designed to protect;
- the importance of the regulation to the regulating and other states;
- the reasonable expectations of parties affected;
- consistency with international traditions;
- potential conflicts with other states.[36]

State legislation

A number of U.S. states have attempted to assert prescriptive jurisdiction, as well as apply their laws, extra-territorially in relation to activity on the Internet. Some U.S. regulatory authorities, for instance, have taken the position that their jurisdiction is broad, covering anyone and any activity that results in information being made available to their residents. In Minnesota, for instance, the state attorney-general's website provides a "Warning to All Internet Users and Providers," as follows:

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[35] U.S. "Restatement (Third) of the Foreign Relations Law of the United States" § 401(c).

[36] *Ibid.*, §401(2).

> Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws.[37]

Likewise, the California *Business and Professional Code*[38] requires vendors, who offer goods or services in that state, by Internet or other means, to ship merchandise or issue a refund within 30 days. The law also contains certain disclosure requirements applicable to Internet vendors "when the transaction involves a buyer located in California."

Some states have been successful in enforcing their statutes extra-territorially in relation to Internet activity. Authorities from the state of Missouri, for instance, successfully obtained an injunction in relation to online gambling against a company registered in Delaware, with its primary place of business in Pennsylvania, whose gambling website was operated by a subsidiary in Grenada. The injunction prohibited the company from marketing its gambling services in Missouri, and both the company and its president were indicted by a state grand jury when the company failed to comply with the injunction.[39]

As in Canada, however, the U.S. Constitution provides certain constraints on the 50 states' extra-territorial application of their laws. These limits arise from the "Due Process" clause in the Fourteenth Amendment (which provides that no state shall "deprive any person of life, liberty, or property, without due process of law"), and the "Full Faith and Credit" clause in Article Four of Section One, which provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which

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[37] ‹http://www.ag.state.mn.us/home/concumer/consumernews/OnlineScams/memo.html›

[38] § 17538 (West 1997).

[39] *Nixon v. Interactive Gaming & Communications Corp.* No. CV97-7808, Jackson Cty. (Mo. Cir. Ct.).

> such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Edinger[40] has cited the following passage from Reese which neatly summarizes the effect of both clauses on the extra-territorial application of state law:

> The command of due process is essentially negative; it forbids a state from applying its own law, or even the law of another state, in situations where no reasonable basis exists for doing so. On the other hand, the command of full faith and credit is affirmative; it compels a state in certain circumstances to entertain suit on a sister state claim and in other circumstances to apply the law of a given state even though the law of two or more other states could permissibly be applied under due process.

In essence, these clauses provide a minimum threshold which State laws must satisfy in order to be applicable, namely, there must be a nexus between the State concerned and the factual situation. Absent this nexus, a State may not apply its own laws.[41] The connection must also be one that is *foreseeable* for the party over whom jurisdiction is sought: there must, in this regard, be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits of its laws."[42]

In *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), one of the earliest American cases to address the extra-territorial application of state laws, the Court observed that a state would act arbitrarily and in contravention of the "Due Process" clause if its laws were applied to persons residing outside that state without any connection thereto. Subsequently, the United States Supreme Court had opportunity to comment upon the application of extra-territorial application of state laws in *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981) wherein it remarked:

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[40] Edinger "Territorial Limitations on Provincial Powers" 14 Ottawa L. Rev. 57 at 92.

[41] *Ibid.* at 92.

[42] *Hanson v. Denckla*, 357 U.S. 235, 243 (1958).

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation . . . In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, . . . the Court has invalidated the choice of law of a State which had no significant contact or significant aggregation of contacts, creating State interests, with the parties and the occurrence or transaction. (at 308)

Thus, the primary consideration is not the physical location of persons or transactions, but rather, whether a State has an interest in applying its laws to the persons or transactions in question. That is not to say that physical presence within a State is not an important factor, only that the absence of such physical presence will not be determinative.

In addition to the foregoing clauses, the so-called "dormant" commerce clause in Article One of Section 8 of the American Constitution provides a further restraint on the extra-territorial application of State laws in so far as it prevents a State from unduly impeding the free flow of commerce across State lines by extending its laws unreasonably to out-of state conduct. Thus, in *American Librairies Association v. Pataki*,[43] the Court struck down a New York law that purported to forbid indecent communications in that state. Applying long-standing constitutional principles in relation to interstate commerce, the court found that the law sought to regulate communications that occurred entirely outside the state, and thereby imposed a burden on intestate commerce that was "disproportionate to the local benefits." The court also noted that the effect of the legislation was such that "a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed."[44]

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[43] 969 F. Supp. 160 (S.D.N.Y. 1997).

[44] *Ibid.* at 183-84.

The legal principles of "due process" and "full faith and credit" in the United States are strikingly similar to the prevailing constitutional principles in Canada,[45] while the approach to interstate commerce appears to create significantly greater restrictions on U.S. states' ability to legislate extra-territorially than is the case with respect to the Canadian provinces.

4. THE POSITION IN THE EUROPEAN UNION

Prescriptive jurisdictional rules in Europe are likewise defined by statute – indeed, all the more so, given the civil law tradition of most European states. In this regard, as in Canada and the U.S., effects within the sovereign territory of a state provide a basis for the assertion of prescriptive jurisdiction, as demonstrated by the French *Yahoo* case,[46] in which one French court asserted French prescriptive jurisdiction over an online auction by Yahoo Inc. of Nazi-related items on the yahoo.com (but not the yahoo.fr) site, although another French court declined jurisdiction on the same facts.

The European Union has been at the forefront of developing rules relating to jurisdictional issues in the context of e-commerce. Undoubtedly this is facilitated by the existence of a treaty-based regime integral to the development of the Single Market, a regime that, perforce, has long provided for resolution of jurisdictional matters. The primary instruments in the civil or private law context in this regard have been the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, which deal with jurisdiction to adjudicate matters as well as with the enforcement of extra-territorial judgments, and the *Rome Convention on the Law Applicable to Contractual Obligations.* The latter determines which state's substantive law shall be applied in cross-border disputes. While these conventions deal primarily with matters of private law, the *Rome Convention*, in particular, has an impact on what regulatory regimes apply to consumer contracts. The criteria used under both the *Brussels* and

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45 P. Hogg, *supra* note 23 at 13-14 to 13-22.

46 *Licra v. Yahoo! Inc.* (2000), Tribunal de Grande Instance, Paris.

the *Rome* Conventions are, in any event, informative in devising a workable regulatory jurisdictional regime in Canada.

Under the *Brussels Convention*, the location of the impugned conduct is a particularly relevant factor for assertion of personal jurisdiction over an individual located outside his or her state of residence. A person may be sued in a country that is not his or her normal place of residence, in matters of contract, in the courts of the "place for the performance of the obligation in question," and, in matters of tort, delict or quasi-delict, in the courts of "the place where the harmful event occurred."[47]

The *Rome Convention on the Law Applicable to Contractual Obligations* provides a template in the European Union for determining the circumstances in which a contractual "choice of law" provision is precluded from "depriving the consumer of the protection afforded by the mandatory rules of the law of the country in which he has his habitual residence." The *Rome Convention* provides that this protection is extended in any of the following cases:

- If the conclusion of the contract was preceded by either (1) a specific invitation to the consumer or (2) by advertising, in the consumer's country of habitual residence; or
- If the vendor or his agent received the consumer's order in the consumer's habitual place of residence; or
- If the contract is for the sale of goods and the consumer travelled from his country of habitual residence to another country, and the consumer gave his order in that country, provided the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

(See Article 3117 of the *Quebec Civil Code*, which contains a strikingly similar rule).

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[47] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, ("*Brussels Convention*"), article 5.

Excluded from the operation of the provision are contracts of carriage and contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

The European Union has attempted to better adapt the *Rome Convention* principles to the electronic age. For instance, the European Commission has declared that electronic marketing via e-mail constitutes a "specific invitation" to an individual and thereby ensures that the "mandatory laws" of the consumer's habitual country of residence will apply, even if other aspects of the contract are governed by the law of the vendor's jurisdiction.

A Green Paper on the law applicable in relation to non-contractual obligations (known as "Rome II") is currently being developed within the Directorate-General for Justice and Home Affairs. Publication of this document is expected in the autumn of 2001. Until recently, it has been presumed that Rome II would adopt and apply the principle that the law of the consumer/victim's habitual country of residence would apply.[48] However, criticism from the business community has opened the door to a reconsideration of this approach.[49]

The competition/anti-trust law in the European Union adopts a similar test to that employed in both the United States and, to a lesser extent, Canada: pursuant to the prevailing "implementation test," jurisdiction over anticompetitive conduct depends on the "the place where it is implemented" rather than "the place where the [impugned] agreement, decision or concerted action was formed."[50]

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[48] See Draft communication on law of non-contractual obligations (Rome II), January 12, 2000, reproduced at http://www.ilpf.org/groups/rome-treaty.htm.

[49] See P. Meller, "Europe Panel is Rethinking How it Views E-Commerce," *The New York Times*, June 27, 2001, available at http://www.nytimes.com/2001/06/27/technology/27CROS.html

[50] *A. Ahlström Osakeyhtiö v. Commission*, 1988 E.C.R. 5193.

The European Community has also taken a pro-active approach to enforcing consumer protection within the Union. This is best exemplified by its Directive (98/27/EC) on *Injunctions for the Protection of Consumer Interests*. The *Directive* specifically recognized the inadequacy of then-existing mechanisms in ensuring compliance with consumer protection measures in a timely manner, and that the resulting ease with which infringing conduct may escape enforcement "constitutes a distortion of competition" and diminishes consumer confidence.

Accordingly, the Directive requires Member States to establish a system of mutual-recognition of their governmental consumer protection authorities ("qualified entities"). Competent courts or administrative authorities within each member state are to be designated to rule on proceedings brought by the qualified entities of other states seeking redress for consumer protection infringements. Among the forms of redress that are to be available, including where appropriate by summary procedure, are cease and desist orders, orders for the publication of corrective statements, and monetary penalties for failure to comply with any such orders (Article 2).

Where the protected interests of a Member State are being affected by infringing activity in another Member State, the "qualified entity" of the affected state is to have standing to seize the competent court or administrative authority, and is entitled to seek redress directly in that State.

Interestingly, however, the Directive does not regulate what state's laws are to be applied in bringing these types of enforcement proceedings. That issue is to be resolved in the context of the adoption of the Rome II convention on non-contractual obligations, discussed above. Indeed, the Directive is expressly made "without prejudice to the rules of private international law with respect to the applicable law" (Article 2(2)). However, the significance of the choice of law is much-reduced, in view of the Directive's limited application to matters that fall within specified aspects of consumer protection within the EC law that have been harmonized across Member States.

More recently, the European Parliament and Council have adopted Directive 2000/31/EC on *Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market*. The Electronic Commerce *Directive* contains numerous provisions relevant to cross-border regulatory issues. For instance, Article 3 prohibits Member States from restricting the flow of "information society services" from another member state, but this is specifically made subject to the enforcement of criminal law and certain regulatory fields, including consumer protection. However, such measures may only be taken if the state that wishes to undertake them has first notified the state from which the infringing activity originates, asked that state to take measures to end the activity, and the latter failed to do so, or the measures were not adequate (Article 3(4)). Exceptions are also made for cases of urgency (Article 3(5)). The EU approach, therefore, appears to be one of mutual cooperation and initial deference to the state in which the infringing activity originates. The principle of mutual cooperation, and certain mechanisms to this end, are provided for at Article 19 of the *Directive*.

At first blush, the deferential approach taken in the *E-Commerce Directive* seems inconsistent with the rigorous extra-territorial enforcement mechanisms provided for in the *Consumer Protection Injunctions Directive*. However, the principles are not incompatible. Reconciling the two Directives, it appears that the European approach is for a consumer's Member State to first seek the assistance of the vendor's Member State in bringing appropriate remedial action. If, however, this is not done or is done inadequately, the "qualified entity" of the consumer's country of residence may obtain useful measures of redress in the vendor's jurisdiction. As will be further discussed below, a similar system may merit further exploration within Canada.

5. POLICY OPTIONS FOR CANADA

There are numerous possible approaches to addressing the jurisdictional problems relating to the consumer protection regulation of cross-border activity. In our view, to do nothing is not among the desirable options. The current regime leads to uneven protection and legal uncertainty for consumers and businesses alike.

Principles

Underlying any resolution of regulatory jurisdictional issues is the establishment of principles: specifically, under what circumstances should a given province's laws apply? The debate among consumer advocates, business interests and policy makers has been whether the law of the consumer or the law of the merchant should generally (or exclusively) apply to consumer transactions.

The issue has generally been debated, however, in the context of the *private law* aspects of consumer transactions, and one question that should be addressed is whether, or the extent to which, the principles applicable to the resolution of private law aspects of consumer protection should mirror the question of regulatory jurisdiction. It is clear that there is necessarily a large degree of overlap between the two. In particular, the "real and substantial connection" test has emerged as the touchstone principle in Canada in the determination of choice of law and choice of forum questions in relation to both private law and regulatory jurisdictional disputes. There is, furthermore, inherently greater predictability and fairness in expecting actors to be bound by a same jurisdiction's rule whether in relation to private disputes or public regulation, particularly given the fact that a same transaction may give rise to both a private dispute and public regulatory action. In this sense, the conclusions and recommendations proposed by Professor Geist, in his accompanying paper, will be highly relevant to the question of what province's regulatory jurisdiction should apply to a given case.

On the other hand, public authorities may, in the exercise of their duties in protecting the public, have a claim to authority in dealing with certain conduct contrary to public policy that is more compelling than is the case in relation to private disputes that arise from that same conduct. In particular, it may be that in some cases it would be reasonable to enforce choice of law and forum clauses in relation to a particular transaction as between private contracting parties, whereas the overriding public interest in dealing with the conduct under the appropriate regulator laws should not be defeated.

As seen above, the European approach to electronic commerce is primarily one of "home-country" control over businesses that make use of the Internet, and restrictions are placed on the ability of Member States to inhibit the flow of "information society" services emanating into that state from another state. However, a significant carve-out to this principle is created in relation to consumer protection, among other public law matters, which allows for extra-territorial assertions of prescriptive jurisdiction and enforcement.

From a public policy perspective, the purpose of consumer protection laws is to protect their citizens from abuse in the context of business-to-consumer transactions. It is therefore unlikely that many governments will wish to endorse a principle that would divest them from their ability to extend and enforce that protection. Any contrary approach would, furthermore, be inconsistent with the fundamental principle of "equivalent protection," set out in the Canadian Framework on "Principles of Consumer Protection for Electronic Commerce."[51] If a government regulator cannot enforce the same principles in favour of a consumer that would apply off-line, the consumer has lost equivalent protection. Indeed, from a broader public policy perspective, it is acknowledged that using the vendor's location to determine choice of law could lead to a "race to the bottom," in that vendors will choose to base their operations in the jurisdictions with the least restrictive requirements, and that governments in turn will be tempted to minimize the exigencies associated with doing business in their jurisdiction in order to retain or attract e-commerce operators.

From a business perspective, there are legitimate concerns that they may be held to a wide array of differing regulatory schemes, one for each province in which they conduct business.
The consumer's general response to this proposition is that it is the cost of doing business online; if businesses wish to avail themselves of the global market opportunities created by the Internet, they must also accept the responsibilities and consequences that flow therefrom. The words of

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[51] 1999, Office of Consumer Affairs, Industry Canada. Available at http://strategis.ic.gc.ca/SSG/ca01185e.html.

Dickson J. in *Moran v. Pyle National (Canada)*, [1975] 1 S.C.R. 393, relating to a jurisdictional dispute in the area of tort law, appear apposite:

> Where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant . . . By tendering his products in the market place directly or through normal distribution channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

This presents a compelling argument against the suggestion that vendors should not be subjected to the inconvenience of responding to allegations (whether civil or regulatory) in another jurisdiction in circumstances in which it is reasonably foreseeable that the vendor's wrongful acts would cause harm in that foreign or extra-provincial jurisdiction. Furthermore, the very fact that this is the law in relation to tort claims suggests that vendors must anticipate the possibility of having to defend such claims outside their jurisdiction, and that it is not unduly burdensome to therefore anticipate having to respond to regulatory requirements of other jurisdictions as well. Although in some cases vendors can limit tort and other civil liability through choice-of-law provisions as a matter of contract, such stipulations will not always be upheld and may not even be applicable where, for instance, there is no privity of contract between the vendor and the ultimate consumer, such as through the interposition of a retailer.[52]

There is a distinction to be drawn, however, between products liability and at least some aspects of consumer protection law, namely the relative uniformity of the former and the diversity and

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[52] The Internet offers the advantage of being able "cut out the middle man" and more often transact directly with a consumer and thereby have the necessary privity of contract to allow a reasonable choice of law clause to apply. That being said, it can be argued that maintaining the inability to contractually restrict choice-of-law may be a small price to pay for the broader benefits, including lower costs, of being able to deal directly with consumers.

inconsistency of the latter. A vendor that sells a product that may harm someone can expect to be met with essentially the same standards across the country. It need not tailor its design and manufacture for each jurisdiction. The diversity and unevenness of consumer protection law across the country may, however, require the vendor to be familiar with a wide range of standards.

Is this unduly burdensome? Within Canada, although there are differences in protection in each province, there are also many similarities. Most significantly, there are no obvious inconsistencies in the standards, such that adherence to one is incompatible with another, a situation that would be less tolerable. In theory, then, there is nothing to prevent a vendor from adhering to the highest standards and thereby ensure compliance with all standards.

That being said, this may be easier for larger, established merchants, and to the disadvantage of smaller companies with fewer resources. Businesses also argue that many of the power imbalances that may exist offline do not necessarily apply to consumer transactions online, by virtue of the wide array of choice a consumer has in dealing over the Internet, and the ability of the Internet to act as a rich source of consumer and business-related information. Some have suggested that, in e-commerce, it is often the consumer that targets the vendor rather than the converse. There is, in general, some truth to this proposition: when a consumer accesses a vendor's website, it is generally a deliberate act of choice, usually initiated by the consumer. On the other hand, vendors do also target consumers directly, through banner ads on other sites, the use of metatags for search engines, and in "spam" e-mail solicitation. Similarly, in the off-line world, consumers often "target the vendor" by visiting a vendor's store. They do not, by that fact, lose the benefit of consumer protection laws.[53]

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[53] Indeed, vendors operating in the "real world" often provide the consumer with certain indicia of repute, by virtue of having an apparently permanent physical establishment, its location, staff, etc. Despite the consumer's "targeting" and these greater visual protections, the consumer may benefit from consumer protection laws. The indicia of repute of "virtual stores" targeted by consumers may, on the other hand, be more deceiving, due to the low cost of creating a slick, attractive website.

It is also worth noting that this proposed approach is consistent with developing Canadian and international standards relating to many regulated professions. For instance, in Canada, the Federation of Medical Licensing Authorities of Canada (FMLAC) has endorsed the principle that physicians who practice cross-border telemedicine should be the subject to the regulatory control of the medical licensing bodies within the patient's jurisdiction.[54] This would be achieved primarily through a system of "simple-to-acquire permits for those wishing to practice telemedicine in provinces other than their own."[55] (In addition, it is suggested that each provincial medical licensing authority adopt a regulation by which the practice of medicine in another jurisdiction without the appropriate permit would constitute professional misconduct. In this way, the physician's own licensing body can enforce the extra-provincial licensing regime.)

Similarly, the Alberta Securities Commission, in its much-cited *World Stock Exchange (Re)* decision[56], has propounded the view that regulators have a legitimate interest in applying the law of their jurisdiction where off-shore activity has unlawful consequences within that jurisdiction and affecting residents of that jurisdiction. Although the decision has been criticized, it is submitted that it reflects the reality that public institutions whose mandate is to protect the public within their jurisdiction are unlikely to divest themselves of that role simply because the offending activity originates outside that jurisdiction.

At the same time, there must be a mechanism for managing such an approach, to avoid over-regulation and unpredictability.

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[54] This principle is consistent with the position taken by medical licensing authorities in the United States. See: Telemedicine Report to Congress, available at http://telehealth.hrsa.gov/pubs/report2001.

[55] J. Carlisle, "Regulatory Aspects of Telemedicine in Canada", (2000-1) Telehealth Law 4.

[56] (2000) 9 ASCS 658 (Alta. Securities Commision).

Agreement on any basic principle governing prescriptive, regulatory jurisdiction would, at minimum, decrease the legal uncertainty that may subsist in this area. Based on the above analysis, it is our view that the balance of public policy arguments favour the proposition that, subject to certain limitations, the prescriptive, regulatory laws of the forum of the consumer should apply to consumer contracts.

There must, however, be some standards and limitations that apply in this regard, flowing from the key underlying premise in favour of this approach, namely that there must be a reasonable expectation on the part of the vendor that its wrongful conduct that has effects in another jurisdiction may lead to consequences in the courts of and under laws of that jurisdiction. For this reason, there must be a "real and substantial connection" between the transaction itself and the consumer's jurisdiction, beyond the mere physical presence of the consumer in the jurisdiction. The physical presence of the consumer should, in our view, be a necessary but not sufficient condition to the application of the prescriptive laws of the jurisdiction in question.

Furthermore, it should be open to a vendor to make reasonable attempts to avoid having any "real and substantial connection" with consumers in a particular jurisdiction if the vendor wishes to avoid being exposed to that jurisdiction's laws. The case law in the United States suggests that the courts have considered efforts to avoid establishing a "real substantial connection," or the lack thereof, to be relevant considerations to determine jurisdiction.[57]

The problem of potential application of the laws of multiple jurisdictions is not confined to the Internet, and neither is the possibility of "opting out" of a jurisdiction by declining to do business in certain jurisdictions. Technology has emerged that should greatly facilitate the ability of sellers to geographically restrict their marketing and sales activity. Such technology, however, is not the only solution. Marketing through any national medium presents the same problem as the

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[57] See *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D. Ark., 1997).

Internet, and vendors have dealt with this problem by specifying jurisdictions to which their marketing is specifically directed or, more commonly, jurisdictions to which it is not directed.

The American Bar Association has undertaken a major project on jurisdictional issues relating to the Internet, "to explore the issues, uncertainties and conflicts created by the proliferation of electronic commerce" in this area, noting that the "reduction of legal uncertainty is critical to the development of an efficient and effective system to promote electronic commerce."[58] Its most recent Draft Report sets out certain jurisdictional "default rules" in relation to both personal and prescriptive jurisdiction. Those proposed default rules provide that "personal or prescriptive jurisdiction should not be based solely on the accessibility in the state of a passive web site that does not target the state." The Draft further provides as follows:

> 1.1.3. Both personal and prescriptive jurisdiction should be assertable over a web site content provider ("sponsor") in a state, assuming there is no enforceable contractual choice of law and forum, if:
>
> 1.1.3.(a) the sponsor is a habitual resident of that state or has its principal place of business in that state;
>
> 1.1.3.(b) the sponsor targets that state and the claim arises out of the content of the site; or
>
> 1.1.3.(c) a dispute arises out of a transaction generated through a web site service that does not target any specific state, but is interactive and can be fairly considered knowingly to engage in business transactions there.

The Draft default rules also propose a means of jurisdictional opting-out:

> 1.1.4. Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

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[58] Available at www.abanet.org.

1.1.4.(a) Users (purchasers) and sponsors (sellers) should be encouraged to identify, with adequate prominence and specificity, the state in which they habitually reside.

1.1.4.(b) Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites and services, either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not engaging in transactions with those who access the site or service.

To the extent the requirement to "opt out" represents a burden to sellers, it is our view that the answer to is to harmonize standards, rather than oust the authority of consumers' governments from exercising the protection which they expect offline or online. This is discussed below.

Criteria

For discussion purposes, the following presumption is suggested to be applied in relation to prescriptive jurisdiction:

> The regulatory law of the consumer's jurisdiction (defined as the consumer's habitual place of residence) will apply, when:
>
> 1. In the case of the sale of goods or services:
>
> > a. the consumer was present in that jurisdiction when making the offer to purchase or accepting the vendor's offer to sell, and the goods were to be delivered to, or the services substantially performed in, the consumer's jurisdiction; OR
> >
> > b. the contract was preceded by an invitation (including by e-mail, bulk or otherwise) addressed to the consumer in the consumer's jurisdiction, or advertising by the vendor was specifically directed to the consumer's jurisdiction;
>
> UNLESS the vendor took reasonable measures to draw to the consumer's attention that its goods or services where not available for sale in the consumer's jurisdiction and took reasonable steps not to enter into a contract for goods and services that would bring it within the criteria set out under (a) and/or (b) above.
>
> 2. In the case of misleading or deceptive advertising or other unfair business practices not involving or resulting in the sale of the goods or services:

> When the vendor's conduct could reasonably be expected to have effects in the consumer's jurisdiction UNLESS the vendor took reasonable measures to draw to the consumer's attention that the information provided was not intended to apply to consumer's jurisdiction.

Where the criteria are not met, the presumption would not apply, leaving open the possibility that the law of the consumer would apply nevertheless, or that a reasonable choice-of-law clause could apply.

The precise means of implementing the presumption should be the object of further consideration. It may be that legislative change is not required or desirable, but that the presumption be made widely known and that participating provinces agree to be bound by it. Such an arrangement is likely workable at least in relation to matters that rely upon the decision of consumer protection authorities to take enforcement measures in relation to proscribed practices.

In our view, such an approach is responsive to a number of concerns. Professor Rothchild has identified a number of challenging jurisdictional issues too in the online context, concerns that the above approach may help avoid:

> First, it may not be clear where to "locate" certain types of online conduct. For example: (1) Is a business considered to have a location where the server hosting the files constituting its Web site is located? (2) In the case of a contract for the supply of a digital good, does performance take place (a) where the seller of the good is located at the time he transmits it, (b) where the computer holding the good is located at the time the seller causes it to be transmitted, (c) where the computer from which the purchaser downloads his e-mail is located, (d) where the computer to which the purchaser downloads his e-mail is located, or (e) where the purchaser is located at the time he downloads or reads his e-mail? (3) In the case of tortious conduct consisting of an online communication, does the harmful event occur in a location associated with the sender or in one associated with the recipient? (4) If a seller invites a transaction via a Web site or a newsgroup posting, is that invitation located in the state where the consumer views it? (5) Does the maintenance

> of a Web site or posting of a newsgroup message constitute "doing business" in every jurisdiction where such communications are received?[59]

Endorsing a general principle that the laws of the consumer's jurisdiction will apply facilitates resolution of these complex issues. Focus is placed not on "where" in cyberspace a particular transaction occurred or was completed but, rather, on the location of a party which, ultimately, are always physically located somewhere in the physical world.

What is more difficult to apply in relation to consumer e-commerce are the reasonable limits that might be placed on extending jurisdiction based on such notions as the foreseeability of consequences of actions. As Prof. Rothchild continues:

> ...if a person makes a commercial communication via a Web site or newsgroup posting, is it foreseeable that the communication will have effects in every jurisdiction in which such communications may be received? If a person sends a message via bulk e-mail, an Internet mailing list, or in a chat session, is it foreseeable that the message will have effects in every jurisdiction in which a recipient of the message is located? When sending an e-mail message to a single recipient, are effects foreseeable wherever the recipient happens to be located when he accesses the message? Is the analysis different if the communication is made in a language that is understood almost exclusively by residents of a particular country, or if the maker of the communication advertises in a jurisdiction using other, specifically targeted media as well?[60]

In this regard, a flexible approach to "foreseeability" is to be endorsed. Guidance may be drawn from the private law jurisprudence on jurisdiction, and in particular from the "active/passive/interactive" trichotomy that has emerged in the United States, starting with the landmark U.S. decision in *Zippo Manufacturing Co. v. Zippo Dot Com., Inc.* 952 F. Supp. 1119 (W.D. Pa. 1997). In that case, the court summarized earlier lower court opinions and posited that whether jurisdiction could be properly asserted in a case based on a defendant's Internet-related

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[59] John Rothchild, "Protecting the Digital Consumer: The Limits of Cyberspace Utopianism" (1999) *Indiana Law Journal* Vol. 74: 893 at pp. 920-921.

[60] *Ibid.*

contacts should depend on the "nature and quality" of commercial activity that an entity conducts over the Internet:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

This approach appears to have been followed in Canada: see *Braintech Inc. v. Kostiuk*, (1999), 171 D.L.R. (4th) 46 (B.C. C.A.). In the latter case, the B.C. Court of Appeal ruled that a passive out-of-state Internet bulletin board was insufficient contact for jurisdiction to attach based on the "real and substantial connection" test. The Court ruled that the "mere possibility" that someone in a jurisdiction "might have reached out to cyberspace" to bring the impugned content onto a computer screen in that jurisdiction was insufficient.

But, as the American Bar Association draft report points out, reliance merely on the nature of the web site is misplaced:

> If an interactive site is not targeted to a specific forum, courts should focus on how the site is actually used. Knowing and willing use of it by a nonpresent party to enter into dealings with persons or businesses in the forum demonstrates a chosen contact with the forum, provides the forum with an interest in the relationships thus created, and makes it less likely that multiple fora with different applicable laws will attempt to regulate the site and assert jurisdiction over its sponsor.

Largely based on the U.S.case law, Prof. Rothchild makes useful observations in limiting the scope of what may be deemed to constitute conduct that would have a foreseeable impact on a particular jurisdiction:

> ...the following activities should not, by themselves, support a finding that the maker of a communication caused foreseeable effects within a state: (1) maintaining a World Wide Web site that is accessible by residents of that state; (2) posting a message in a Usenet newsgroup, or any other electronic bulletin board system, that is accessible by residents of that state; (3) transmitting a message to an Internet mailing list whose membership includes residents of that state; or (4) making a statement in a chat session that includes a participant who is a resident of that state.
>
> To support extraterritorial jurisdiction in the online context, there must be "[a]dditional conduct" beyond merely making a communication available within a particular state. Sufficient additional conduct will exist where: (1) the online communication results in a commercial transaction involving the shipment of a physical good to an address located in the state that asserts jurisdiction; (2) the communication results in a commercial transaction involving the transmission of a digital good to a recipient who resides in that state, if at the time the transaction was consummated the sender knew or reasonably should have known that the purchaser resided in that state; (3) the person made affirmative and unmistakable efforts to direct the communication or transmission to residents of that state, or to injure persons located in that state, or (4) the person knew, or reasonably should have known, that the transaction would have effects within that state. Conversely, assertion of extraterritorial jurisdiction will be less appropriate where the seller takes steps to *avoid* doing business by residents of a particular country, such as by posting a notice indicating the geographic or political limits within which the offer is intended to be valid, declining to ship goods into particular jurisdictions, or making efforts to ascertain the location of a prospective customer and limiting one's commercial activity accordingly.[61] [Footnotes omitted]

We would not agree unreservedly with these parameters. For instance, where a digital good is to be shipped, it could well be incumbent upon the seller to take reasonable steps to enquire as to the consumer's address, on the understanding that if the seller is entitled to rely on the consumer's representations, whether true or not. Nevertheless, these guideposts do, in our view, contribute to the debate by outlining many of the relevant factors and leaving open for discussion whether the presence or absence of a factor should or should not militate in favour of the assertion of jurisdiction. In our view, agreement should be reached on such a set of such parameters that would be expressly identified as guidelines in relation to the application of the general criteria set out above.

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[61] *Ibid.*

An arrangement among provinces to establish criteria along the lines of that proposed above, along with accompanying guidelines, would, in our view, be constitutionally permissible and would reduce legal uncertainty.

As discussed above, the provinces do have the power to make and enforce laws for consumer protection that may, as their incidental effect, impinge upon vendors situate outside the province. However, a law that purported to prevent another province from asserting jurisdiction over the conduct of vendors situate within that province, even in relation to cross-border transactions, would likely be open to constitutional challenge in a Canadian jurisdiction that declined to follow such a rule.

The preferred approach, from a public policy, legal and constitutional perspective, is therefore to apply the consumer-jurisdiction principle by way of informal agreement. As discussed above, it seems unlikely that the consumer protection laws of the provinces are in fact limited in their application to conduct that impacts upon consumers in the respective provinces or to conduct of businesses within their borders. There is, furthermore, no definite need to formally introduce such limits in relation to prescriptive jurisdiction. It is likely sufficient to agree to adhere to whatever policy and criteria is developed among the provinces and to agree to be guided by it in the extra-provincial enforcement of their respective legislation.

Mechanisms

"Equivalent protection" for consumers may be meaningless if no effective means of redress can be provided for. In this sense, the fact that a consumer's jurisdiction's regulatory laws may apply to a particular transaction involving a cross-border vendor is meaningless if the authorities in the consumer's jurisdiction have no power to deter, prevent, punish and/or seek redress in relation to offending conduct.

In this regard, unscrupulous vendors or marketers have been known to establish operations in one jurisdiction, but to target consumers in another.[62] The Internet is, of course, an ideal platform from which to operate such arrangements. Nevertheless, the problem is not confined to the Internet, and regulatory agencies have developed cooperative arrangements for dealing with such problems not only for the Internet, but also in relation to, for instance, deceptive telemarketing. For instance, Canada and the United States have established a joint working group on cross-border telemarketing fraud, and have developed mutual legal assistance mechanisms for the sharing of information and cooperating in investigation and enforcement, and have signed a mutual assistance agreement in this area.[63] The Canadian "phonebusters" database, which centralizes information on deceptive marketing practices by phone and online, is of course an excellent example of such cooperation within Canada's federal system.

Conversely, attempts by regulatory agencies to pursue enforcement outside their jurisdiction, in the absence of a consensual arrangement, can lead to disputes between agencies and undermine the normative and enforcement regime. A number of Canadian jurisdictions, for instance, adopted blocking statutes aimed at protecting their citizens and businesses from aggressive attempts by the United States to enforce its anti-trust laws.

A cooperative approach is, clearly, to be preferred. Among the areas in which cooperation could be envisaged are the following:

Legal process

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[62] See, for instance, *(B.C.) Director of Trade Practices* v. *Ideal Credit Referral Services Ltd., supra* note 12, in which injunctive relief was brought against a B.C.-based "credit repair" company that targeted consumers in the United States.

[63] *Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* (1995).

A court generally cannot assert jurisdiction over an individual located outside the forum state unless that individual is served with process. Mutual mechanisms for effecting and recognizing extra-territorial process can significantly reduce the obstacles this presents: see, for instance, the multilateral *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.*[64]

Mareva Injunctions

In common law jurisdictions, *ex parte* orders can be brought to freeze a person's assets on an interlocutory basis (known as a "*Mareva* injunction"), in a jurisdiction in which the party has assets. This can prove a very effective means of ensuring redress, where there is a reasonable belief that the person in question may dissipate or transfer assets to evade enforcement. As timely action is often key to the success of such court applications, cooperation between agencies would be highly beneficial. Although some authors have suggested that Article 3138 of the *Quebec Civil Code* provides for such a remedy, others argue that this is precluded by virtue of Article 3155, which provides that foreign decisions must be "final" to be enforced through the Quebec courts.

Information sharing/Investigations assistance

As discussed above, the sharing of information and assistance in investigation is central to effective, cooperative enforcement of regulatory laws, and Canada has been a leader in this regard, both internally and internationally.

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[64] 658 U.N.T.S. 163.

Injunctive and Monetary Relief

There does not appear to be any constitutional obstacle precluding the courts of one province to enforce regulatory judgments rendered in another province. Certainly this holds true in relation to a monetary judgment, whether civil or regulatory.[65] Nevertheless, the process of doing so can be lengthy and costly. The problems associated with extra-provincial enforcement have led the provinces to adopt procedures to facilitate recognition and enforcement of judgments as between them: money judgments in civil matters are governed by the *Reciprocal Enforcement of Judgments Act* as between all provinces and territories, with the exception of Quebec. Similarly, all provinces and territories of Canada, including Quebec, as well as most U.S. and Australian states and several foreign countries, have a *Reciprocal Enforcement of Support Orders* arrangement and enabling legislation. Extra-territorial enforcement of certain types of orders and decrees may be expanded under the model *Enforcement of Canadian Judgments and Decrees Act* crafted by the Uniform Law Conference of Canada.[66]

Some form of cooperative arrangement for mutual recognition of enforcement orders could be contemplated for the enforcement of consumer protection laws. Even under proposed uniform enforcement of judgments and decrees acts, fines and penalties under prescriptive laws are excluded and are not enforceable extra-provincially.

There are a variety of means of broadening the ability to enforce legislation extra-provincially. As discussed above, the European *Directive on Consumer Protection Injunctions* presents one interesting model, in allowing provincial regulatory agencies to more easily obtain injunctive relief (such as a "cease and desist" order or a mandatory publication order) and monetary penalties for failure to comply, within the jurisdiction of the vendor.

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[65] See *De Savoye v. Morgaurd Investments, supra* note 27 and *Hunt v. T&N PLC, supra* note 30.

[66] Available at: http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1p.

This approach could also be facilitated through a formal reciprocal enforcement arrangement. An arrangement of cooperation between the relevant consumer protection authorities, similar to the cooperation arrangements between Attorneys-General in relation to the reciprocal enforcement of support orders, could also be contemplated. That model provides that regulatory agencies, rather than bring enforcement measures directly, seek the aid of the regulatory agencies of the jurisdiction where the offender is situated in securing the appropriate remedy.

Regardless of what mechanism for facilitating enforcement is implemented, it is unlikely that governments will want to establish a system by which they would be bound to implement or facilitate the implementation against business interests within its territory of any consumer protection law another Canadian jurisdiction may deem appropriate. In general, differences in consumer protection laws between jurisdictions will not be so significant as to make implementation in another jurisdiction offensive to the authorities of that jurisdiction. Nevertheless, this possibility does exist that the situation would arise, and governments are unlikely to want to create a mechanism that may involve them in enforcing a norm with which it does not agree. Governments will want to know what norms will be enforced through any such mechanism, and to have the ability not to involve themselves, directly or indirectly, in the enforcement of any existing or future norm with which it does not agree.

It should be noted that, at present, foreign and sister-provincial governments do appear to have the ability of enforcing certain monetary judgments obtained under their laws in the courts of other Canadian provinces: see *U.S. v. Ivey*, *supra*. The ability to oppose such enforcement on public policy grounds appears to be narrow, as discussed above. Even the ability to take legislative action to limit enforcement appears constrained by the Constitution: *Hunt v. P&N*, *supra*. However, there is a public policy distinction between allowing, grudgingly or not, such enforcement to take place, and becoming directly involved in facilitating such enforcement.

In this regard, it may be advisable to limit mutual cooperation and enforcement arrangements to certain defined, harmonized norms on which the participating provinces can agree.[67] This topic is, therefore, briefly addressed below.

Harmonization

It is worth underscoring that the European *Directive relating to Consumer Protection Injunctions* is confined to "practices coming within the remit of national laws that have been harmonized" under specific, designated EU laws. This clearly minimizes the possible charge of unfairness that might otherwise be directed at a policy that allows one state, in enforcement of its consumer protection laws, to obtain injunctive relief in another state in which a vendor or marketer operates. To the extent the impugned conduct is recognized as illegal in both the consumer's and the vendor's place of habitual residence, there can be no complaint that the vendor was unaware that the conduct in question was not permissible.

Similarly, the Canadian Framework and OECD Guidelines encourage the harmonization of consumer protection laws and their adaptation to electronic commerce "without requiring any jurisdiction to lower its standards." Harmonization is clearly desirable for consumers, businesses and policy makers alike, to better ensure predictability, equal protection and certainty.

As noted above, the scope of consumer protection laws across Canada varies considerably. It seems unlikely, therefore, that harmonization of consumer protection laws as a whole is likely to occur in the short term. Nor is the need for harmonization as pressing in relation to the traditional sphere of consumer protection offline. The dramatic growth in cross-border transactions that the Internet has made possible, and the desirability of encouraging its continued expansion, suggest that the need for greater harmonization in relation to e-commerce consumer protection is particularly acute. The development by the Consumer Measures Committee E-

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[67] This, too, is similar to the European model, which limits the mechanisms foreseen in the *Consumer Protection Injunction Directive* to specified, harmonized EC laws.

Commerce Working Group under the Agreement on Internal Trade of a *Draft Internet Sales Harmonization Template*[68] is encouraging in this regard.

Such an approach may seem inconsistent with the preference in many jurisdictions to ensure commercial and regulatory "neutrality" as between online and offline commerce. The Draft Internet Sales Template appears to recognize that failure to tailor a regime that takes the particularities of e-commerce into consideration could result in favouring one mode of conducting business over another. "Formal equality" in regulating modes of business may result in actual inequality. The nature of e-commerce is such that consumers are more wary of using this method of purchasing. Therefore, measures specific to enhancing online confidence will help to right imbalances in the market as between online and offline transactions. Conversely, to the extent that e-commerce appears far more susceptible to evading consumer protection laws, the absence of measures to redress this problem creates an imbalance in the degree of regulation of online and offline commerce. Thus, the establishment of mechanisms and harmonized principles or laws specific to e-commerce, far from derogating from the principle of neutrality, may be necessary to uphold it.

Legislative initiatives in Alberta [69] and Manitoba [70]in relation to e-commerce -specific consumer protection legislation suggests the possibility of establishing a core, harmonized e-commerce consumer protection standard.

Conclusions regarding Canadian policy options

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[68] Available at http://strategis.ic.gc.ca/pics/ca/internet_sales.pdf.

[69] *Electronic Sales Contract Regulation* pursuant to the *Fair Trading Act*, S.A. F.1.05.

[70] Bill 31, *Electronic Commerce and Information, Consumer Protection Amendment and Manitoba Evidence Amendment Act* (2000).

This paper argues that Canadian provinces should recognize the prescriptive law of the consumer as being applicable in dealing with cross-border consumer transactions, within certain defined limits. Governments have a legitimate public policy interest in ensuring that their consumers are accorded the same level of protection online as offline. In practice, unless governments are prepared to allow their consumers to lose equivalent protection by virtue of the consumer making a cross-border purchase, this means upholding the extra-territorial applicability of consumer protection legislation.

At the same time, governments also have a legitimate public policy interest in ensuring that businesses that operate within their borders respect the legal and ethical norms within that jurisdiction. Furthermore, the mechanisms by which cross-border consumer protection policy is in fact implemented must be effective, and must be respectful of other provinces' interests. The latter factors militate in favour of relying upon the regulatory authorities of the vendor to assume jurisdiction and, in particular, enforcement.

Are these visions incompatible? In our view, they are not, and indeed the European model offers an example of how both can be reconciled. The starting premise, articulated in the *Rome Convention* and urged in this paper, is that, within certain prescribed limits, the prescriptive laws of the consumer's jurisdiction are applicable, regardless of the location of the vendor. Where offensive activity originates in another jurisdiction, however, the authorities of the consumer's jurisdiction should begin by asking the authorities of the vendor's jurisdiction to take appropriate corrective action. This step allows the authorities in the consumer's jurisdiction to extend (and be seen to be extending) protection to the consumers it is mandated to help protect, and allows the consumers to rely on their government's regulatory authorities, while being respectful of the legitimate public policy interests of the authorities within vendor's jurisdiction's. If, however, the authorities within that jurisdiction are unable or unwilling to act, or to take adequate measures, the authorities within the consumer's jurisdiction should be entitled to take appropriate

steps.[71] Implementation of those steps, in turn, should be facilitated through the various enforcement and information-sharing mechanisms described above, including, perhaps an arrangement similar to the European *Consumer Protection Injunction Directive* of mutual-recognition of regulatory authorities enabled to bring corrective and injunctive relief quickly within another jurisdiction.

In our view, there is much to commend a staged-approach mechanism, which recognizes the protections of the laws of the consumer's jurisdiction, but defaults to the vendor's jurisdiction for enforcement and, finally, provides for effective remedies by the consumer's authorities as a final resort.[72] In addition to balancing the various government, consumer and business interests, such a mechanism is likely to be the most practical. For example, it appears likely that, in many instances, the conduct of a particular vendor will have consequences in more than one jurisdiction, including the jurisdiction in which that vendor is located. In such a case, it will usually make sense for the authorities of the vendor's jurisdiction to take the lead.

To the extent that harmonization of consumer protection laws as a whole is unlikely to occur, core standards in relation to electronic commerce may also be more readily achieved, leaving provinces to maintain the legal and public policy diversity that currently characterizes consumer protection law in Canada. Alternatively, a harmonized core set of standards might be agreed to <u>for the purposes of extra-provincial enforcement only</u>. In other words, provinces may again wish to retain their own standards and approaches generally, and to apply such standards within their own jurisdiction. The harmonized standard would, however, provide a basic, core standard across Canada and be applicable for the purposes of enforcing consumer protection in relation to cross-border transactions.

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[71] This is the model incorporated in the European *Electronic Commerce Directive* 2000/31/EC, discussed above.

[72] Provision could also be made for the consumer's authority to take the lead on consent or in cases of urgency.

RECOMMENDATIONS

Perhaps more than any other business activity, electronic commerce requires a balanced approach of "co-regulation," or what has been called "a new paradigm for governance that recognizes the complexity of networks, builds constructive relationships among the various participants (including governments, systems operators, information providers, and citizens), and promotes incentives for the attainment of various public policy objectives in the private sector."[73]

Governmental regulation and enforcement has a role to play in this regard; the extent of that control and the degree to which it is aggressively pursued is a matter of policy that is beyond the scope of this study. What is clear, however, is that whatever regime emerges must have a large measure of consistency, predictability and transparency. A key component in this regard is arriving at common understanding of the jurisdictional rules that will apply to the regulation and enforcement of consumer protection standards by the various governmental authorities.

In our respectful opinion, consideration should, in this regard, be given to the following:

1. Establishment of a presumption in favour of the applicability of the consumer's prescriptive jurisdiction

The starting premise should be that the laws of the consumer's jurisdiction apply to consumer e-commerce transactions, subject to certain limits designed to recognize that it must be reasonable for the seller to know where the consumer is located and that allow a seller to "opt out" of conducting business in that jurisdiction.

Guidelines should also be established to help determine whether conduct would reasonably regarded as foreseeably having an impact on a particular jurisdiction. Under what circumstances,

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[73] Joel R. Reindenberg, "Governing Networks and Rule-Making in Cyberspace", (1996), 45 Emory L.J. 911 at p. 912.

for instance, will maintaining a web site be regarded as foreseeably having an impact in another jurisdiction?

2. Establishment of mutual-assistance measures for extra-provincial enforcement

Mutual cooperation mechanisms between regulatory agencies should be established to allow authorities to obtain court orders, promptly and cost-effectively, including "cease and desist" orders and monetary orders. One option in this regard is to establish a system based on the European *Consumer Protection Injunction Directive*. Under such a regime, the authorities in the vendors jurisdiction should be expected to take the lead in enforcement, either of their own initiative or at the request of another jurisdiction's authorities. Provision should be made, however, for authorities to be able to more readily obtain appropriate enforcement orders through the courts of other provinces, where the authorities in the vendor's jurisdiction are unable or unwilling to act, or in cases of urgency.

Such a mechanism could be limited to a defined, harmonized core set of e-commerce consumer protection standards.

Continued and increased information sharing and investigatory assistance should be encouraged.

3. Harmonization of consumer protection principles applicable to e-commerce.

Provinces should continue to strive to harmonize their laws in relation to consumer protection in electronic commerce, based on the strong foundation established by the *Draft Internet Sales Harmonization Template* drafted under the auspices of the Consumer Measures Committee E-Commerce Working Group under the Agreement on Internal Trade.