

Electronic Contracts Under Canadian Law—A Practical Guide

BRADLEY J. FREEDMAN*

The conduct of business has for many years been enhanced by technological improvements in communication. Those improvements should not be rejected automatically when attempts are made to apply them to matters involving the law. They should be considered and, unless there are compelling reasons for rejection, they should be encouraged, applied and approved.¹

I. INTRODUCTION

ELECTRONIC COMMERCE IS AN INCREASINGLY important part of the Canadian economy.² Canadian businesses are embracing the advantages of electronic commerce, and are using the Internet and related technologies to expand markets, improve efficiency, increase profitability, and develop new business models. Confidence in the legal effectiveness of electronic communications and certainty regarding the legal rules governing the validity and enforceability of electronic contracts³ are fundamental to the profitability of electronic commerce.

Canadian businesses operate in a fairly well defined legal environment established by statutes and common law. Laws regarding contracts were developed over many centuries in the context of physical premises and paper-based

* Partner, Borden Ladner Gervais LLP, Vancouver, British Columbia, Canada. LL.B., 1986, University of British Columbia; LL.M., 1990, University of California at Berkeley. Member of the Bar of British Columbia. I am grateful for the comments and suggestions of my colleague Robert Deane and my assistant Catherine Rodgers, and the research assistance of Lindsay Waddell, student-at-law. This article is dedicated to my parents, Ken and Roberta Freedman.

¹ *Beatty v. First Explor. Fund 1987 and Co.* (1988), 25 B.C.L.R. (2d) 377 (B.C.S.C.) at 385. See also *Rolling v. Willann Investments Ltd.* (1989), 70 O.R. (2d) 578 (Ont. C.A.) at 581, as follows: "Where technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved."

² In November 2000, Industry Canada reported that Canadian e-commerce totaled \$11.02 billion in 1999, which was 6.8% of the global e-commerce total of \$195.39 billion. Online: Government of Canada <<http://www.ecom.ic.gc.ca/using/en/e-comstats.pdf>>.

³ In this article, the term "electronic contracts" refers to contracts formed using electronic communications.

transactions, in which agreements were negotiated through face-to-face communications, recorded on paper, and verified by handwritten signatures. As a result, legal rules regarding contracts are often expressed in language, and reflect concepts and practices, that are difficult to apply to electronic transactions.

Electronic contracts present specific challenges to the application of traditional contract law principles, including rules regarding contract formation, legal formalities, and enforcement. Consider the following: Are contracts formed through email, Web-site communications, or electronic data interchange valid and enforceable? Is an electronic signature valid? Does clicking on an "I Agree" icon result in a valid contract? Are Web-site use agreements binding? Do automated computer communications result in valid contracts? Where is an electronic contract made, what law governs the contract, and what courts have jurisdiction over contract disputes? Are electronic records of contractual communications admissible evidence in legal proceedings? Uncertainty regarding these and other issues increases transaction costs and undermines the confidence in the legal effectiveness of electronic contracts that is essential for the continuing growth of electronic commerce.

This article discusses how Canadian lawmakers, courts, and businesses have addressed the legal challenges presented by electronic contracts. It is not possible to cover all substantive and procedural issues in an article of this nature, or to compare and contrast the differences in the various new electronic commerce laws in Canada and throughout the world. The law in this area is developing rapidly. Accordingly, reference to current legislation and relevant case law is essential for anyone addressing these issues in practice.⁴

II. ELECTRONIC COMMERCE LAWS

MANY OF THE LEGAL CHALLENGES PRESENTED by electronic commerce are beginning to be addressed by lawmakers. The most important effort in that regard is the *Model Law on Electronic Commerce* (the "*Model Law*"), prepared by the United National Commission on International Trade Law ("UNCITRAL") and adopted by the United Nations General Assembly in November 1996.⁵ The stated purpose of the *Model Law* is to foster economy and efficiency in international trade by offering lawmakers a set of internationally acceptable rules that remove legal obstacles to the use of electronic communications and uncertainty as to their legal effect or validity.⁶ The *Model Law* has been adopted by several countries, and significantly influenced the U.S. *Uniform Electronic Transactions*

⁴ This paper discusses legal developments occurring up to 25 August 2001.

⁵ A copy of the *Model Law* and its *Guide to Enactment* may be found online: The United Nations <<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>>.

⁶ *Model Law Guide to Enactment*, *ibid.* at paras. 1-6.

Act⁷ and the U.S. federal *Electronic Signatures in Global and National Commerce Act*.⁸

The *Model Law* was the basis for the Canadian *Uniform Electronic Commerce Act* (the "UECA"),⁹ which was adopted by the Uniform Law Conference of Canada on 30 September 1999 as a model for provincial electronic commerce laws.¹⁰ The UECA has been adopted, in some instances with minor modifications, in Ontario,¹¹ Manitoba,¹² Saskatchewan,¹³ Nova Scotia,¹⁴ Yukon,¹⁵ British Columbia,¹⁶ Prince Edward Island,¹⁷ and New Brunswick.¹⁸ Adopting legislation has been introduced in Alberta,¹⁹ but has not yet been passed. Quebec enacted a comprehensive information technology law that is much broader than the UECA.²⁰ The *Model Law* and early drafts of the UECA also influenced the Canadian federal government's *Canadian Personal Information Protection and Electronic Documents Act*.²¹

⁷ This document may be found online: The University of Pennsylvania Faculty of Law <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>.

⁸ Enacted 30 June 2000 and effective 1 October 2000 (with some provisions effective 1 March and 1 June 2001).

⁹ The *Annotated UECA* may be found online: The University of Alberta Faculty of Law <<http://www.law.ualberta.ca/alri/ulc/current/euecafin.htm>> [hereinafter UECA].

¹⁰ Not all *Model Law* provisions have been included in the UECA. For example, the UECA does not include provisions similar to *Model Law* articles 13 and 14, which provide detailed rules regarding the attribution of electronic communications and acknowledgements of receipt of electronic communications.

¹¹ *The Electronic Commerce Act*, 2000, S.O. 2000, c. 17.

¹² *The Electronic Commerce and Information Act*, S.M. 2000, c.E55.

¹³ *The Electronic Information and Documents Act*, S.S. 2000, c.E-7.22.

¹⁴ *The Electronic Commerce Act*, S.N.S. 2000, c. 26.

¹⁵ *The Electronic Commerce Act*, S.Y. 2000, c. 10.

¹⁶ *The Electronic Transactions Act*, S.B.C. 2001, c. 10.

¹⁷ *The Electronic Commerce Act*, S.P.E.I. 2001, c. 31.

¹⁸ *The Electronic Transactions Act*, S.N.B. 2001, c. E-5.5.

¹⁹ *The Electronic Transactions Act*, Bill 21 (2001).

²⁰ *An Act to Establish a Legal Framework for Information Technology*, S.Q. 2001, c. 31. The stated objectives of the law are "to provide for the legal security of documentary communications, the functional equivalence and legal value of documents regardless of the medium used, and interchangeability between media" The law is also intended to promote "concerted action for the harmonization of the technical systems, norms and standards involved in communications by means of technology-based documents."

²¹ S.C. 2000, c. 5 (formerly Bill C-6) (Part 2 in force 1 May 2001). The electronic documents provisions of this Act relate to dealings with government and do not apply to general con-

Specific provisions of the *UECA* will be discussed throughout this article. Given the importance of the *UECA*, however, an introductory overview of the *UECA* and its limitations is appropriate. The *UECA* is minimalist enabling legislation that does not purport to change general contract law or require that electronic documents be better than their paper equivalents or use any specific technology. Rather, the *UECA* seeks to remove legal barriers to electronic commerce by providing certainty to those wishing to engage in electronic contracting, making laws equally applicable to paper-based and electronic information and communications, and providing some basic rules for electronic contracts and communications.²²

The *UECA* applies to almost any legal relationship that may require documentation, including dealings with government. The governing principle of the *UECA* is that information should not be denied legal effect or enforceability solely by reason that it is in electronic form.²³ The *UECA* achieves this goal through a series of technology-neutral rules based upon the principle that electronic records that are functionally equivalent to paper-based records ought to have the same legal effect. For example, the *UECA* provides that a legal requirement that information be in writing is satisfied by electronic information "that is accessible so as to be usable for subsequent reference."²⁴ Thus, elec-

tract law matters, which are within the exclusive jurisdiction of the provincial legislatures regarding property and civil rights: *Constitution Act, 1867*, s. 92(13). In February 2000 the Department of Justice Canada issued a consultation paper on facilitating electronic commerce. Available online: Government of Canada <<http://canada.justice.gc.ca/en/cons/facilt7.html>>.

²² The approach of the *Model Law* and the *UECA* is explained in the *Annotated UECA* as follows:

The *Model Law* seeks to make the law media neutral, i.e. equally applicable to paper-based and electronic communications. It does so by proposing functional equivalents to paper, i.e. methods to serve electronically the policy purposes behind the requirements to use paper. It does so in a technology neutral way, i.e. without specifying what technology one has to use to achieve this functional equivalence.

The result may be described as minimalist legislation. The rules may appear very simple, even self-evident. They are also flexible, allowing many possible ways of satisfying them. They are, however, a vital step forward toward certainty. They transform questions of capacity ("Am I allowed to do this electronically?") into questions of proof ("Have I met the standard?"). This is a radical difference. Many computer communications occur between people who have agreed to deal that way. (Indeed the *Model Law* does not force people to use computer communications against their will.) Without provisions like those of the *Model Law*, however, the legal effectiveness of electronic transactions on consent may not be clear.

²³ *UECA*, *supra* note 9 at s. 5. See also *Model Law*, *supra* note 5 at article 5. This is known as the "non-discrimination" provision.

²⁴ *UECA*, *ibid.* at s. 7. See also *Model Law*, *ibid.* at article 6.

tronic information that has the same basic functionality as a written document—to provide a record of information for future reference—is accorded the same legal effect. The technology-neutral *UECA* rules are flexible enough to accommodate future technological developments.

The *UECA* broadly defines the concept of “electronic” as including “created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means.”²⁵ This definition includes information that is either originally created electronically or derived from paper documents.²⁶

The *UECA* prescribes rules for the legal validity and effectiveness of electronic communications for those who wish to use them. It expressly provides that it does not require a person to use or accept information in electronic form, although consent to do so may be inferred from conduct.²⁷ Nothing in the *UECA* prevents a person from providing a conditional or limited consent, or from revoking consent.²⁸ However, in accordance with generally applicable legal rules, courts will likely not interpret the consent principle to permit strategic, bad faith withdrawals of consent.

Many *UECA* provisions are expressly subject to the parties’ contrary agreement, and may be changed or supplemented by agreement. Certain provisions—including those dealing with legal formalities—may not be varied, because they prescribe how to satisfy legal rules imposed for public policy reasons.

The *UECA* does not limit the operation of any law that expressly authorizes, prohibits or regulates the use of electronic documents.²⁹ The *UECA* does not apply to the following kinds of documents: wills and their codicils; trusts created by wills or codicils; powers of attorney (to the extent that they are in respect of the financial affairs or personal care of an individual); documents that create or transfer interests in land and that require registration to be effective against third parties; and negotiable instruments (including negotiable docu-

²⁵ *UECA*, *ibid.* at s. 1(a).

²⁶ The *UECA* definition of “electronic” is also broad enough to include electronic records of speech, such as voice mail messages. Accordingly, the *UECA* may permit speech records to satisfy statutory writing requirements.

²⁷ *UECA*, *supra* note 9 at s. 6. The *UECA* does not provide any guidance regarding the basis for inferred consent. It is uncertain, for example, whether the provision of an email address on a letterhead or business card will constitute consent to electronic communications and the designation of an email system for the purpose of receiving electronic communications.

²⁸ For example, consent to electronic communications could be conditional on the use of certain information technology standards.

²⁹ *UECA*, *supra* note 9 at s. 2(5). See also *UECA* s. 15. In contrast, the electronic documents provisions of the *Canadian Personal Information Protection and Electronic Documents Act* only apply to federal laws specifically listed in schedules to the legislation.

ments of title).³⁰ Those documents were excluded because they were seen to require more detailed rules, or more safeguards for their users, than could be established by a general purpose statute such as the *UECA*.³¹ The *UECA* also contemplates that regulations may exclude other kinds of documents.³²

The *UECA* binds the Crown and applies to dealings with government. In some circumstances, however, the *UECA* provides special rules for government, including rules regarding government consent to accept information in electronic form,³³ legal writing requirements,³⁴ providing information to government in specific form,³⁵ providing signed documents to government,³⁶ and providing original documents to government.³⁷ Those rules will not be discussed in detail in this paper, as they do not relate directly to electronic contracting.

The *UECA* does not address consumer protection issues.³⁸ While many consumer protection concerns regarding electronic commerce may be satisfied as a result of the *UECA*'s general rules, specific consumer protection concerns are left for future legislative reform.

The *UECA* is a basic law that stipulates fundamental legal rules and prescribes minimum legal requirements. In many circumstances, prudence may dictate the use of standards that exceed the *UECA*'s basic requirements for legal effectiveness. For example, although there is generally no legal requirement for most commercial agreements to be in writing or signed, it is a common business practice to have commercial agreements memorialized in a written document signed by the parties. Similarly, over time, businesses and consumer groups will likely develop rules and guidelines regarding commercially acceptable electronic contracting practices that supplement the *UECA*'s basic rules.

The *UECA* is important because it provides certainty that in principle electronic information can satisfy legal requirements, including legal requirements for the formation of valid contracts. The *UECA* is also important because it provides a framework for private rule-making by individuals and further legal

³⁰ *Ibid.* at ss. 2(3) and 2(4).

³¹ *Annotated UECA, ibid.* at comment regarding section 2.

³² *UECA, ibid.* at ss. 2(2) and (6). For example, Saskatchewan's *Electronic Information and Documents Regulations* c. E-7.22, Reg. 1, provides for the continued use of handwritten signatures on summary offence tickets and warrants.

³³ *UECA, ibid.* at s. 6(2).

³⁴ *Ibid.* at s. 8(1)(b).

³⁵ *Ibid.* at s. 9(b).

³⁶ *Ibid.* at s. 10(3).

³⁷ *Ibid.* at s. 11(c).

³⁸ *Model Law Guide to Enactment, supra* note 5 at para. 27; *Annotated UECA, ibid.* at comment regarding section 2.

developments by lawmakers and courts. The UECA does not resolve all legal issues presented by electronic commerce. Nevertheless, it should provide sufficient certainty (or at least a reasonably acceptable level of uncertainty) regarding the rules governing the formation, performance, and enforcement of electronic contracts to allow electronic commerce to flourish in Canada.

III. CONTRACT FORMATION

ELECTRONIC CONTRACTS PRESENT CHALLENGES to traditional contract formation rules. In addition to uncertainty regarding the legal effectiveness of electronic communications, there are risks relating to contractual offers and acceptances and contract formation timing; the identity, capacity and authority of contracting parties; and the legal effectiveness of automated contracting systems. Some of those uncertainties and risks have been addressed by the UECA: Other uncertainties and risks may be addressed by private rule-making.

A. General Principles

To identify and address the contract formation risks presented by electronic contracting, one must turn first to basic contract law principles, which may be summarized as follows:

1. A contract is a legally enforceable mutual promise.³⁹ A contract is usually reached through a process of offer and acceptance—the making of an offer to enter into a binding agreement with another person; the communication of an unconditional acceptance of that offer by the person to whom it is made; consideration; and certainty regarding the fundamental terms of the agreement.⁴⁰ There must also be an intention on the part of the contracting parties to create a binding agreement.⁴¹
2. An offer is a manifestation of the intention of one party (the “offeror”) to enter into a legally binding bargain with another person (the “offeree”). The law distinguishes between a contractual offer (which results in the creation of a binding contract the moment it is accepted) and a mere solicitation or indication of willingness to consider contractual offers (known as an “invitation to treat”). For example, advertisements or store-shelf displays of goods are generally

³⁹ G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 5.

⁴⁰ This general pattern of contract formation is subject to certain exceptions, including rules regarding unilateral contracts. See Fridman, *ibid.* at 76; S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at 157.

⁴¹ Fridman, *ibid.* at 28–35.

not offers for sale.⁴² Instead, they are merely invitations to potential purchasers to make purchase offers.⁴³ In those circumstances, the potential purchaser makes an offer to purchase, and the vendor then accepts the offer if it is willing to do so.⁴⁴

3. An offer creates a power of acceptance in the offeree. However, the offeror is the "master of the offer," because he may stipulate the manner in which the offer may be accepted, and is not necessarily bound unless acceptance is effected in that way.⁴⁵
4. As a general rule, acceptance of an offer is not effective unless and until it is communicated to the offeror.⁴⁶ Unless the offer indicates otherwise, an acceptance may be communicated orally, in writing, or by conduct.⁴⁷ Where an acceptance of an offer is not communicated to the offeror, there is no binding contract even though the offeree reasonably believes that the acceptance was communicated.⁴⁸ This puts the risk of miscommunication of the acceptance on the offeree.
5. To be effective, acceptance must correspond identically to the terms of the offer. Acceptance that alters or qualifies the terms of an offer constitutes a counter-offer, which requires acceptance by the person who made the original offer in order to create a contract. A counter-offer also acts as a rejection of the original offer, which can no longer be accepted.⁴⁹

⁴² *Grainger & Son v. Gough*, [1896] A.C. 325 (H.L.); *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, [1953] 1 Q.B. 401 (C.A.); *Fisher v. Bell*, [1961] 1 Q.B. 394 (C.A.); *Partridge v. Crittenden*, [1968] 2 All E.R. 421.

⁴³ The practical effect of this rule is to protect merchants from supply shortages. An advertisement may constitute an offer capable of acceptance if it is sufficiently clear and explicit regarding the contract terms.

⁴⁴ *Fridman*, *supra* note 39 at 35.

⁴⁵ *Fridman*, *ibid.* at 54–61.

⁴⁶ *Entores LD v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.); *Schiller v. Fisher*, [1981] 1 S.C.R. 593; *Lanca Contracting Ltd. v. Brant County Board of Education* (1986), 54 O.R. (2d) 414 (Ont. C.A.); and *835039 Ontario Inc. v. Fram Development Corp.*, [1994] O.J. No. 1725 (Ont. H.C.). An offer may expressly or implicitly waive the requirement that acceptance be communicated, and may allow the offeree to accept the offer and conclude the contract by the performance of some act.

⁴⁷ *Fridman*, *supra* note 39 at 54–61. *Trans-Pacific Trading v. Rayonier Canada Ltd.* (1998), 48 B.C.L.R. (3d) 296 (C.A.).

⁴⁸ *835039 Ontario Inc. v. Fram Development Corp.*, [1994] O.J. No. 1725 (Ont. H.C.).

⁴⁹ *Fridman*, *supra* note 39 at 61–63.

6. In the basic contract negotiation pattern, the process of offer and counter-offer continues until there is an acceptance of the most current offer, the terms of which will then be binding. This often results in what is known as a "battle of the forms"—which presents a risk of misunderstanding regarding the terms of the agreement.⁵⁰

B. The Legal Effectiveness of Electronic Communications

Common law contract formation rules generally do not require the use of any particular communication method or other formalities. In particular, there need not be any face-to-face negotiations, and there is no general requirement for contracts to be written, signed, sealed, witnessed, or delivered.⁵¹ A binding contract may be formed using any communication method, including oral communications, signs and notices, tickets, postal mail, telexes, telegrams, and facsimile transmissions. Accordingly, there is no reason in principle why binding contracts may not be formed using electronic communications, such as electronic mail and Internet Web-site communications.

The effectiveness of electronic Internet communications in creating valid and enforceable contracts under Canadian common law was confirmed by the Ontario Superior Court in *Rudder v. Microsoft Corp.*,⁵² which involved a dispute regarding the effectiveness of certain provisions of the Microsoft Network member agreement. Potential members accepted the agreement by clicking an "I Agree" icon during the registration process. The Plaintiffs argued that the provisions of the agreement that were not visible on the computer screen without scrolling were unenforceable. The Court rejected that argument, holding that the electronic multi-screen display of the agreement was "not materially different from a multi-page written document which requires a party to turn the pages," and concluded that the electronic contract "must be afforded the sanctity that must be given to any agreement in writing."

Various American courts have similarly held that contracts formed through Internet communications are binding. For example, Internet agreements formed by users clicking an "I Agree" icon were held valid in *Caspi v. The Microsoft Network*,⁵³ (which, like *Rudder*, involved the Microsoft Network Member

⁵⁰ *Ibid.* at 63–66.

⁵¹ Waddams, *supra* note 40 at 157-159. This is confirmed regarding contracts for the sale of goods by the British Columbia *Sale of Goods Act*, R.S.B.C. 1996, c. 410, s. 8; the Ontario *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 4, as amended; and the *United Nations Convention on Contracts for the International Sale of Goods*, arts. 11 and 12.

⁵² (1999), 47 C.C.L.T. (2d) 168; 2 C.P.R. (4th) 474 (Ont. S.C.); 40 C.P.C. (4th) 394 (Ont. S.C.J.) [hereinafter *Rudder*].

⁵³ 323 N.J. Super. 118; 732 A. 2d 528 (N.J. App. Div. 1999); cert. denied 743 A.2d 851 (N.J. Sup. 1999) [hereinafter *Caspi*].

Agreement) and *Lieschke v. RealNetworks Inc.*⁵⁴ (which involved an electronic software license agreement).⁵⁵

The increasing use of electronic communications to form and perform contracts indicates that many businesses and consumers accept that electronic communications may be used to form contracts. Any lingering doubt in that regard is removed by the *UECA*. In addition to the *UECA*'s general provision that information shall not be denied legal effect or enforceability solely by reason that it is in electronic form,⁵⁶ the *UECA* specifically provides that a contract shall not be denied legal effect or enforceability solely by reason that an electronic document was used in its formation.⁵⁷ For greater certainty, the *UECA* also provides that unless the parties agree otherwise, an offer or acceptance or any other matter that is material to the formation or operation of a contract may be expressed by means of an electronic document or by an action in electronic form, including touching or clicking an appropriately designated icon or place on a computer screen, or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.⁵⁸

It is important to note that the *UECA* does not necessarily make contracts formed by electronic communications valid and enforceable. There may be many legal reasons, under common law or statute, to challenge the validity of a particular electronic contract. In addition, legal formalities, such as writing, signature, and delivery requirements, must be satisfied through electronic equivalents before certain kinds of contracts are valid or enforceable. Those requirements are addressed by other *UECA* provisions and are discussed below.

C. Electronic Contract Formation Rules and Risks

Electronic contracts generally engage the same rules, and present the same risks, as contracts formed using other means of distant communications, such as postal correspondence, telephones, telex and facsimile. Many of those contract formation risks may be addressed by the parties through private ordering—by

⁵⁴ 2000 U.S. Dist. LEXIS 1683 (N.D. Ill. 1999); *aff'd* upon hearing of intervenors' arguments 2000 WL 631341 (N.D. Ill. 1999) [hereinafter *Lieschke*].

⁵⁵ See also *Groff v. America Online Inc.*, 1998 WL 307001 (R.I. Sup. 1998) [hereinafter *Groff*]; *Hotmail Corporation v. Van\$ Money Pie Inc.*, 47 U.S.P.Q. 2D 1020 (N.D. Cal. 1998); *Jessup-Morgan v. America Online Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998); *Clemens v. America Online*, No. 98-04307 (Fla.App. Dist. 2 1999); and *Register.com Inc. v. Verio Inc.*, 8 December 2000; Civ. 5747 (BSJ); S.D.N.Y. [hereinafter *Verio*].

⁵⁶ *UECA*, *supra* note 9 at s. 5.

⁵⁷ *Ibid.* at s. 20(2). See also *Model Law*, *supra* note 5 at article 12.

⁵⁸ *UECA*, *ibid.* at s. 20(1). See also *Model Law*, *ibid.* at article 11.

carefully stipulating the intended terms and effect of their communications and establishing their own contract formation rules.

Where the parties expect to engage in numerous transactions, they may wish to first enter into a general agreement (which itself may be formed through electronic communications) that establishes contract formation rules for subsequent transactions. If multiple transactions are not intended, the parties may stipulate contract formation rules in their offers and counter-offers. The following are some of the more significant contract formation risks that should be addressed in either case.

1. Offer and Acceptance

Risks inherent in the electronic contract formation process can be reduced significantly by stipulating clearly the terms and intended effect of contract formation communications—offer, counter-offer, and acceptance. Clarity and disclosure not only reduce uncertainty and risk, but are also considered a fair business practice essential for the protection of consumers and the growth of business-to-consumer electronic commerce.⁵⁹ The following are some suggestions:

1. It is likely that in most cases Web-site advertisements will constitute solicitations rather than offers. To eliminate uncertainty, however, Web-site advertisements should stipulate whether they are offers capable of acceptance or are merely solicitations of offers.⁶⁰
2. In most Web-site transactions, the purchaser's order will constitute an offer, and the vendor's acceptance of the order will create a binding contract. Consequently, if the vendor wishes the contract to include its standard terms and conditions, those provisions must be included in the order, because an attempt to include standard terms and conditions in an acceptance would result in a counter-offer rather than a contract. This may be achieved by structuring the transaction so that purchase orders must include the vendor's standard terms and conditions.
3. In certain circumstances, offers may be revoked before acceptance. To avoid that risk, contractual offers may stipulate the circum-

⁵⁹ See *Principles of Consumer Protection for Electronic Commerce—A Canadian Framework* published by Industry Canada, which is available online: Government of Canada <<http://www.strategis.ic.gc.ca/SSG/ca01185e.html>>. The *Principles* provide guidelines regarding electronic contracts as well as other consumer protection issues, including information disclosure, privacy, security of payment and personal information, redress, liability, and unsolicited commercial email.

⁶⁰ See *Principles of Consumer Protection for Electronic Commerce—A Canadian Framework*, *ibid.* at principle 2.1.

stances, if any, in which they may be revoked and the manner in which the revocation must be effected. In most Web-site transactions, where purchase orders constitute offers, the vendor may wish to require that all orders include an acknowledgement that order cancellation requests are not effective if the vendor has processed the order.

4. Electronic communications often generate automated acknowledgements of receipt, known as "functional acknowledgements." Merely confirming receipt of an offer, as distinct from accepting it, does not create a contract. For example, in *Corinthian Pharmaceutical Systems Inc. v. Lederle Lab*⁶¹ the issuance of an order tracking number by an automated telephone ordering system was found to be merely an acknowledgement of the customer's order rather than an acceptance creating a binding contract. In some circumstances, however, it may be difficult to distinguish between an acknowledgement and an acceptance. This uncertainty may be addressed by expressly indicating whether a communication is merely an acknowledgement of receipt or constitutes an acceptance creating a contract.
5. To avoid uncertainty regarding acceptance, electronic offers should stipulate the exclusive manner in which an acceptance may be made and communicated. Where this is not done, an acceptance might be communicated in a manner that is not acceptable to the offeror. Further, where appropriate and practicable, the method of acceptance should be an unequivocal act, such as entering one's name and clicking an "I Agree" icon.
6. The ease with which electronic documents can be altered presents the risk of an electronic battle of the forms. In certain circumstances, this risk may be reduced by requiring the use of standard terms that may not be varied. Practical measures may also be taken to minimize this risk. For example, electronic forms should not allow for additions or changes to contractual terms or for comments or notes that may be used to amend standard provisions.
7. The unreliability of the Internet infrastructure presents a risk that communications may be lost or garbled. This may be addressed by various practical measures (such as the use of message-confirming functional acknowledgements) or technological measures (such as digital signatures which verify the integrity of the message).

⁶¹ 724 F. Supp. 605 (S.D. Ind. 1989).

2. Contract Formation Timing

Contract formation timing may be important because, as a general rule and in the absence of an agreement to the contrary, an offer or an acceptance may be revoked or withdrawn before the contract is made, and an offer not accepted in a timely manner may lapse.⁶² Once a contract has been made, the offer and acceptance are binding and cannot be revoked or withdrawn.⁶³ Accordingly, the rules regarding contract formation timing determine which of the parties bears the risk of failed communications.⁶⁴

In face-to-face transactions, communications are instantaneous and there is little doubt when the contract is formed. When parties are separated by physical distance and use non-instantaneous communications, however, there can be uncertainty regarding the timing of receipt of communications. For Internet transactions, this uncertainty is compounded by the relative unreliability of the Internet infrastructure and the need for most users to access their email servers to retrieve their email.

The general rule regarding contract formation timing is that, subject to an express or implied waiver of this requirement, an acceptance of a contractual offer is effective, and a contract is made, when notice of the acceptance is received by the offeror.⁶⁵ This general "notification" rule places the risk of delay, miscommunication, and non-delivery on the offeree, which is generally accepted as fair where communications are instantaneous and the offeree knows, or can easily confirm, whether notice of the acceptance has been received by the offeror.⁶⁶

⁶² Fridman, *supra* note 39 at 47.

⁶³ *Trans-Pacific Trading v. Rayonier Canada Ltd.* (1998), 48 B.C.L.R. (3d) 296 (C.A.); *Dickinson v. Dodds* (1876), 2 Ch.D. 463 (C.A.); *Hughes v. Gyratron Developments Ltd.*, [1988] B.C.J. No. 1598 (S.C.); *Stevenson v. McLean* (1880), 5 Q.B.D. 346.

⁶⁴ Contract formation timing rules may also be relevant to determining the law that governs the contract and the courts that have jurisdiction over contractual disputes.

⁶⁵ Fridman, *supra* note 39 at 70–76. *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 Q.B. 256 (C.A.) and *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.) (acceptance by telex). See J. Chitty, *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999) at chapter 2. *Quebec Civil Code*, art. 1387, provides as follows: "A contract is formed when and where acceptance is received by the offeror, regardless of the method of communication used, and even though the parties have agreed to reserve agreement as to secondary terms." The *United Nations Convention on Contracts for the International Sale of Goods*, article 18(2) provides, in part: "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." The Convention has been adopted by all Canadian provinces, for example, *International Sale of Goods Act*, R.S.B.C. 1996, c. 236; *International Sale of Goods Act*, R.S.O. 1990, c. I-10; and *An Act respecting the United Nations Convention on Contracts for the International Sale of Goods*, S.Q. 1991, c. 68.

⁶⁶ *Brinkibon Ltd. v. Stahag Stahl G.m.b.H.*, [1982] 1 All E.R. 293 (H.L.) [hereinafter *Brinkibon*]; *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.).

A long-recognized exception to the notification rule is the “postal acceptance” or “mailbox” rule, which provides that in certain circumstances an acceptance delivered by mail is effective, and a contract is made, when notice of the acceptance is posted, regardless of whether or when notice of the acceptance is received by the offeror.⁶⁷ This exception is a rule of commercial convenience based upon practical considerations, the perceived reliability of the postal system, and the view that business efficacy requires such a rule.⁶⁸ It places the risk of delay, miscommunication, and non-delivery on the offeror, because the offeror is contractually bound at the moment the acceptance is mailed, even though the offeror will not know whether its offer has been accepted unless and until it receives the acceptance in the mail.⁶⁹

Courts have held that contracts formed through methods of distant communications that are instantaneous (such as by telephone and radio) or substantially instantaneous (such as by telex or facsimile transmission) are governed by the notification rule rather than the postal acceptance exception.⁷⁰

⁶⁷ *Adams v. Lindsell* (1818), 1 B & Ald 681; 106 ER 250; *Magann v. Auger* (1901), 31 S.C.R. 186; *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443; *Brinkibon* *ibid.*; *Trans-Pacific Trading v. Rayonier Canada Ltd.* (1998), 48 B.C.L.R. (3d) 296 (C.A.). The postal acceptance rule has been applied to courier delivery: see *The Queen v. Commercial Credit Corp.* (1983), 4 D.L.R. (4th) 314 (N.S.C.A. - App. Div.), affirming (1983), 149 D.L.R. (3d) 636 (N.S.S.C.) See also the *Restatement (Second) of Contracts*, chapter 63 (1979).

⁶⁸ See *Trans-Pacific Trading v. Rayonier Canada Ltd.* (1998), 48 B.C.L.R. (3d) 296 (C.A.); *Adams v. Lindsell* (1818), 1 B & Ald. 681; 106 ER 250.

⁶⁹ *Fridman*, *supra* note 39 at 72-73. *Henthorn v. Fraser*, [1892] 2 Ch. 27 (C.A.); *Adams v. Lindsell* (1818), 1 B & Ald 681; 106 ER 250; and *Household Fire Insurance Company v. Grant* (1879), 4 Ex. Div. 216 (C.A.).

⁷⁰ *Eastern Power Ltd. v. Azienda Comunale Energia and Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), leave to appeal refused, 22 June 2000 (S.C.C.) (acceptance by fax transmission) [hereinafter *Eastern Power*]; *McDonald & Sons Ltd. v. Export Packers Company Limited* (1979), 95 D.L.R. (3d) 174 (B.C.S.C.) (acceptance by telephone) [hereinafter *McDonald*]; *Re Viscount Supply Co.*, [1963] 40 D.L.R. (2d) 501 (Ont. C.A.) (acceptance by telephone); *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 747 (Ont. H.C.) (acceptance by telephone); *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.) (acceptance by telex); *Brinkibon*, *supra* note 66 (acceptance by telex); *Cawston v. Crown Drilling Ltd.*, [1995] M.J. No. 316 (Man. Q.B.; Master) (acceptance by fax transmission); *Joan Balcom Sales Inc. v. Poirier* (1991), 49 C.P.C. (2d) 180 (N.S.Co.Ct.) (acceptance by fax transmission). The U.S. *Restatement of the Law (Second) Contracts*, s. 64 provides that acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other. See, however, *Bickmore v. Bickmore* (1996), 7 C.P.C. (4th) 294 (Ont. S.C.) [hereinafter *Bickmore*], where the Court held that an offer delivered by fax and silent regarding the method and timing of acceptance could be accepted by fax, and the acceptance was effective when the fax transmission was sent, even though the acceptance fax was not brought to the attention of the offeror until later. See also the *Restatement (Second) of Contracts*, chapter 64 (1979).

Courts have cautioned, however, that the application of the notification rule to near-instantaneous forms of distant communication depends upon all of the circumstances, including the intention of the parties, the nature of the communication method, considerations of sound business practices, and a judgment of where risks should lie. For example, in *Brinkibon Ltd. v. Stahag Stahl*,⁷¹ a case involving a contract formed through telex communications, Lord Wilberforce of the English House of Lords cautioned as follows:

Since 1955 the use of telex communications has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice, and in some cases by a judgment where the risks should lie.⁷²

Canadian courts have not yet considered whether the notification rule applies to contracts formed through email and other Internet communications, or whether there should be an "electronic mailbox" rule.⁷³ The judicial resolution of this issue will likely depend upon the attributes of the technology involved and the parties' intentions and conduct.

Even if the notification rule is held to apply to email and other Internet communications, uncertainty will remain regarding the time of sending and receipt. For example, is an email message sent when the sender has instructed the email system to send it, when the system has stored it for sending, or when it actually leaves the sender's email system? Similarly, is notice of an email acceptance received when it is delivered to the recipient's email system, when the recipient is notified of its arrival, or only when it is accessed by the recipient? The common law provides little guidance.⁷⁴

⁷¹ *Brinkibon*, *ibid.*

⁷² *Ibid.*, at 296. A similar cautionary view was expressed by the Ontario Court of Appeal in *Eastern Power*, *supra* note 70.

⁷³ Professor Waddams suggests that there may be a distinction between substantially instantaneous two-way communications and substantially instantaneous one-way communications. Waddams, *supra* note 40 at chapter 7.

⁷⁴ In *Arrowsmith v. Ingle* (1810), 3 Taunt. 233, the Court held that delivery of process in a sealed letter, in the absence of the person to whom it is addressed, is effective from the time when the letter is opened. In *N.V. Stoomv Maats "De Maas" v. Nippon Yusen Kaisha* (the *Pendrecht*), [1980] 2 Lloyd's L.R. 56 (Q.B.) the Court held that a telex notice was served when it was received at the registered office, whether or not this was in normal business

The timing of electronic communications delivery is addressed by the *UECA*.⁷⁵ It provides that unless the parties agree otherwise, an electronic document is sent: (a) when it enters an information system outside the control of the originator; or (b) if the originator and the addressee are using the same information system, when it becomes capable of being retrieved and processed by the addressee.⁷⁶ The *UECA* also provides that an electronic document is presumed to be received by the addressee: (a) when the document enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and the document is capable of being retrieved and processed by the addressee; or (b) if the addressee has not designated or does not use an information system for the purpose of receiving documents of the type sent, when the addressee becomes aware of the document in the addressee's information system and the document is capable of being retrieved and processed by the addressee.⁷⁷ The *UECA* does not require actual retrieval and processing to effect receipt.⁷⁸

The *UECA* allocates responsibility for communications errors between the sender and addressee of an electronic document based upon the notion of presumed delivery. The sender bears the risk of errors that occur before the document is presumed to be delivered, and the addressee bears the risk of errors that occur after the document is presumed to be delivered. In addition, persons who designate or use an information system for receiving electronic documents will be obliged to ensure that the system is reliable and to actively monitor the system for incoming communications.

The *UECA* does not provide any guidance regarding the conduct necessary to constitute the "designation" or "use" of a communications system. There may also be uncertainty regarding whether an electronic document is capable of being "processed" by the addressee. For example, is an electronic document capable of being processed if it contains an attachment that may only be opened with software that the addressee does not possess? These issues and others will have to be resolved by courts on a case-by-case basis.

If there is a dispute regarding electronic message delivery, it may be difficult for the sender to prove that the message was received by the addressee's information system, or the time when the addressee became aware of the electronic

hours or at a time when for some other reason the office was closed. In *Bickmore*, *supra* note 70, the Court held that an acceptance transmitted by fax was effective when the fax transmission was sent, even though the acceptance fax was not brought to the attention of the offeror until later.

⁷⁵ See also *Model Law*, *supra* note 5 at article 15.

⁷⁶ *UECA*, *supra* note 9 at s. 23(1).

⁷⁷ *Ibid.* at s. 23(2).

⁷⁸ *Annotated UECA*, *ibid.* at s. 23.

document.⁷⁹ Accordingly, senders desiring certainty regarding electronic document delivery will obtain receipt acknowledgements from addressees. Receipt acknowledgements that re-communicate the terms of the originally received message also reduce the risk of error due to garbled messages.

The *UECA* document receipt presumption is not expressly subject to the parties' contrary agreement. Nevertheless, the *UECA* does not purport to alter the general rule that an offeror may stipulate the exclusive manner in which the offer may be accepted. Also, the *UECA*'s consent principle should support the parties' ability to agree upon alternative document delivery rules.⁸⁰ Accordingly, contracting parties should be able to include in electronic transaction agreements or contract-forming communications various document delivery and contract formation timing rules, including: (a) the circumstances under which electronic communications will be deemed to be sent and received (including rules regarding after-hours delivery), and the allocation of risk of undelivered communications; (b) the allocation of risk of unintelligible electronic communications; (c) the manner in which an offer may be accepted and notice of acceptance delivered; (d) obligations to issue receipt acknowledgements and the sender's remedies if receipt acknowledgements are not timely delivered; (e) when and how offers or acceptances may be revoked; and (f) the time when a contract is formed. Guidance regarding such rules may be found in the *Model Law*, which stipulates various acknowledgement of receipt rules.⁸¹

3. Identity, Capacity and Authority to Contract

Uncertainty regarding the identity, capacity and authority of contracting parties and the authenticity of electronic communications may present significant risks of fraud and invalid or unenforceable agreements. Persons engaged in electronic contracting may use false names and related information, send fraudulent messages, or repudiate their messages. Contracts with minors⁸² may be voidable at the minor's option.⁸³ Contracts with persons with diminished mental capacity

⁷⁹ *Hastie & Jenkerson v. McMahon*, [1991] 1 All E.R. 255 (C.A.).

⁸⁰ *UECA*, *supra* note 9 at s. 6.

⁸¹ *Model Law*, *supra* note 5 at article 14.

⁸² At common law a minor is a person under the age of 21 years, but in most provinces statutes have lowered the age of majority to 18 or 19 years. See, for example, the *British Columbia Age of Majority Act*, R.S.B.C. 1996, c. 7 (19 years); *Ontario Age of Majority and Accountability Act*, R.S.O. 1990, c. A-7 (18 years); *Quebec Civil Code*, article 153 (18 years).

⁸³ See S. Waddams, *Law of Contract*, 3rd ed. (Toronto: Canada Law Book, 1993), chapter 18. See also *Ontario Sale of Goods Act*, R.S.O. 1990, c. 462, s. 3(1); and the *British Columbia Infants Act*, R.S.B.C. 1996, c. 223, s. 19.

may be invalid.⁸⁴ Persons purporting to contract for others may not have authority to do so.

Identity, capacity and authority risks are not unique to electronic contracting. Conventional contracting practices present similar risks.⁸⁵ Nevertheless, electronic contracting removes some of the circumstances that assist in deterring or detecting fraud and avoiding identity, capacity and authority risks in conventional contracting—the exchange of paper-based writings bearing witnessed signatures, more direct contacts between the parties, and physical forms of identity verification. Further, fraudsters may use Internet technologies to assume false identities and operate from anywhere in the world.

The issues of identity, capacity and authority to contract are not addressed by the *UECA*, except to the extent that it contemplates the use of certain kinds of secure electronic signatures.⁸⁶ The *Model Law* addresses those issues to some extent by providing certain presumptions regarding the attribution of electronic messages and reliance on the integrity of electronic messages,⁸⁷ but those rules are not included in the *UECA*.

There are various technological and practical means of reducing identity, capacity and authority risks in electronic contracting, such as certified and secure electronic signatures, cryptography, and passwords or personal identification numbers. Some technological measures may provide greater security than is often achieved in conventional paper-based transactions. In some circumstances, technological measures may be supplemented with traditional verification techniques, such as confirmation by telephone, facsimile delivery of signed and witnessed paper contracts, or credit card verification.⁸⁸ Where identity, ca-

⁸⁴ Waddams, *ibid.* at 650-56; *Bank of Nova Scotia v. Kelly*, [1973] 41 D.L.R.(3d) 273 (P.E.I.S.C.); *Stubbs v. Erickson* (1981), 45 B.C.L.R. 45 (S.C.); *Lloyd's Bank of Canada v. Hug*, [1991] O.J. No. 2337 (Gen.Div.).

⁸⁵ For example, credit card information is routinely exchanged over the telephone and by facsimile between otherwise unknown persons, and paper documents are routinely relied upon without any verification of the identity or authority of the purported author. The responsibility for fraudulent "tested telexes" used regarding letters of credit was considered in *Standard Bank London Ltd. v. The Bank of Tokyo Ltd.*, [1995] 2 Lloyd's Law Reports 169 (Eng. Q.B.).

⁸⁶ Generally, secure electronic signatures provide attributes of identity (the signer is who they purport to be), confidentiality (the information is protected from unauthorized access), and integrity (the information was not altered after sending).

⁸⁷ See *Model Law*, *supra* note 5 at article 13; and *Model Law Guide to Enactment*, *supra* note 5 at paras. 83-92.

⁸⁸ Possession of a valid credit card may be used as a surrogate for identity and capacity.

capacity and authority risks cannot be eliminated entirely, residual risk may be addressed through contractual risk allocation and insurance.⁸⁹

4. Automated Contracting

Electronic contracting is often partially or fully automated through the use of computer software known as “electronic agents.”⁹⁰ Electronic agents enable computers to initiate or respond to contractual communications autonomously. This may result in contracts being formed by communications between a natural person and a computer, or between two computers without any human oversight or intervention. There is uncertainty regarding the validity of contracts formed through electronic agents, liability for human errors and mistakes in communications with electronic agents, and liability for electronic agent errors and malfunctions.⁹¹

In many circumstances, an electronic agent will function as an instrument, and the electronic agent’s actions will be treated as those of its human controller. Depending upon the nature and technological sophistication of electronic agent software however, an electronic agent may transform from instrument to autonomous actor. Electronic agents may not only automate transactions, they may initiate them. In those circumstances, the use of electronic agents challenges basic contract law principles. Contract law is based on the fundamental premise that a contract is formed as a result of a meeting of the minds—or *consensus ad idem*—between two juridical persons with the legal capacity to form the requisite intention—or *animus contrahendi*—to enter into legal relations.⁹² Electronic agents are not juridical persons, they do not have legal capacity, and they are not capable of forming contractual intentions. Accordingly, there may be uncertainty whether contracts formed through electronic agents are valid.

Contracting with electronic agents presents an increased risk of contracting mistakes resulting from inadvertent human error. Natural persons communicat-

⁸⁹ For example, electronic transaction agreements may stipulate commercially acceptable security procedures and then place the risk of loss on the party that fails to conform to the procedures. As another example, passwords may be issued pursuant to an agreement that makes the password holder responsible for all unauthorized uses of the password unless and until notice of password misuse is given to the other party. Also, commercial contracts commonly contain representations and warranties regarding identity, capacity to contract, and authority to contract on behalf of others.

⁹⁰ Electronic agents are also known as “intelligent software agents” or “autonomous agents.”

⁹¹ A detailed discussion of the legal challenges presented by the use of electronic agents in electronic commerce, and some suggestions for law reform to address those challenges, may be found in *Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act*, Professor Ian R. Kerr, available online: The University of Alberta Faculty of Law <<http://www.law.ualberta.ca/alri/ulc/current/ekerr.pdf>>.

⁹² Fridman, *supra* note 39 at 5–8 and 28–35. A discussion of traditional legal rules regarding legal capacity to contract may be found in Fridman, chapter 4.

ing with electronic agents may hit the wrong computer key or click the wrong icon, and by doing so send a communication with unintended legal consequences. It is usually relatively easy to correct similar errors made in communications between natural persons. In contrast, electronic agents may not be programmed to question an unusual order, or respond to error correction requests or a message saying: "I didn't mean that." The common law currently has no rules that provide a fair and practical solution to this problem.

There is also uncertainty regarding liability for electronic agent malfunctions or errors. Electronic agents, like other kinds of computer software, may malfunction or engage in transactions that are unintended, unforeseen, or unauthorized by the person on whose behalf the agent is operating. In those circumstances, there may be uncertainty regarding who should bear the risk of loss.⁹³

The use of electronic agents to create contracts is addressed by the *UECA*. It defines "electronic agent" as "a computer program or any electronic means used to initiate an action or to respond to electronic documents or actions in whole or in part without review by a natural person at the time of the response or action."⁹⁴ The *UECA* provides that a contract may be formed by the interaction of an electronic agent and a natural person or by the interaction of electronic agents.⁹⁵ This provision should resolve legal uncertainty whether automated means of communication can convey the necessary intention to form a contract where no human being reviewed the communication before the contract was made.⁹⁶

The *UECA* also supplements general legal rules regarding mistake with limited remedies for certain kinds of human error when communicating with electronic agents. The *UECA* provides that an electronic document made by a natural person with the electronic agent of another person has no legal effect and is not enforceable if the natural person made a material error in the docu-

⁹³ This issue has been considered by some U.S. courts. For example, in *State Farm Mutual Automobile Insurance Company v. Bockhorst*, 453 F.2d 533 (1972; 10th Cir.) the Court held that State Farm was bound to honour an insurance policy issued as a result of a computer system error. The Court stated, at pp. 536-7 as follows: "Holding a company responsible for the actions of its computer does not exhibit a distaste for modern business practices as State Farm asserts. A computer operates only in accordance with the information and directions supplied by its human programmers. If the computer does not think like a man, it is man's fault. The reinstatement of Bockhorst's policy was the direct result of the errors and oversights of State Farm's human agents and employees. The fact that the actual processing of the policy was carried out by an unimaginative mechanical device can have no effect on the company's responsibilities for those errors and oversights." See also *Ford Motor Credit Company v. Swarens*, 447 S.W.2d 53 (Ky. 1969).

⁹⁴ *UECA*, *supra* note 9 at s. 19.

⁹⁵ *Ibid.* at s. 21. See also *Uniform Electronic Transactions Act*, s. 14.

⁹⁶ *Annotated UECA*, *ibid.* at s. 21.

ment and: (a) the electronic agent did not provide the natural person with an opportunity to prevent or correct the error; (b) the natural person notifies the other person of the error as soon as practicable when the natural person learns of it; (c) the natural person takes reasonable steps, including steps that conform to the other person's instructions to return the consideration received as a result of the error or, if instructed to do so, to destroy the consideration; and (d) the natural person has not used or received any material benefit or value from the consideration received from the other person.⁹⁷ The safe harbour established by this provision will encourage Web-site vendors to use a multi-step ordering process that provides users with an order verification screen and an opportunity to correct errors made in the ordering process.

The communications verification procedure prescribed by the *UECA* is considered to be a fair business practice essential for the protection of consumers. For example, Industry Canada's *Principles of Consumer Protection for Electronic Commerce—A Canadian Framework*⁹⁸ recommends that business-to-consumer Web-sites either employ a multi-step ordering and confirmation process,⁹⁹ or allow consumers a reasonable period within which to cancel the contract.¹⁰⁰

The *UECA* does not address electronic agent malfunctions or errors. In particular, the *UECA* does not provide any rules regarding the liability of natural persons for the errors and malfunctions of their electronic agents. The *UECA* does not include the provisions of the *Model Law* regarding the attribution of the acts of electronic agents to natural persons.¹⁰¹ It leaves the resolution of those issues to private ordering or determination by courts. In both cases, rules regarding the attribution of electronic agent communications, and liability for those communications, may be based upon common law concepts such as comparative fault, reasonable reliance, and actual or ostensible authority.¹⁰²

⁹⁷ *UECA*, *ibid.* at s. 22.

⁹⁸ This document may be found online: Government of Canada <<http://strategis.ic.gc.ca/SSG/ca01182e.html>>.

⁹⁹ The recommended process requires consumers to, specifically and separately, confirm: (i) their interest in buying; (ii) the full price, terms and conditions, details of the order, and method of payment; and (iii) their agreement to the purchase.

¹⁰⁰ *Supra* note 98 at principle 2.2.

¹⁰¹ *Model Law* articles 2(c) and 13 provide for the attribution of electronic agent data messages to the person by whom, or on whose behalf, the data message purports to have been sent or generated.

¹⁰² See the judgment of Denning L.J. in *Entores LD v. Miles Far East Corporation*, [1955] 2 Q.B. 327 (C.A.). See also *Adams v. Lindsell* (1818), 1 B & Ald 681; 106 ER 250 (K.B.); *Harper v. Western Union Telegraph Co.*, 130 S.E. 119 (S.C. 1925); *Henckel v. Pape* (1870), 23 L.T. 419; and *Ford Motor Credit Company v. Swarens*, 447 S.W.2d 53 (Ky. 1969).

E. Standard Form Contracts

Electronic contracts will often be standard forms that customers must either accept or reject entirely. The validity and enforceability of those contracts will generally be governed by the same rules that apply to paper-based, standard form contracts. Those rules may be summarized as follows:

1. Generally, where a party signs a document knowing it affects his legal rights, he is bound by the document even though he may not have read or understood it.¹⁰³ Failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it.¹⁰⁴
2. Generally, there is no legal obligation on a party presenting a contract to bring to the attention of the other party exclusions of liability or onerous terms, or to advise him to read it.¹⁰⁵ However, if the circumstances are such that a reasonable person would know that the other party is not consenting to a provision, there is an obligation to take reasonable measures to bring the provision to his attention. Whether there is a duty to give reasonable notice of a specific provision will depend upon the particular circumstances of the transaction, including whether the provision is surprising or unusual given the nature of the contract as a whole, the length and format of the contract, the time available for reading and understanding it, and the circumstances in which it is accepted.¹⁰⁶ What will constitute reasonable notice will also depend upon the circumstances, and

¹⁰³ *L'Estrange v. Graucob Limited*, [1934] 2 K.B. 394 (C.A.) [hereinafter *L'Estrange*]; *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.) [hereinafter *Karroll*]; *Mayer v. Big White Ski Resort Ltd.*, [1997] B.C.J. No. 725 (B.C.S.C.), aff'd [1998] B.C.J. No. 2155 (C.A.); *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 95 D.L.R. (4th) 701 (B.C.C.A.); *Agopsowicz v. Honeywell Ltd.*, [1997] S.J. No. 311 (Sask. Q.B.); *Soloman v. American Express Travel Related Services Co.*, [1998] O.J. No. 5329 (Ont. S.C.); *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 (C.A.) [hereinafter *Fraser Jewellers*]; *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership*, [1994] B.C.J. No. 2602 (S.C.).

¹⁰⁴ There are at least three recognized exceptions to this general rule: (a) where the document is signed in circumstances in which the signature does not indicate assent (*non est factum*); (b) where the purported agreement is induced by fraud or misrepresentation; and (c) where the other contracting party knew or had reason to know that the signing party was not consenting to surprising or unusual contract terms. See *Fridman supra* note 39 at 295-297, 307-324, and 610-615.

¹⁰⁵ *Karroll, supra* note 103; *Fraser Jewellers, supra* note 103.

¹⁰⁶ *Karroll, ibid.*; *Tilden Rent-A-Car v. Clendenning* (1978), 83 D.L.R. (3d) 400 (C.A.); *Delaney v. Cascade River Holidays* (1983), 44 B.C.L.R. 24 (C.A.), aff'd (1981) 34 B.C.L.R. 62 (S.C.); *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.

may include clear headings in the agreement and an admonition to read it carefully.¹⁰⁷

3. Where a contract is not signed, there must be a positive indication that the party has accepted and agreed to be bound by the contract. The party seeking to rely upon the contract must establish that the other party accepted the contract with knowledge of its terms, or that reasonable efforts were made to bring the contract terms to the other party's attention.¹⁰⁸
4. Standard form contracts are construed strictly against the party who prepares them, and any ambiguities will be resolved in favour of the other party.¹⁰⁹

In some ways, electronic standard form contracts present fewer contract formation risks than other types of standard form contracts, which are often presented in hurried circumstances in which the customer may not have a reasonable opportunity to read the contract. When standard form contracts are presented electronically, either on Web-sites or by email, customers usually have unlimited time to review the contract, and are not subject to the pressures inherent in other contracting situations.¹¹⁰

Electronic transactions may include standard form contracts presented in various ways, the most common of which are: payment-now-terms-later agreements, point-and-click agreements, and notice-and-acceptance-by-conduct agreements. In each case, the validity of the contract depends on whether the customer is given adequate notice of the contract and has, expressly or by conduct, accepted it.

There is often a tension between marketing considerations, which favour subtle contract presentation, and legal risk management considerations, which favour more direct contract presentation. Achieving an acceptable balance between those competing considerations can be a difficult practical challenge. In consumer transaction situations, however, new Internet consumer protection

¹⁰⁷ *Karroll, ibid.*; *Hood v. Anchor Line (Henderson Bros.) Ltd.*, [1918] A.C. 837 (H.L.).

¹⁰⁸ *L'Estrange, supra* note 103; *Union Steamships Ltd. v. Barnes* (1956), 5 D.L.R. (2d) 535 (S.C.C.); *Greeven v. Blackcomb Skiing Enterprises Ltd.*, [1994] B.C.J. No. 2056 (S.C.). See also *Hatton v. The Copeland-Chatterson Company* (1906), 37 S.C.C. 651; *Badische Anilin Und Soda Fabrik v. Isler*, [1906] 1 Ch. 605 (Eng.); and *Thornton v. Shoe Lane Parking*, [1971] 1 All E.R. 686 (C.A.).

¹⁰⁹ *Continental Securities v. McLeod*, [1995] B.C.J. No. 1762 (S.C.); *S.R. Petroleum Sales Ltd. v. Canadian Turbo Inc.*, [1995] A.J. No. 1221 (Q.B.); *Quick v. Jericho Tennis Club*, [1998] B.C.J. No. 1149 (S.C.).

¹¹⁰ See *Caspi, supra* note 53; and *Lieschke, supra* note 54.

laws require businesses to ensure that contract terms are clearly presented to consumers before the transaction is concluded.

The enforceability of standard form contracts may depend not only upon the manner in which they are presented, but also the reasonableness of their terms. Accordingly, standard form contracts should be drafted in plain English understandable to non-lawyers, and should protect important interests without being unreasonable or overreaching. In addition, contract terms that are unusual or onerous should be indicated clearly.

1. Payment-Now-Terms-Later Agreements

Electronic transactions often involve payment-now-terms-later agreements. For example, computer hardware and software are often purchased through electronic transactions, but the buyer is not provided with the full terms and conditions of the transaction until the product is delivered. The concern regarding the enforceability of such agreements is that the buyer does not see the contract terms before paying for the product. Nevertheless, U.S. courts have held that such contracts are valid and enforceable if notice of the contract is provided at the time of purchase and the buyer is subsequently given a reasonable opportunity to read the contract and a right to return the goods for a full refund if the contract terms are not acceptable. The same reasoning could be applied by Canadian courts. It is important to note, however, that Internet consumer protection laws may preclude the use of payment-now-terms-later agreements in certain electronic consumer transactions.

The leading U.S. case is the 1996 decision of the Seventh Circuit Court of Appeals in *ProCD v. Zeidenberg*,¹¹¹ in which the Court upheld the validity of a computer software shrink-wrap license agreement.¹¹² Zeidenberg purchased a copy of ProCD's *SelectPhone* telephone directory database CD-ROM, which came in a box that indicated the transaction was subject to the restrictions stated in an enclosed license agreement. The agreement was printed in the software manual and appeared on the computer screen every time the software was run, and the user was required to indicate acceptance of the agreement before using the software. The agreement provided that unused software could be returned for a full refund if the purchaser did not accept the license terms. Zeidenberg purchased the software knowing that it was subject to a license agreement, but argued that he was not bound by the agreement because its terms were inside the box rather than printed on the outside, and he therefore could not have known or agreed to the terms when he purchased the software. The

¹¹¹ 86 F.3d 1447 (7th Cir. 1996).

¹¹² Consumer computer software license agreements are often presented as *shrink-wrap* agreements, whereby the purchaser is deemed to accept the terms of the license by opening the plastic or cellophane shrink-wrap on the software package or opening an envelope containing the software disks or CD-ROM.

Court rejected those arguments, and held the agreement to be valid and enforceable.

The Court reasoned that “notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable” is an efficient means of doing business valuable to buyers and sellers alike. The Court observed that transactions in which the exchange of money precedes the communication of detailed terms are common—for example, sales of insurance policies, airline and concert tickets, consumer electronics, and pharmaceuticals. The Court rejected Zeidenberg’s argument that shrink-wrap agreements are unfair to consumers, observing that consumers unwilling to accept the license agreement may return the software for a refund. The Court concluded that shrink-wrap agreements, presented in a “notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable” manner, are enforceable unless the terms are objectionable on grounds applicable to contracts in general.

The reasoning in *ProCD v. Zeidenberg* was followed and elaborated upon by the Seventh Circuit Court of Appeals in *Hill v. Gateway 2000 Inc.*,¹¹³ a case involving a computer ordered and paid for over the telephone and delivered with an agreement that purported to govern the purchase unless the buyer returned the computer within 30 days. The Court rejected the buyers’ argument that the agreement’s arbitration provision was not enforceable because they did not read it and it did not stand out. The Court reasoned that a contract need not be read to be effective, and that people who accept a contract take the risk that unread terms may in retrospect prove unwelcome—“competent adults are bound by such documents, read or unread.” The Court confirmed the view that payment with notice of terms to follow and an approve-or-return right is a commercially efficient and legally effective way to create a binding contract.¹¹⁴

The only reported Canadian case to consider the validity of a payment-now-terms-later agreement is the 1989 Alberta Court of Queen’s Bench decision in

¹¹³ 105 F.3d 1147 (7th Cir. 1997), cert. denied 522 U.S. 808 (1997).

¹¹⁴ The reasoning in *ProCD v. Zeidenberg* and *Hill v. Gateway 2000 Inc.* was also followed in *Brower v. Gateway 2000 Inc.* 246 A.D.2d 246, 676 N.Y.S.2d 569 (AD 1998) and *M.A. Mortenson Company Inc. v. Timberline Software Corp.*, Supreme Court of Washington State, 4 May 2000. In both cases, the court held that a vendor may propose that a contract of sale be formed not with a general order for the product or the payment of money but rather after the purchaser has had a chance to inspect the product and the applicable agreement terms. See also *Storm Impact Inc. v. Software of the Month Club*, 1998 WL 456572 (N.D. Ill. 1998); *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998); *Westendorf v. Gateway 2000 Inc.*, 2000 Del. Ch. LEXIS 54 (Del.); and *Scott v. Bell Atlantic Corporation*, 10 May 2001, N.Y.S.C., A.D. For shrink-wrap contract cases with a contrary result see: *Klocek v. Gateway Inc.*, 2000 U.S. Dist. LEXIS 9896 (Kansas 2000); *Step-Saver Data Sys. Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); and *Arizona Retail Sys. Inc. v. The Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

North American Systemshops Ltd. v. King.¹¹⁵ In that case, the Court refused to give effect to a license agreement found in a software user manual because there was no reference to the license agreement on the software package or the program initiation screen. The Court reasoned that the software vendor had not used any of the "simple, cheap, obvious methods" of giving buyers notice that their purchase of the software was subject to license restrictions. The decision in *North American Systemshops* is consistent with *ProCD v. Zeidenberg*. The reasoning in *North American Systemshops* indicates that the Court would have enforced the license restrictions if the buyer had been given proper notice at the time of purchase that the software was subject to license restrictions.

The following are some recommendations regarding the implementation of payment-now-terms-later agreements:

1. The buyer should be provided with clear notice at the time of purchase that the transaction is subject to certain terms and conditions available after the purchase.
2. The terms and conditions should be disclosed to the buyer as soon as practicable after the purchase.
3. The buyer should be given a reasonable opportunity to either accept the terms and conditions by keeping the goods, or reject the terms and conditions and return the goods at no cost for a full refund of the purchase price.

It is also important to determine whether the use of payment-now-terms-later agreements is precluded by applicable laws, such as Internet consumer protection laws, that require disclosure of contract terms before the transaction is completed.

2. Point-And-Click Agreements

Electronic contracts are often point-and-click agreements, whereby the contract is accepted by clicking an "I Accept" icon on the computer screen.¹¹⁶ The validity of point-and-click agreements has been upheld by a number of American courts and at least one Canadian court.

In *Caspi v. The Microsoft Network*,¹¹⁷ the New Jersey Appellate Division held a forum selection clause in the Microsoft Network membership agreement to be valid and enforceable. The agreement was presented on the computer screen in a scrollable window next to blocks providing the choices: "I Agree" and "I

¹¹⁵ [1989] A.J. No. 512 (Q.B.).

¹¹⁶ This kind of agreement is often called a *click-wrap* agreement, by way of analogy to a *shrink-wrap* agreement.

¹¹⁷ *Caspi*, *supra* note 53.

Don't Agree." Prospective members were required to accept the agreement by clicking the "I Agree" icon. Microsoft sought to have a class action lawsuit dismissed on the basis of the agreement's forum selection clause, which required all lawsuits be brought in Washington. Caspi challenged the validity of the clause on the basis that prospective members were not given adequate notice of the provision. The Court rejected that argument, holding that there was no significant distinction between standard form contracts presented electronically and standard form paper contracts. The Court reasoned that prospective members were free to scroll through the entire agreement before clicking their acceptance. Although the forum selection clause was in the last paragraph of the agreement and was presented in lower-case font, the Court held that the style and mode of presentation were not grounds for concluding that the provision was presented unfairly or with a design to conceal or de-emphasize it. The Court concluded: "Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contract as a whole."¹¹⁸

Similarly, in *Groff v. America Online Inc.*,¹¹⁹ the Rhode Island Superior Court upheld the validity of a forum selection clause in the AOL Terms of Service agreement. AOL sought to have a class action lawsuit dismissed on the basis of the agreement's forum selection clause, which required all lawsuits be brought in Virginia. Prospective AOL members were presented with the agreement and given the option of selecting: "I Agree" or "I Disagree." Groff challenged the validity of the form selection clause, arguing that he "never saw, read, negotiated for or knowingly agreed to be bound by" the provision. The Court rejected that argument, reasoning that Groff was under no obligation to accept the agreement and had the option to refuse the agreement and AOL's services. The Court concluded that Groff "effectively 'signed' the agreement by clicking 'I Agree,'" and he could not be heard to complain that he did not see or read the forum selection clause.

Not all point-and-click agreements have been upheld. *Williams v. America Online Inc.*¹²⁰ involved a class action claim that AOL's software caused unauthorized and damaging changes to users' computer configuration. AOL applied to have the lawsuit dismissed on the basis that the AOL Terms of Service agreement forum selection clause required the lawsuit be brought in another

¹¹⁸ See also *Hotmail Corporation v. Van\$ Money Pie Inc.*, 47 USPQ 2d 1020 (N.D. Cal. 1998); *Jessup-Morgan v. America Online Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998); *Jessup-Morgan v. America Online Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998); *Clemens v. America Online Inc.*, (No. 98-04307 (Fla.App. Dist.2 05/19/1999)); and *Lieschke*, *supra* note 54.

¹¹⁹ 1998 WL 307001 (R.I. Superior Ct. 1998).

¹²⁰ (Mass. February 2001).

state. The agreement was presented to users in an unusual manner. At the end of the software installation process, after the unauthorized computer configuration changes had been made, users were asked to accept the agreement, and were presented with a choice between: "I Agree" or "Read Now." The agreement terms were not displayed. If users selected "I Agree," they were bound by the undisclosed agreement. If users selected "Read Now," they were presented with another choice between: "Okay, I Agree" and "Read Now." If users again selected "Read Now," the agreement was displayed. Thus, the agreement terms were not displayed unless twice specifically requested. AOL argued that the agreement was nevertheless binding, and the forum selection clause effective. The Court rejected that argument, holding that users were not provided with adequate notice of the forum selection clause in the agreement before the re-configuration of their computers.¹²¹

The only reported Canadian case to consider the validity of a point-and-click agreement is the 1999 decision of the Ontario Superior Court in *Rudder v. Microsoft Corp.*¹²² As in *Caspi*, Microsoft sought to have a class action lawsuit stayed on the basis of the MSN membership agreement's forum selection clause. The agreement was presented to potential members in a scrollable window on the computer screen. Only portions of the agreement could be seen at one time, but the entire agreement was readily viewable by using the scrolling function. Potential members were given the option of either accepting the agreement by clicking an "I Agree" icon, or disagreeing with the agreement, in which case the registration process terminated. They were warned: "If you click "I Agree" without reading the member agreement, you are still agreeing to be bound by all of the terms of the membership agreement, without limitation... ." The Plaintiffs argued that because only a portion of the agreement was presented on the computer screen at one time, the terms of the agreement that were not on the screen were essentially unenforceable "fine print." The Court rejected that argument, holding that the multi-screen electronic display of the agreement was not materially different from a multi-page written document. The Court reasoned that the Plaintiffs' argument would move electronic contracts "into the realm of commercial absurdity," and would "lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium." The Court concluded that the agreement "must be afforded the sanctity that must be given to any agreement in writing."

¹²¹ The Court also held that enforcement of the forum selection clause was contrary to public policy because Massachusetts consumers who individually have damages of only a few hundred dollars should not have to sue AOL in another state. Similarly, in *America Online Inc. v. Mendoza* (21 June 21, 2001, Cal. C.A.), the Court held that the forum selection clause in the AOL Terms of Service agreement was unenforceable on public policy grounds.

¹²² *Rudder*, *supra* note 52.

As previously noted, the legal validity of electronic point-and-click contracts is addressed by the *UECA*, which provides that, unless the parties agree otherwise, an offer or acceptance and any other matter that is material to the formation or operation of a contract may be expressed by means of an action in electronic form, including touching or clicking an appropriately designated icon or place on a computer screen.¹²³

The following are some recommendations regarding the implementation of point-and-click agreements:

1. Users should be required to scroll through the entire agreement before accepting or rejecting it.
2. Users should be required to either unequivocally accept the agreement by clicking an "I Agree" icon or reject the agreement without penalty by clicking an "I Don't Agree" icon. Users might also be required to "sign" the agreement by entering their name or other personal code.
3. If possible, users should be required to specifically acknowledge contract terms that are unusual or onerous. They should also be warned that they will be bound by all of the terms of the agreement, whether they have read the agreement or not.
4. Users should not be able to proceed with the transaction unless the agreement is accepted.
5. The risk of inadvertent acceptance may be reduced by requiring users to confirm acceptance of the agreement by clicking a second icon.
6. A record of users' acceptance of the agreement (including user name and password, date and time of acceptance, and the version of the agreement) should be automatically created and maintained for future reference.
7. Both before and after acceptance of the agreement, users should be able to download and print a copy of the agreement using a technology that does not permit alterations to the agreement, and users should be informed of their ability to do so.

¹²³ *UECA*, *supra* note 9 at s. 20(1).

8. If the agreement applies to subsequent transactions or activities, users should be reminded of the agreement by notices on log-in screens, electronic order forms, email messages, and Web-site pages.
9. If goods are purchased pursuant to the agreement, a paper copy of the agreement should be delivered with the goods.

3. Notice-and-Acceptance-by-Conduct Agreements

An electronic contract may be presented by notices on Web-site pages or other electronic communications, which provide a hypertext link¹²⁴ to the actual text of the agreement and provide that certain unambiguous conduct by users constitutes acceptance of the contract.¹²⁵ Sometimes the notices are clear and prominently presented.¹²⁶ Often, the notices are cryptic,¹²⁷ included with other links at the bottom of the Web-site front page, and not prominently displayed. According to general contract principles, a conspicuous notice that certain unambiguous conduct constitutes acceptance of the contract, the terms of which are accessible, ought to be sufficient to create a contract. On the other hand, notices that are cryptic or not prominent are unlikely to be effective.

The effectiveness of a Web-site notice in creating a contract was considered in *Ticketmaster Corp. v. Tickets.com Inc.*,¹²⁸ which involved a dispute over deep links¹²⁹ by the Tickets.com Web-site to pages within Ticketmaster's Web-site. Ticketmaster sued claiming, among other things, that Tickets.com breached the Ticketmaster Web-site terms and conditions, which prohibited commercial use

¹²⁴ Hypertext links are Web-site text or graphics which, when selected by the user, cause the user's computer to connect to a page within the same Web-site or with another Web-site. Links are the central feature of the Web's user interface, and provide the easy, point-and-click method of navigating among Web-sites.

¹²⁵ This kind of agreement has been described as a "browse wrap" agreement. See *Pollstar v. Gignania Ltd.*, 2000 WL 33266437 (E.D. Cal.).

¹²⁶ For example:

Use of this Web-site is governed by the Web-site Use Agreement which may be found by clicking [here](#). By using this Web-site, you acknowledge and signify that you have read, understood, and agreed to be bound by the Web-site Use Agreement. If you do not accept the Web-site Use Agreement, you may not use this Web-site.

¹²⁷ For example, "Terms of Use" or "Legal Notice or Stuff our Lawyers Made Us Put On This Site."

¹²⁸ 27 March 2000; CV99-7654; C.D. Cal [hereinafter *Ticketmaster*].

¹²⁹ Deep links, which bypass the target Web-site's front page and go directly to internal Web pages, may be objectionable because they cause the user to navigate the target site in a different way than the site owner intended (including bypassing the initial messages and legal notices commonly found on Web-site front pages), and may also deprive the target site's owner of advertising revenue determined by the number of visits to its front page.

and deep linking. A cryptic notice of the terms and conditions was placed at the bottom of the Web-site front page. Users were not required to signify their assent to the terms and conditions by clicking an "I Agree" icon. On a motion to dismiss, Ticketmaster argued that the notice created a binding contract, and relied upon cases involving payment-now-terms-later agreements. In brief reasons, the Court rejected that argument. The Court reasoned that users would have to scroll down to the bottom of the Web-site front page to see the notice, and that many users were likely to proceed directly to the interior pages of the Web-site without reading the "small print" at the bottom of the page. The Court dismissed the contract claim, but granted Ticketmaster leave to restate the claim if there were facts showing that Tickets.com knew of, and impliedly agreed to, the Ticketmaster Web-site terms and conditions.¹³⁰

A similar issue was considered, with a different result, in *Register.com Inc. v. Verio Inc.*,¹³¹ which involved a dispute over Verio's collection and use of domain name registrant information available from Register.com's "Whois" database. Register.com claimed that Verio's automated collection and commercial use of the "Whois" database information violated Register.com's Web-site Terms of Use agreement. The Register.com Web-site front page contained a cryptic notice regarding its Terms of Use. In addition, however, the top of each "Whois" search results page prominently displayed the "Whois" database use restrictions and a notice that "[b]y submitting this query, you agree to abide by these terms." Verio did not claim that it was not aware of the Terms of Use. Rather, it argued that it was not bound by them because it did not accept them and was not required to indicate assent by clicking an "I Agree" icon. On an injunction application, Verio's argument was rejected by the Court on the basis that by using the "Whois" database, Verio had manifested its assent to be bound by the Terms of Use and consequently a contract had been made. On that basis, the Court held that Register.com had demonstrated a likelihood of success on the merits of its breach of contract claim, and was entitled to a pre-trial injunction restraining Verio from unauthorized use of the "Whois" database.

The "timeless issue of assent" was also considered in *Specht v. Netscape Communications Corp.*,¹³² which involved a class action claim that Netscape's *SmartDownload* software unlawfully transmits information regarding private Internet use. Netscape sought to compel arbitration of the claims based on an

¹³⁰ Shortly after this decision, Ticketmaster changed its Web-site design to place the terms and conditions notice at the very top of the Web-site front page, so that it must be seen by all users immediately upon accessing the Web-site. In a later injunction application, the court held that Ticketmaster's contract theory "lacks sufficient proof of agreement by [Tickets.com] to be taken seriously as a ground for preliminary injunction": 10 August 2000; U.S. Dist. LEXIS 12987 (C.D. Cal.).

¹³¹ *Verio*, *supra* note 55.

¹³² 3 July 2001, S.D.N.Y..

arbitration provision in the *SmartDownload* software license agreement. The *SmartDownload* software was available for free download from Netscape's Web-site. The sole reference to the license agreement was the following notice and link, visible only if users scrolled to the bottom of the download Web page: "Please review and agree to the terms of the Netscape *SmartDownload* software license agreement before downloading and using the software." Netscape argued that the license agreement was binding because the act of downloading indicated users' assent to the agreement. The Court rejected that argument, holding that the act of downloading did not unambiguously indicate users' assent to be bound by the agreement ("the primary purpose of downloading is to obtain a product, not to assent to an agreement"), users were not made aware that they were entering into a contract, and users were not required to view the license agreement terms or even the notice referencing the agreement before downloading and using the software. The Court also held that the notice regarding the license agreement was inadequate because it read as a mere invitation, not as a requirement, and did not provide adequate warning that a binding contract was being created.

The Court observed that Netscape made other software available pursuant to click-wrap license agreements, and noted that other courts had held such agreements to be valid and enforceable. The Court distinguished those cases on the basis that click-wrap agreements require users to perform an affirmative action (clicking an "I Agree" icon) unambiguously expressing assent before they download software, whereas Netscape allowed users to download and use the *SmartDownload* software without taking any such action. The Court concluded that Netscape's failure to require users of *SmartDownload* to unambiguously indicate assent to the license agreement before downloading and using the software was fatal to the argument that a contract was formed.¹³³ In the result, Netscape was unable to enforce the arbitration provision, and the class action was allowed to proceed.

The decisions in *Register.com*, *Ticketmaster* and *Specht* are consistent. The difference in result turned on whether the user knowingly accepted the contract. In *Ticketmaster* and *Specht*, the inconspicuous notice was not sufficient to establish the requisite knowledge of the contract. In *Register.com*, however, there was no need for Register.com to rely upon the Web-site notice of the contract, because Verio admitted that it was aware of Register.com's Terms of Use. If Register.com had not been able to establish that Verio had actual knowledge of the Terms of Use, and had been forced to rely on the Web-site notice, the Court might have reached a different result.

¹³³ Netscape's Web-site now places the license agreement text in a scrollable window on the download Web page, and clearly warns users that downloading the *SmartDownload* software constitutes assent to the license agreement.

The following are some recommendations regarding the implementation of notice-and-acceptance-by-conduct agreements:

1. The notice should be prominently displayed so that it necessarily must be seen by users without scrolling down a Web page.
2. The notice should clearly indicate that certain unambiguous conduct by users will constitute acceptance of the agreement, whether users have read the agreement or not.
3. The notice should inform users how they may easily access the terms of the agreement (usually by hyper-text link), and users should be able to download and print a copy of the agreement using a technology that does not permit alterations to the agreement.
4. If the agreement applies to subsequent transactions or activities, users should be reminded of the agreement by notices on log-in screens, electronic order forms, email messages, and Web-site pages.
5. A record of users' acceptance of the agreement (including user name and password, date and time of acceptance, and the version of the agreement) should be automatically created and maintained for future reference.
6. If goods are purchased pursuant to the agreement, a paper copy of the agreement should be delivered with the goods.

E. Electronic Data Interchange

Before the commercial use of the Internet became common, businesses engaged in electronic transactions using private networks and a process known as electronic data interchange ("EDI"). EDI is the computer-to-computer exchange of electronic versions of routine paper documents (such as requests for quotations, quotations, purchase orders, acknowledgements, invoices, and payment records) that can be processed automatically by computers without the intervention of natural persons.¹³⁴ EDI communications may be transmitted through private networks or over the Internet. EDI is usually used for repetitive business-to-business transactions between parties with a pre-existing relationship. EDI transactions, often combined with just-in-time inventory management and quick response retailing, can provide tremendous efficiencies to the contracting parties.

¹³⁴ EDI communications sometimes include text elements intended for review by natural persons.

Most EDI transactions occur pursuant to a trading partner agreement that establishes the relationship between the parties and the legal framework for their electronic transactions. Trading partner agreements contain the substantive provisions typically found in complex commercial agreements as well as provisions dealing specifically with contract formation and other issues presented by electronic distant communications. For example, trading partner agreements typically include provisions regarding: passwords, authentication, and encryption protocols; document and data transmission standards and forms; the delivery, receipt, acknowledgement, verification and acceptance of transmissions; contract formation procedures; system and data security measures; apportionment of risks of communications errors; legal writing and signature formalities; record retention requirements; and the evidentiary use of electronic records.¹³⁵ Accordingly, various model EDI trading partner agreements provide guidance regarding the ways in which the legal uncertainties and business risks associated with electronic contracts may be addressed by the contracting parties through private rule-making.

F. Formal Requirements

Most contracts do not have to be written, signed, or satisfy other formal requirements to be valid and enforceable. Certain contracts, however, must meet statutory formalities—such as writing, signature, and delivery—to be valid and enforceable.¹³⁶ Many of those statutory formalities have their origin in the Eng-

¹³⁵ See “The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement,” (1990) 45 *Bus. Law* 1645; “Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary,” Legal and Audit Issues Committee of the Electronic Data Interchange Council of Canada, 1990; and the United Nations Commission On International Trade Law *Model Law for Electronic Data Interchange*, which may be found online: The United Nations <<http://www.uncitral.org/english/sessions/unc/unc-29/acn9-426.htm>>. See also B. D. Grayton, “Canadian Legal Issues Arising From Electronic Data Interchange,” (1993) 27:2 *UBC L. R.* 257.

¹³⁶ Contracts may also be sealed, in which case consideration is not required. Courts have relaxed the formal requirements of a sealed contract. A seal in the traditional form of a wax impression or paper wafer is no longer necessary to consider a document sealed. A written facsimile (such as the word *seal*) is sufficient, provided that the use of the seal facsimile to create a sealed document is a conscious and deliberate act. However, mere recitals regarding sealing are not sufficient to create a sealed contract.: *Friedmann Equity Developments Inc. v. Final Note Ltd.* (2000), 188 D.L.R. (4th) 269 (S.C.C.); 872899 *Ontario Inc. v. Iacovoni* (1997), 33 O.R. 561 (Ont. Gen. Div.); affirmed (1998), 40 O.R. (3d) 715 (C.A.); application for leave to S.C.C. dismissed (1998), S.C.C. Bulletin, 1999, at page 256, [1998] S.C.C.A. No. 476; and *Royal Bank of Canada v. Kiska*, [1967] 2 O.R. 379, 63 D.L.R. (2d) 582 (C.A.).

The UECA does not provide for an electronic equivalent to a seal. The *Canadian Personal Information Protection and Electronic Documents Act*, note 21, s. 41 provides that certain legal

lish *Statute of Frauds* of 1677,¹³⁷ which was enacted to prevent fraud and perjury regarding contract disputes.¹³⁸ Other statutory formalities are of more recent origin, and are often intended to protect consumers from unfair business practices.¹³⁹

Statutory formalities serve a number of policy objectives, including encouraging deliberation and reflection by indicating that the document has legal consequences, providing a durable record of the parties and their agreement, and ensuring the availability of admissible and reliable evidence.¹⁴⁰ When consider-

requirements for a seal are satisfied by a secure electronic signature that identifies the signature as a seal. The Ontario *Electronic Commerce Act 2000*, *supra* note 11 at s. 11(6) also provides that a document is deemed to have been sealed if it is signed with an electronic signature and meets prescribed seal equivalency requirements (which have not yet been promulgated).

¹³⁷ "An act for the prevention of frauds and perjuries," 29 Charles II, Ch. 3 (1677).

¹³⁸ See for example *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 59 and *Statute of Frauds*, R.S.O. 1990, c. S.19.

¹³⁹ For example, the British Columbia *Consumer Protection Act*, R.S.B.C. 1996, c. 69, s. 77(1)(b) and the *Consumer Protection Act Regulations*, B.C. Reg. 62/87, require "executory contracts" for the sale of goods or services, where the total consideration excluding the cost of borrowing is more than \$50 and is not paid by means of a credit card, to be in writing and contain specific information and prescribed notices. An "executory contract" is defined as a contract between a buyer and a seller for the purchase and sale of goods or services in respect of which delivery of the goods or services or payment in full is not made at the time that the contract is entered into. The Ontario *Consumer Protection Act*, R.S.O. 1990, c. C.31, ss. 1, 18 and 19, contain similar requirements and also require that all parties sign the contract and receive a duplicate original. However, unlike the B.C. legislation, there is no provision in the Ontario *Consumer Protection Act* or its regulations excluding credit card transactions. These provisions are particularly significant for electronic commerce because almost all Internet transactions are based on executory contracts, unless they involve the immediate delivery of products such as downloaded music or software.

¹⁴⁰ The *Model Law Guide to Enactment*, *supra* note 5 at para. 48, reads as follows:

In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of writings in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of writings: (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the writing and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a writing was required for validity purposes.

ing whether electronic records satisfy paper-based formal requirements, it is important to recognize that those policy objectives may not be fulfilled perfectly by signed paper writings—signatures can be illegible or forged, signed documents can be altered, risks regarding authenticity and repudiation remain, and signed documents are not always binding.¹⁴¹

The *UECA* addresses statutory formalities through a series of technology-neutral rules based upon the principle that electronic information that fulfils the basic policy objective at the root of a paper-based legal formality should be accorded the same legal effect as its paper-based equivalent. Prudence may dictate the use of technologies or standards that exceed the *UECA*'s minimum standards for legal effectiveness. The *UECA*'s consent principle¹⁴² should allow consent to the use of electronic information to be made conditional upon use of specific technologies or compliance with supplementary requirements.

In addition, notwithstanding the *UECA* and similar laws in other countries, parties involved in electronic contracting may wish to agree expressly that their electronic communications satisfy applicable statutory writing, signature, delivery and other formalities. While the effectiveness of such an agreement is uncertain, it is commonly found in EDI agreements.¹⁴³

1. Writing

Courts in Canada and elsewhere, mindful of generally accepted modern business practices, have taken a liberal approach to legal writing requirements. Courts have held that writing requirements may be satisfied by various kinds of records created through distant communications, including telegraph, telegram,

See also "Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact on the Statute Book," UNSW L. J., 1998, available online: The University of New South Wales <<http://www.law.unsw.edu.au/unswlj/e-commerce/sneddon.html>>.

¹⁴¹ See the discussion of the defence of mistake and *non est factum* in Fridman, *supra* note 39 at 259–306.

¹⁴² *UECA*, *supra* note 9 at s. 6.

¹⁴³ The Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary published by the Legal and Audit Issues Committee of the Electronic Data Interchange Council of Canada, 1990, contains the following provision (s. 6.04):

The parties agree that as between them each Document that is received by the Receiver shall be deemed to constitute a memorandum in writing signed and delivered by or on behalf of the Sender thereof for the purposes of any statute or rule of law that requires a Contract to be evidenced by a written memorandum or be in writing, or requires any such written memorandum to be signed and/or delivered. Each party acknowledges that in any legal proceedings between them respecting or in any way related to a Contract it hereby expressly waives any right to raise any defence or waiver of liability based upon the absence of a memorandum in writing or of a signature.

telex, and facsimile transmissions.¹⁴⁴ This approach is consistent with the expansive definitions of the words “written” and “writing” found in many interpretation statutes. For example, the British Columbia *Interpretation Act*¹⁴⁵ provides that “written” includes “words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form.”¹⁴⁶

The “written” nature of an electronic contract was considered in *Lieschke v. RealNetworks Inc.*,¹⁴⁷ which involved a challenge to an arbitration provision in a point-and-click software license agreement. RealNetworks argued that the arbitration provision prevented the Plaintiffs from bringing a class action lawsuit. The enforceability of the provision was challenged on numerous grounds, including its alleged failure to comply with applicable statutory writing requirements. The Court rejected that argument, holding that the electronic arbitration provision was in a “written agreement.” The Court referred to *Webster’s Dictionary* and held that the plain and ordinary meanings of “writing” and “written” do not exclude all electronic communications. The Court then went on to hold that while not all electronic communications may be considered to be “written,” the printable and storable nature of the RealNetworks agreement was sufficient to render it “written.”¹⁴⁸

¹⁴⁴ *Trevor v. Wood* 36 N.Y. 307 (1867); *Coupland v. Arrowsmith*, (1868) 18 L.T. 755 (letters and a telegraph together satisfy the Statute of Frauds signed writing requirements); *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117 (S.D. Cal. 1948), motion for a new trial granted 89 F. Supp. 962 (S.D. Cal. 1950), rev’d 188 F.2d 569 (9th Cir. 1951), cert denied 345 U.S. 820 (1951) and 344 U.S. 829 (1952) (teletype messages with a typed signature satisfies the California Statute of Frauds signed writing requirements); *La Mar Hosiery Mills Inc. v. Credit and Commodity Corporation*, 216 N.Y.S.2d. 186 (City Ct. of N.Y. 1961) (a telegram with a typed signature constitutes a signed writing); *Ellis Canning Company v. Bernstein*, 348 F. Supp. 1212 (D. Colo. 1972) (a tape recorded oral agreement satisfies the Statute of Frauds signed writing requirements); *Clyburn v. Allstate Insurance Company*, 826 F. Supp. 955 (D.S.C. 1993) (a computer diskette constitutes written and signed notice); *Godwin v. Francis* (1870), L.R. 5 C.P. 295 (letters and a telegraph together satisfy the Statute of Frauds signed writing requirements).

¹⁴⁵ R.S.B.C. 1996, c. 238, s. 29.

¹⁴⁶ See also the Canada *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35(1); the Ontario *Interpretation Act*, R.S.O. 1990, c. I-11, s. 28; the Alberta *Interpretation Act*, R.S.A. 1980, c. I-7, s. 25; and the United States *Uniform Commercial Code* at para. 1-201(46) [hereinafter UCC].

¹⁴⁷ *Lieschke*, *supra* note 54.

¹⁴⁸ The Court rejected the argument that the agreement was not printable because it was presented on a pop-up window without a conspicuous “print” or “save” button. The Court reasoned that the agreement could be copied and printed using a conventional word processing program, and was also automatically downloaded and saved to the user’s computer hard drive.

The *UECA* addresses legal writing requirements. In addition to the general provision that information shall not be denied legal effect or enforceability solely by reason that it is in electronic form,¹⁴⁹ the *UECA* specifically provides that a legal requirement that information be in writing is satisfied by information in electronic form if the information is accessible and usable for subsequent reference.¹⁵⁰

The *UECA* writing provision reflects the minimalist approach of the *UECA*. Legal writing requirements serve many purposes. Nevertheless, since the basic function of writing is to provide a record of information that may be reproduced and read, an electronic record with the same core functionality should be treated as equivalent.¹⁵¹ Similarly, since paper documents need not have particular attributes of reliability, authenticity, integrity, security, confidentiality or durability to have legal effect, there is no reason in principle to impose stricter requirements on electronic writings. Accordingly, the *UECA* does not stipulate any technical standard for the creation of a valid electronic writing; require any particular standard of reliability, authenticity, integrity, security, or confidentiality; or stipulate a minimum period of time for which the electronic information must be accessible.

The *UECA* does not explain whether the accessibility requirement is to be determined according to an objective or subjective standard. The *Model Law Guide to Enactment* explains that the use of the word "accessible" implies that information should be readable and interpretable, and that the software necessary to render such information readable should be retained.¹⁵² However, neither the *Model Law* nor the *UECA* indicates whether the sender or recipient of the information bears the burden of responding to changes in technological standards and the obsolescence of storage and retrieval equipment. Those issues and others will have to be resolved by courts on a case-by-case basis.

2. Signatures

At law, a signature is the affixing of a person's name or mark, by himself or with his authority, with the intention of identifying a document as being binding on the signatory.¹⁵³ Courts in Canada and elsewhere have taken a liberal approach

¹⁴⁹ *UECA*, *supra* note 9 at s. 5.

¹⁵⁰ *Ibid.* at s. 7. See *Model Law*, *supra* note 5 at article 6.

¹⁵¹ See *Model Law Guide to Enactment*, *ibid.* at paras. 47 - 52.

¹⁵² See *ibid.* at para. 50.

¹⁵³ *R. v. Moore* (1884), 10 V.L.R. 322 (C.A.); *Morton v. Copeland* (1855), 139 E.R. 861 (C.P.); *Goodman v. J. Eban Ltd.*, [1954] 1 All E.R. 763 (C.A.); *Atkinson v. Municipality of Metropolitan Toronto* (1976), 12 O.R. (2d) 401 (Ont. C.A.); *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.). The term "signature" is not defined in the *Interpretation Acts* of Canada, British Columbia or Ontario. *Quebec Civil Code* art. 2827 defines a signature as "the affixing by a person, on a writing, of his name or the distinctive mark which he regularly uses to signify

to statutory signature requirements, and have recognized that the practical function of a signature "is to indicate, but not necessarily prove, that the document has been considered personally" by the signatory and is approved by him.¹⁵⁴ Courts have held that a stamp, mark or facsimile of a signature will generally satisfy statutory signature requirements, provided that is the customary way of identifying the signor.¹⁵⁵ Accordingly, a signature in electronic format attached to an electronic document should, as a matter of principle, satisfy statutory signature requirements. Nevertheless, as of yet there is no reported Canadian judicial determination that statutory signature requirements may be satisfied by an electronic signature.¹⁵⁶

The term "electronic signature" is a generic, technology neutral term that refers to the many ways in which a person may indicate an association with an electronic document, such as: a name typed at the end of an email message; a digitized form of manual signature; a unique password, code or personal identification number; or a digital signature created through the use of public key cryptography.¹⁵⁷ All forms of electronic signature, if used appropriately, may sat-

his intention." The U.S. *Uniform Commercial Code* para. 1-201(39) defines a signature as including "any symbol executed or adopted by a party with present intention to authenticate a writing." The U.S. *Restatement of the Law (Second) Contracts* para. 134 provides that a signature may be "any symbol made or adopted with intention, actual or apparent, to authenticate the writing as that of the signer." *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Publishing Co., 1999) defines signature as: "Any name, mark or writing used with the intention of authenticating a document."

¹⁵⁴ *Re a Debtor (No. 2021 of 1995)*, [1996] 2 All E.R. 345 (Ch.).

¹⁵⁵ See *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.*, [1998] 3 F.C. 103 (T.D.); aff'd [2000] F.C.J. No. 129 (C.A.); *R. v. Fox* (1958), 120 C.C.C. 289 (Ont. C.A.); *Goodman v. J. Eban Ltd.*, [1954] 1 All E.R. 763 (C.A.); *Grondin v., Tisi & Turner*, [1912] 4 D.L.R. 819 (Que.); *Godwin v. Francis* (1870), L.R. 5 C.P. 295; *Morton v. Copeland* (1855), 139 E.R. 861 (C.P.); *Re a Debtor (No. 2021 of 1995)*, [1996] 2 All E.R. 345 (Ch.); *Atkinson v. Municipality of Metropolitan Toronto* (1976), 12 O.R. (2d) 401 (Ont. C.A.); and *Beatty v. First Explore Fund 1987 and Co.* (1998), 25 B.C.L.R. (2d) 377 (B.C.S.C.). The liberal approach to signature requirements, while consistent with commercial reality, also serves to undermine the authenticating function of the facsimile signature. See *Goodman v. J. Eban Ltd.*, [1954] 1 All E.R. 763 (C.A.); and *Re Botiuk and Collison* (1979), 26 O.R. 580 (Ont. C.A.).

¹⁵⁶ In *Doherty v. Registry Of Motor Vehicles*, Mass. No. 97CV0050, the Court held that a police report in email format, that identified the officer making the report and stated that it was made under penalty of perjury, was effectively signed by the reporting officer, even though the report did not contain a handwritten signature. In coming to this conclusion, the Court followed earlier decisions to the effect that statutory signed writing requirements do not necessarily require a handwritten signature.

¹⁵⁷ Digital signatures generally have the following characteristics: they are unique to a particular person, capable of verification, under the person's control, and capable of indicating whether the record to which they are applied has been changed. Usually there is a third party certification authority which provides independent verification that a specific digital signature belongs to a particular person. Digital signatures are usually secured with a

isfy the basic legal requirement of a signature—linking an electronic document to the signatory. However, only some forms of electronic signature provide additional assurances of attribution, security, and integrity.¹⁵⁸

The *UECA* addresses legal signature requirements. It focuses on the basic function of a signature, which is to link the signatory with a document.¹⁵⁹ The *UECA* provides that a legal requirement for a signature is satisfied by an electronic signature,¹⁶⁰ which it defines as information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to, or associated with the document.¹⁶¹

The *UECA*'s signature provision reflects the minimalist approach of the *UECA*. Since the basic function of a signature is to link the signatory with a particular document, an electronic signature with the same functionality and created with the requisite intention should be treated as equivalent.¹⁶² Similarly, since a signature on a paper document need not have particular attributes of reliability, authenticity, integrity, or security to have legal effect, there is no reason in principle to impose stricter requirements on electronic signatures. Accordingly, the *UECA* does not stipulate any technical standard for the creation

method of asymmetric encryption known as public key encryption. Public key cryptography is based upon the use of algorithmic functions to generate two different but related numerical codes known as "keys," which are used to encrypt and decrypt a message. A detailed discussion of public key cryptography and Canada's public key infrastructure initiative may be found online: Government of Canada <<http://www.cse.dnd.ca/cse/english/gov.html>> and <<http://www.strategis.ic.gc.ca/SSG/mi06310e.html>>. The American Bar Association has published information and guidelines regarding digital signatures, which may be found online: The American Bar Association <<http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html>> and <<http://www.abanet.org/scitech/ec/isc/dsgfree.html>>.

¹⁵⁸ On 6 July 2001, the United Nations Commission on International Trade Law adopted a *Model Law on Electronic Signatures*, which may be found online: The United Nations <<http://www.uncitral.org/en-index.htm>>.

¹⁵⁹ See *Model Law Guide to Enactment*, *supra* note 5 at paras. 53–61.

¹⁶⁰ *UECA*, *supra* note 9 at s. 10(1).

¹⁶¹ *Ibid.* at s. 1(b). See *Model Law*, *supra* note 5 at article 7.

¹⁶² See *Model Law Guide to Enactment*, *ibid.* at paras. 53–61. *Model Law Guide to Enactment*, paragraph 53, reads as follows:

In the preparation of the Model Law, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of the document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

of a valid electronic signature, or require any particular standard of reliability, security or authenticity.¹⁶³

Nevertheless, the *UECA* contemplates that in some circumstances laws may require electronic signatures that provide certain additional functionality—namely that the electronic signature is reliable for the purpose of identifying the signatory and that the association of the electronic signature with the electronic document is reliable for the purpose for which the electronic document was made.¹⁶⁴ For both requirements, reliability is to be determined in light of all the circumstances, including any relevant agreement and the time the electronic signature was made.¹⁶⁵ The *UECA* does not prescribe any particular technological measures required to achieve the additional identification and association functionalities.

Unlike the *UECA*, some electronic commerce laws require the use of digital signatures created with certain technologies or possessing certain attributes, and often provide that electronic records signed with those kinds of electronic signatures are presumed to be valid, authentic, and reliable. This approach may be found in the *Canadian Personal Information Protection and Electronic Documents Act*,¹⁶⁶ which provides for the use of “secure electronic signatures” in connection with electronic documents that are originals, statutory declarations, sealed, made under oath, or witnessed. To qualify as a “secure electronic signature,” the signature must comply with certain regulations (which have not yet been

¹⁶³ *Model Law* article 7 requires valid electronic signatures to be as reliable as is appropriate in the circumstances. A draft version of the *UECA* required electronic signatures to be reliable regarding the identity of the signatory and the association of the signature with the electronic document. Those requirements were removed because the *UECA* drafters felt that they detracted from the media-neutrality of the Act.

¹⁶⁴ *UECA*, *supra* note 9 at s. 10(2). There are also special provisions regarding signatures on documents submitted to government.

¹⁶⁵ *The Model Law Guide to Enactment*, paragraph 58, enumerates legal, technical and commercial factors that might be considered in assessing the reliability of an electronic signature, as follows: (1) the sophistication of the equipment used by each of the parties; (2) the nature of their trade activity; (3) the frequency at which commercial transactions take place between the parties; (4) the kind and size of the transaction; (5) the function of signature requirements in a given statutory and regulatory environment; (6) the capability of communication systems; (7) compliance with authentication procedures set forth by intermediaries; (8) the range of authentication procedures made available by any intermediary; (9) compliance with trade customs and practice; (10) the existence of insurance coverage mechanisms against unauthorized messages; (11) the importance and the value of the information contained in the data message; (12) the availability of alternative methods of identification and the cost of implementation; (13) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (14) any other relevant factor.

¹⁶⁶ *Canadian Personal Information Protection and Electronic Documents Act*, *supra* note 21.

promulgated), which will require the use of technologies or processes that prove: (a) the electronic signature is unique to the signer; (b) the application of the electronic signature was under the signer's sole control; (c) the person using the technology is identifiable; and (d) the electronic signature can be used to determine whether the electronic document has been changed since it was electronically signed.¹⁶⁷ The regulations may also establish evidentiary presumptions regarding the association of secure electronic signatures with persons and the integrity of information contained in electronic documents signed with secure electronic signatures.¹⁶⁸

As with paper-based signatures, a person relying upon an electronic signature takes the risk that the signature may not be valid, and in the event of a dispute will have the burden of proving that the signature is genuine and was made with the requisite intent. The *UECA* does not address those issues, or attribute risk or liability for losses arising from good faith reliance on electronic signatures. Accordingly, before accepting or acting on an electronic signature, businesses and individuals may require additional reliability assurances, agree to allocate risks and liabilities associated with electronic signatures, and obtain insurance for residual risk.

3. Delivery Requirements

Some laws require that written documents be delivered to another person. The purpose of delivering a document is to ensure that its contents are in the possession of the recipient and may be retained for a reasonable period of time.¹⁶⁹ Courts have held that delivery of documents by facsimile transmission adequately complies with contractual and statutory delivery obligations, as long as the document is legible and is either reasonably permanent or can be made so through further copying.¹⁷⁰

The *UECA* addresses legal document delivery requirements. It provides that a legal requirement that written information be provided to another person is satisfied if the information is provided in an electronic document that is accessible by the other person and capable of being retained by that person so as to be usable for subsequent reference.¹⁷¹ The *UECA* also provides that a legal re-

¹⁶⁷ *Ibid.* at s. 48.

¹⁶⁸ *Ibid.* at s. 56, adding s. 31.4 to the *Canada Evidence Act*, R.S.C. 1985, c. C-5. A similar provision is found in the *Manitoba Evidence Act* s. 51.5.

¹⁶⁹ *Hastie & Jenkerson v. McMahon*, [1991] 1 All E.R. 255 (C.A.) [hereinafter *Hastie*].

¹⁷⁰ *Rolling v. Willamn Investments Ltd.* (1989), 70 O.R. (2d) 578 (Ont. C.A.); *Hastie, ibid.*; *Re a debtor* (No. 2021 of 1995), [1996] 2 All E.R. 345 (Ch.); *Beatty v. First Explor. Fund 1987 and Co.* (1998), 25 B.C.L.R. (2d) 377 (B.C.S.C.).

¹⁷¹ *UECA, supra* note 9 at s. 8, which also stipulates a slightly different rule for delivery of information to government.

quirement to deliver copies of a document to a single addressee at the same time is satisfied by the submission of a single version of an electronic document.¹⁷²

The *UECA* expressly provides that an electronic document is not capable of being retained if the person providing the electronic document inhibits the printing or storage of the electronic document by the recipient.¹⁷³ Apart from this, the *UECA* does not indicate the standard to be applied in determining whether the document is capable of being retained or impose any technical document retention requirements.

It is uncertain whether the *UECA* delivery rules require the electronic delivery of a complete document, or if they are satisfied by the delivery of electronic documents that use hypertext links to incorporate other documents by reference or give notice that information may be accessed from a Web-site or other similar source. The *Model Law* does not contain a document delivery rule, but nevertheless expressly provides that information should not be denied legal effect, validity or enforceability solely on the grounds that it is referred to, but not contained in, the data message purporting to give it legal effect.¹⁷⁴ The *Model Law Guide to Enactment*¹⁷⁵ explains that "in an electronic environment, incorporation by reference is often regarded as essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce." It also observes that the use of technologies such as hypertext links may improve considerably the accessibility of referenced documents.

This issue is addressed by the *Ontario Electronic Commerce Act, 2000*,¹⁷⁶ which expressly provides that an electronic document is not provided to a person if it is merely made available for access by the person, for example on a Web-site. The Ontario law provides, however, that an electronic document may be provided to a person by sending the electronic document to the person by electronic mail or displaying it to the person in the course of a transaction that is being conducted electronically.

In contrast, the Canadian Securities Administrators' *National Policy 11-201—Delivery of Documents by Electronic Means*,¹⁷⁷ which became effective in January 2000, permits the delivery of documents required by securities laws (in-

¹⁷² *Ibid.* at s. 14.

¹⁷³ *Ibid.* at s. 12.

¹⁷⁴ *Model Law*, *supra* note 5 at article 5.

¹⁷⁵ *Model Law Guide to Enactment*, *ibid.* at paras. 46-1–46-7

¹⁷⁶ *The Electronic Commerce Act*, *supra* note 11 at s. 10.

¹⁷⁷ (1999) 22 OSCB 8156, which may be found online: Government of Ontario <<http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Policies/np11-201.html>> [hereinafter *Policy*].

cluding prospectuses, financial statements, trade confirmations, account statements and proxy solicitation materials) by making documents available through a Web-site and delivering a notice that they may be accessed at the Web-site.¹⁷⁸ Similarly, the *Manitoba Consumer Protection Act*¹⁷⁹ and its *Internet Agreements Regulation*¹⁸⁰ permit a seller to deliver prescribed information to a buyer in writing by making the information accessible to the buyer on the Internet in a manner that ensures that the buyer has accessed the information before entering into the agreement and the information is capable of being retained and printed by the buyer.

If there is a dispute regarding electronic document delivery, it may be difficult for the sender to prove that the document was received. Accordingly, senders desiring certainty regarding electronic document delivery will obtain receipt acknowledgements from recipients.

4. Prescribed Forms

Some laws require that information be provided in a prescribed, written form. In those cases, the format of the information may be essential to its meaning. The *UECA* addresses those legal requirements by providing that a legal requirement for information to be provided in a prescribed form is satisfied by the provision of an electronic document that contains the information in the same or substantially the same form as the paper document, and that is accessible by the other person and capable of being retained by that person so as to be usable for subsequent reference.¹⁸¹ The *UECA* rule is consistent with the rule regarding prescribed forms found in many interpretation statutes.¹⁸²

5. Original Documents

¹⁷⁸ The *Policy* identifies four basic requirements for the effective electronic delivery of documents, each of which is intended to achieve functional equivalency to the delivery of paper documents: (i) the document recipient receives notice that the document has been or will be electronically delivered or made available; (ii) the document recipient has easy access to the document; (iii) the document deliverer has evidence of delivery; and (iv) the document is received by the document recipient in an unaltered state. The *Policy* provides detailed guidelines regarding each of those requirements. The *Policy* recommends, but does not require, that the recipient's informed consent be obtained before documents are delivered electronically.

¹⁷⁹ C.C.S.M. c. C200.

¹⁸⁰ Reg. 176/2000.

¹⁸¹ *UECA*, *supra* note 9 at s. 9, which also stipulates a slightly different rule for delivery of information to government.

¹⁸² For example, *The Interpretation Act*, R.S.B.C. 1996, c. 238, s. 28(1), reads: "If a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used." See also *The Interpretation Act*, R.S.O. 1990, c. I-11, s. 28(d).

Some laws require that documents be "original." The primary purpose of requiring an original document is to enhance confidence in the integrity of the document and its contents. It is presumably easier to detect an alteration in an original than in a copy. Documents that might be required to be original are trade documents, such as weight certificates, agricultural certificates, quality or quantity certificates, inspection reports, insurance certificates, and documents relating to the carriage of goods. Consumer protection laws may also require delivery of original documents to consumers.¹⁸³

The concept of a unique, original document presents challenges to electronic records, which are easily, and often automatically, copied. For example, the recipient of a data message almost always receives a copy of it, since the original message remains with the sender. However, technological means may be used to provide assurances regarding the integrity of an electronic record.

The *UECA* addresses original document requirements.¹⁸⁴ It focuses on the basic function of an original document, which is to provide an assurance regarding the integrity of the information contained in the document,¹⁸⁵ and treats an electronic document the same as an original paper document if there are sufficient assurances regarding the integrity of the information in the electronic document. The *UECA* provides that a legal requirement to retain or present a document in original form is satisfied by the provision or retention of an electronic document if: (a) there is a reliable assurance as to the integrity of the information contained in the electronic document from the time the document was first made in its final form, whether as a paper document or as an electronic document; and (b) the electronic document is accessible by the person to whom it is presented and capable of being retained, printed and stored by that person so as to be usable for subsequent reference.¹⁸⁶ The *UECA*-prescribed criterion for assessing integrity is whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display. The *UECA* provides that the standard of reliability required must be assessed in the light of the purpose for which the document was made and all the circumstances.¹⁸⁷

¹⁸³ See *The Consumer Protection Act*, R.S.O. 1990, c. C.31, ss. 1, 18 and 19.

¹⁸⁴ *UECA*, *supra* note 9 at article 8.

¹⁸⁵ See *Model Law Guide to Enactment*, *supra* note 5 at paras. 62–69.

¹⁸⁶ *UECA*, *supra* note 9 at s. 11(1) and (3), which also stipulates a slightly different rule for presentation of an original electronic document to government. This provision is similar to the provision in the *Uniform Electronic Evidence Act* regarding the best evidence rule, and *Civil Code of Quebec*, art. 2838.

¹⁸⁷ *UECA*, *ibid.* at s. 11(2).

The *UECA* also addresses the issue of original documents in the context of carriage of goods contracts.¹⁸⁸ Certain shipping documents (such as bills of lading) must be negotiable and therefore themselves carry the value of the goods they list. As a result, they must be unique and transferable. The *UECA* provides that a legal requirement that rights or obligations be given to one particular person by the transfer or use of a document in writing is satisfied if the right or obligation is conveyed through the use of an electronic document created by a method that gives reliable assurance that the right or obligation has become the right or obligation of that person and no other person. The standard of reliability is to be assessed in the light of the purpose for which the right or obligation was conveyed and all the circumstances, including any relevant agreement. The *UECA* also provides that if electronic shipping documents are used, paper-based documents are invalid unless they expressly provide for the termination and replacement of the electronic documents.

6. Language

Some laws may require contracts or other documents to be written in a particular language. Most importantly for Canadians, Quebec's *Charter of the French Language*¹⁸⁹ requires that contracts pre-determined by one party, contracts containing printed standard clauses, and related documents be drawn up in French, unless the parties expressly agree that they may be drawn up in another language as well. To address this requirement, an English language selection provision is often included in agreements. Nevertheless, the *Charter of the French Language*¹⁹⁰ requires that even in those circumstances a French version of the document must be available and be as accessible as every other version of the document.¹⁹¹

For business as well as legal reasons, Web-site businesses dealing with non-English speaking customers should ensure that legal notices and standard form agreements are translated into foreign languages and should stipulate that a par-

¹⁸⁸ *Ibid.* at ss. 24 and 25. See also *Model Law*, *supra* note 5 at articles 16 and 17.

¹⁸⁹ R.S.Q., c. C-11, s. 55.

¹⁹⁰ *Ibid.* at s. 91.

¹⁹¹ Also, Quebec's *Charter of the French Language*, s. 52, requires that all commercial catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French. Non-commercial messages or those of a political or ideological nature are excluded. Quebec's Office of the French Language has taken the position that commercial advertising posted on a Web-site by a firm which has a place of business in Quebec must be in the French language or provide a French language translation that is given equal prominence to other language versions, but that requirement does not apply to firms that do not have their head office or a place of business or an address in Quebec. See the OFL Web-site online: Government of Quebec <<http://www.olf.gouv.qc.ca>>.

ticular language version of the notices and agreements prevails over all other versions.

VII. CONSUMER PROTECTION LAWS

MANY LAWMAKERS AND OTHERS BELIEVE that for business-to-consumer electronic commerce to flourish, consumer confidence must be reinforced through Internet-specific consumer protection laws.¹⁹² As a result, Internet consumer protection laws are being enacted in many jurisdictions around the world. For example, in 1996 the *California Business and Professions Code*¹⁹³ was amended to impose specific disclosure, delivery, refund and other obligations on businesses conducting Internet transactions with persons located in California.¹⁹⁴ Similarly, the European Parliament's *Directive on the Protection of Consumers in respect of Distance Contracts*¹⁹⁵ requires European Union states to enact laws providing consumers with information disclosure, timely delivery, withdrawal and other rights and remedies regarding contracts formed through means of distant communications.

Manitoba was the first Canadian province to enact laws specifically designed to protect Internet consumers. Effective 19 March 2001, the *Electronic Commerce and Information, Consumer Protection Amendment and Manitoba Evidence Amendment Act*,¹⁹⁶ the *Consumer Protection Act*,¹⁹⁷ and the *Internet Agree-*

¹⁹² In Canada, those issues have been considered by the Consumer Measures Committee (the "CMC"), which is comprised of Canadian federal and provincial government representatives and provides a forum for the development and harmonization of consumer protection laws, regulations and practices. Consumer protection issues are discussed in detail in *Consumer Protection for the 21st Century*, Ontario Ministry of Consumer and Commercial Relations, August 2000, which may be found online: Government of Ontario <<http://www.ccr.gov.on.ca/pdf/EnConsProt.pdf>>, and in *Consumer Protection Rights in Canada in the Context of Electronic Commerce*, Roger Tassé, O.C., Q.C. and Kathleen Lemieux, March 1998, which may be found online: Government of Canada <<http://strategis.ic.gc.ca/SSG/ca01031e.html>>. A discussion of consumer protection issues may also be found at the Public Interest Advocacy Centre (the "PIAC") Web-site online: The Public Interest Advocacy Centre <<http://www.piac.ca>>.

¹⁹³ Chapter 17538 (1996).

¹⁹⁴ Vendors must satisfy certain disclosure obligations, including disclosure of their legal business name and proper address and their return and refund policy. Vendors must also deliver goods and services by stipulated deadlines, failing which they must offer refunds and other remedies to buyers. Violation of those requirements is a misdemeanor punishable by imprisonment for up to six months, a fine of up to \$1,000, or both.

¹⁹⁵ Directive 97/7/EC. The Directive and related information may be obtained online: European Union <http://europa.eu.int/comm/consumers/policy/developments/dist_sell/index_en.html>.

¹⁹⁶ S.M. 2000, c.E55.

ments Regulation¹⁹⁸ provided Manitoba consumers with significant new rights and remedies regarding certain Internet transactions. On 25 May 2001, Canadian federal, provincial and territorial ministers responsible for consumer affairs approved an *Internet Sales Contract Harmonization Template* to provide uniformity regarding Canadian Internet consumer protection laws. The *Template* covers contract formation, cancellation rights, information provision, and credit card charge-backs.¹⁹⁹ Subsequently, Alberta passed an *Electronic Sales Contracts Regulation* for its *Fair Trading Act*,²⁰⁰ to provide Internet consumer rights and remedies. Other provinces are expected to enact similar laws based upon the *Template*.

The following is a brief overview of Manitoba's Internet consumer protection laws.

1. Application: The laws apply to agreements formed by Internet communications regarding the retail sale of goods or services, or the retail hire-purchase (lease-to-own) of goods, made to a consumer by a seller in the course of the seller's business. Certain transactions are excluded, including transactions where the purchaser or hirer is a corporation or a person who intends to re-sell or re-let the goods to others, or where the goods or services are used or are intended to be used by the purchaser for the primary purpose of carrying on a business.
2. Automated Transactions: A valid contract may be formed by the interaction of an individual and an electronic agent. However, an agreement formed in that manner has no legal effect and is not enforceable if the individual made a material error in an electronic document used in the formation of the agreement and: (a) the electronic agent did not provide the individual with an opportunity to prevent or correct the error; (b) the individual notifies the other party of the error promptly after becoming aware of it; and (c) the individual returns any goods or services received under the agreement and does not benefit materially by having received them.²⁰¹

¹⁹⁷ C.C.S.M. c. C200.

¹⁹⁸ Man. Reg. 176/2000.

¹⁹⁹ The template may be obtained online: Government of Canada <<http://strategis.ic.gc.ca/SSG/ca01642e.html>>.

²⁰⁰ S.A. c. F-1.05.

²⁰¹ This rule is based upon UECA s. 21 and is not restricted to consumer transactions.

3. **Seller's Obligation to Provide Information:** A seller must provide the following information to a buyer in writing and before entering into an Internet agreement: (a) the seller's name and, if different, the name under which the seller is carrying on business; (b) the seller's business address and, if different, the seller's mailing address; (c) the seller's phone number and, if applicable, the seller's fax number and e-mail address; (d) a fair and accurate description of the goods or services being sold to the buyer, including any relevant technical or system specifications; (e) details of any warranties or guarantees that apply to the agreement; (f) an itemized list of the price of the goods or services being sold to the buyer, as well as any shipping charges, taxes, customs duties, or broker fees payable by the buyer to the seller; (g) any delivery, handling or insurance costs payable by the buyer in addition to the purchase price of the goods or services; (h) the total consideration payable by the buyer to the seller under the agreement, and the currency in which it is payable; (i) the terms, conditions and method of payment; (j) if credit is extended by the seller, a description of any security taken by the seller and information regarding the cost of borrowing; (k) the date when the goods are to be delivered or the services are to be commenced; (l) the seller's delivery arrangements, including the method of delivery; (m) any restrictions or conditions the seller may apply, including geographic limitations for the sale or delivery of the goods or services; (n) the seller's exchange, cancellation and refund policies, if applicable; and (o) the seller's policies and arrangements for the protection of the buyer's financial and personal information. The provided information forms part of the transaction agreement.

A seller is considered to have provided the prescribed information to a buyer in writing if: (a) the information is sent to the email address provided by the buyer to the seller for the provision of information regarding the transaction; or (b) the information is made accessible to the buyer on the Internet in a manner that ensures that the buyer has accessed the information before entering into the agreement, and the information is capable of being retained and printed by the buyer.

4. **Buyer's Cancellation Rights:** A buyer may, before accepting delivery of goods or services, cancel the agreement if: (a) the seller failed to provide prescribed information to the buyer in writing before entering into an agreement; or (b) the seller failed to deliver the goods or services within 30 days after the specified delivery date or the date of the agreement if there is no specified delivery date. In certain cir-

cumstances, the seller's attempted but unsuccessful delivery of goods or services will be sufficient. If a court considers a buyer's cancellation of the agreement to be inequitable, the court may make any order it considers appropriate.

5. **Effect of Cancellation:** If a buyer cancels an agreement due to the seller's failure to provide prescribed information or timely deliver the goods or services, the buyer's obligations under the agreement are extinguished and the seller must refund to the buyer, within 30 days after cancellation, all consideration paid by the buyer under the agreement, whether paid to the seller or any other person.
6. **Post-Cancellation Delivery:** If services are provided to a buyer after the buyer has cancelled the agreement, the buyer may rescind the cancellation of the agreement by accepting the services. If goods are delivered to a buyer after the buyer has cancelled the agreement, the buyer may: (a) rescind the cancellation of the agreement by accepting the goods; (b) refuse to accept delivery of the goods; or (c) within 30 days after accepting delivery of the goods return to the seller the goods in the same condition in which they were delivered. The seller must accept the return of goods returned or refused by the buyer, and the seller is responsible for the cost of returning the goods.
7. **Credit Card Refunds:** A buyer who has charged all or any part of the purchase price to a credit card account may require the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges if the seller fails to provide a required purchase price refund within 30 days after the buyer cancels a transaction due to either: (a) a material error made by the buyer during an automated transaction that results in the unenforceability of the transaction; or (b) the seller's failure to provide prescribed information or timely deliver the goods or services. The buyer's request must state that the agreement has been cancelled, identify the credit card charge sought to be cancelled or reversed, and provide other prescribed information.
8. **Other Consequences of Non-Compliance:** In addition to the remedies and consequences outlined above, a contravention or failure to comply with the requirements of the *Manitoba Consumer Protection Act* and its regulations is an offence punishable by fines, imprisonment, and other court ordered corrective measures.

9. No Contracting Out: The Internet consumer rights and remedies cannot be avoided, limited, modified or abrogated by agreement. Further, they are in addition to any other rights or remedies the buyer may have by agreement or at law, including other consumer protection and sale of goods laws.

Internet consumer protection laws will encourage Internet business-to-consumer vendors to use a multi-step ordering process in which consumers click through: (a) an order verification screen that provides them with an opportunity to correct errors they may have made in the ordering process; and (b) a screen that presents all prescribed information regarding the proposed transaction and an opportunity to download and print the information before the transaction is completed.²⁰² Internet consumer protection disclosure requirements may also preclude the use of payment-now-terms-later agreements.

VIII. GOVERNING LAW AND JURISDICTION

WHEN CONTRACTS ARE MADE BETWEEN parties in different jurisdictions, there may be uncertainty regarding the laws that govern the contract and the courts that have jurisdiction over contract-related disputes. Traditional legal rules regarding applicable laws and jurisdiction, which are based upon notions of geographic boundaries and territorial sovereignty, may be difficult to apply to Internet transactions.²⁰³

The proper law of a contract is the law that governs the formation of the contract and disputes between the contracting parties regarding the contract's interpretation and enforcement. A contract's proper law may be determined by the express or implied agreement of the parties. Where there is no such agreement, the proper law will be the system of law with which the transaction has the closest and most real connection.²⁰⁴

²⁰² This is generally consistent with Industry Canada's *Principles of Consumer Protection for Electronic Commerce—A Canadian Framework*, which recommends that business-to-consumer Web-sites either employ a multi-step ordering and confirmation process or allow consumers a reasonable period within which to cancel the contract.

²⁰³ For example, in *American Library Association v. Pataki*, 97 Civ. 0222 (LAP) (S.D.N.Y. 1997), the Court stated:

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.

²⁰⁴ J. G. Castel, *Canadian Conflict of Laws*, 4th ed., (Toronto: Butterworths, 1997), s. 448; *Eastern Power*, *supra* note 70; *Imperial Life Assurance Company of Canada v. Colmenares*, [1967] S.C.R. 443.

The jurisdiction of courts to adjudicate contract disputes is separate and distinct from the proper law of the contract. Contracting parties may agree that specific courts have concurrent or exclusive jurisdiction regarding the interpretation and enforcement of the contract and any contract-related disputes between the parties. Canadian courts will generally enforce the parties' court selection, unless there is a strong reason not to do so.²⁰⁵ Where there is no court selection agreement, Canadian courts may assert adjudicative authority in civil matters where there is a real and substantial connection between the court's jurisdiction and the subject matter of the dispute.²⁰⁶

The place where the contract is made is an important consideration in determining both the proper law of the contract and whether a court has jurisdiction regarding contract disputes.²⁰⁷ The general rule at common law, in the absence of an agreement to the contrary, is that a contract is made at the place where the acceptance of an offer becomes effective. This is generally the place where the offeror receives notice of the acceptance of the offer.²⁰⁸ Courts have

²⁰⁵ Castel, *ibid.* at s. 147-148; *Sarabia v. The "Oceanic Mindoro"* (1996), 26 B.C.L.R. (3d) 143 (B.C.C.A.); *Rudder*, *supra* note 52.

²⁰⁶ See, for example, *Libman v. The Queen*, [1985] 2 S.C.R. 178; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. In the United States, a similar test is applied: see, for example, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

In Internet-related matters, U.S. courts have adopted a sliding scale approach based upon traditional legal principles. Generally, they have not asserted jurisdiction over foreign owners of "passive" Web-sites that do not have active contact with residents of their jurisdiction, but have asserted jurisdiction over foreign owners of "active" Web-sites used to communicate and engage in commerce with residents of the court's jurisdiction. See *Braintech Inc. v. Kostiuik* (1999), 171 D.L.R. (4th) 461 (B.C.C.A.), leave to appeal to S.C.C. refused; *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997); *CompuServe Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Playboy Enterprises Inc. v. Chuckleberry Publications Inc.*, 939 F.Supp. 1032 (S.D.N.Y. 1996); *Hollywood Entertainment Corp. v. Hollywood Entertainment Inc.*, 1999 U.S. Dist. LEXIS 6466 (N.D.Cal. 1999); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997); *K.C.P.L Inc. v. Nash*, 49 U.S.P.Q. 2d 1584 (S.D.N.Y. 1998); *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997); *Fix My PC, L.L.C. et al. v. N.F.N. Associates Inc. et al.*, No. 3:98-CV-0709-L, N.D. Texas (April 1999); *Panavision International LP v. Toeppen*, 141 F.3d 1315 (9th Cir. 1998); *CFOS's 2 Go Inc. v. CFO 2 Go Inc.*, 1998 U.S. Dist. Lexis 8886 (N.D. Cal. 1998); *American Network Inc. v. Access Am/Connect Atlanta Inc.*, 975 F.Supp. 494 (S.D.N.Y. 1997); and *Soma Medical International v. Standard Chartered Bank*, 1999 U.S. App. Lexis 31227 (10th Cir. 1999).

²⁰⁷ See, for example, the Ontario *Rules of Civil Procedure*, rule 17.02(f)(i), and the Quebec *Code of Civil Procedure*, art. 68(2).

²⁰⁸ See *Ungar v. Sayisi Dene First Nation (No. 303)*, [1999] S.J. No. 402 (Sask. Q.B.) (contract negotiated by telephone); *Sennett v. Tape Estate* (1985), 45 Sask. R. 314(Q.B.) (contract ne-

cautioned, however, that the rule should be applied flexibly to accommodate the many variants in communication methods and the ability of persons to exchange contractual communications from locations other than their normal place of business.²⁰⁹

The location where an electronic document is sent and received is addressed by the *UECA*.²¹⁰ It provides that, unless the parties otherwise agree, an electronic document is deemed to be sent from the sender's place of business (or if no such place, then the sender's habitual residence) and is deemed to be received at the recipient's place of business (or if no such place, then the recipient's habitual residence).²¹¹ The *UECA* also provides that if the sender or the recipient have more than one place of business, the place of business referenced by the rule is that which has the closest relationship to the underlying transaction to which the electronic document relates or, if there is no underlying transaction, the principal place of business of the sender or the recipient.²¹² The *UECA* rule separates the essence of the communication from its incidental aspects, such as the location of the email server and other computer equipment used in the communication and the location of the sender or recipient when they actually deal with the message.

The *UECA* document location rule is expressly subject to the parties' contrary agreement. Accordingly, contracting parties may agree upon alternative rules regarding the legal location of their communications. In addition, contracting parties may expressly agree upon the law that governs their dealings and the courts that have jurisdiction regarding disputes. Exclusive jurisdiction and mandatory arbitration provisions in electronic standard form consumer agreements have been held to be valid and enforceable regarding private, contractual disputes.²¹³

Contractual choice of laws and jurisdiction provisions cannot prevent the application of foreign criminal and regulatory laws (such as consumer protection laws) or oust the jurisdiction of foreign courts or tribunals regarding proceedings relating to those matters. Nevertheless, contract provisions regarding governing

gotiated by telephone); and *England Surfwood Supply (1964) Ltd.*, [1987] O.J. No. 1412 (Ont. Dist. Ct.) (contract negotiated by telephone).

²⁰⁹ *McDonald* *supra* note 70; *Brinkibon*, *supra* note 66; *Eastern Power*, *supra* note 70; and *Bailey & Co. Inc. v. Laser Medical Technology Inc.* (1993) 15 O.R. (3d) 212 (Ont. Gen. Div.).

²¹⁰ See also *Model Law*, *supra* note 5 at article 15(4).

²¹¹ *UECA*, *supra* note 9 at s. 23(2) and (4).

²¹² *Ibid.* at s. 23(3).

²¹³ See *Caspi*, *supra* note 53; *Groff*, *supra* note 55; *Rudder*, *supra* note 52; and *Lieschke*, *supra* note 54. See also *American Eyewear Inc. v. Peeper's Sunglasses and Accessories Inc.* 2000 U.S. Dist. LEXIS 6875 (N.D. Tex. 2000). For contrary decisions, see *Williams v. America Online Inc.*, *supra* note 120 and *America Online Inc. v. Mendoza*, *supra* note 121.

law and jurisdiction may support arguments that foreign laws should not be applied and foreign courts should not assert jurisdiction.

IX. DOCUMENT RETENTION AND EVIDENCE ISSUES

THE EFFECTIVE ENFORCEMENT OF ELECTRONIC contracts requires that records of those contracts and related communications be available and admissible as evidence in legal proceedings. In addition, many laws require businesses to maintain books of account and records for a variety of other purposes.²¹⁴ Accordingly, those engaged in electronic contracting should ensure that their electronic records are retained in a manner that satisfies legal document retention requirements and evidence rules.

A. Document Retention

Various laws require the retention of certain documents for prescribed time periods. Some of those laws address specifically the use and retention of electronic documents. For example, Canada Customs and Revenue Agency has issued memoranda regarding the retention and availability of electronic records, books of account, and other documents required to be retained pursuant to the *Income Tax Act*, the *Employment Insurance Act*, the *Canada Pension Plan*, and the *Excise Tax Act*.²¹⁵

The *UECA* addresses document retention requirements.²¹⁶ It provides that a legal requirement to retain a document is satisfied by the retention of an electronic document if: (a) the electronic document is retained in the format in which it was made, sent or received, or in a format that does not materially change the information contained in the original document; (b) the information in the electronic document will be accessible so as to be usable for subsequent reference by authorized persons; and (c) if the electronic document was sent or received, available information regarding the origin and destination of the document and the date and time when it was sent or received is also retained.²¹⁷ The *UECA* also provides that an electronic document is not capable of being retained if the person providing the electronic document inhibits the printing or storage of the electronic document by the recipient.²¹⁸ Where docu-

²¹⁴ See, for example, *Income Tax Act* R.S.C. 1985, c. 1, s. 230(1).

²¹⁵ Information Circular IC78-10R3, *Books and Records Retention/Destruction*, 5 October 1998; and Memoranda ET 102, 15.1 and 15.2.

²¹⁶ See also *Model Law*, *supra* note 5 at article 10. By virtue of *UECA* s. 2(5), the *UECA*'s document retention rules will not override legal document retention laws that specifically provide for electronic records.

²¹⁷ *UECA*, *supra* note 9 at s. 13.

²¹⁸ *Ibid.* at s. 12.

ment retention laws require original documents, the *UECA* provisions regarding original electronic records will also apply.²¹⁹

The *UECA* document retention provisions reflect the basic function of document retention—to maintain the integrity of the information contained in the document and keep it available for future reference.²²⁰ In addition, in a departure from the *UECA*'s usual minimalist approach, if an electronic document is transmitted, then available transmission-related information (known as "metadata") must also be retained.²²¹ The *UECA* does not prescribe a time period for which records must be retained, or stipulate any record retention technology standards.

B. Use in Evidence

The use of electronic records as evidence in legal proceedings is subject to a complex body of statutory and common law rules designed to ensure that legal decisions are based upon accurate and reliable information. A detailed discussion of evidence law is beyond the scope of this article. Nevertheless, for the purpose of discussing electronic evidence and appropriate document retention practices, three principle evidence issues must be considered: authentication, the rule against hearsay, and the best evidence rule. Those rules may be summarized as follows:

1. Authentication is the requirement for proof that a document is that which it purports to be.
2. The hearsay rule requires that, wherever possible, evidence should be obtained from the oral testimony of sworn witnesses, rather than from second-hand oral or written sources. The orthodox rule against hearsay provides that written or oral statements made by persons otherwise than in testimony at the proceeding are inadmissible as proof of their truth or as proof of assertions implicit in them.²²² Over the years, courts developed various exceptions to the hearsay rule. Most importantly, in recent years Canadian courts have established the general principle that hearsay evidence should be accepted where it is both necessary and reliable.²²³ There are also various

²¹⁹ *Ibid.* at s. 11.

²²⁰ See *Model Law Guide to Enactment*, *supra* note 5 at paras. 72–75.

²²¹ A person who receives a paper document is usually not required to keep the envelope or other delivery information.

²²² J. Sopinka, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at chapter 6.

²²³ See *Ares v. Venner*, [1970] S.C.R. 608; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Starr*, 2000 SCC 40. *Quebec Civil Code*, art. 2870 contains similar rules.

statutory exceptions to the hearsay rule, the most relevant of which allow the use of business records to prove the truth of the recorded facts, provided the records were made and kept in the usual and ordinary course of business and it was in the usual and ordinary course of business to record a statement of the fact at the time it occurred or within a reasonable time afterward.²²⁴

3. The best evidence rule requires that a party seeking to prove a document must use the original of the document, if it is available or can be readily obtained, and not a copy.²²⁵ The purpose of the rule is to secure the most reliable information as to the content of the document. The rule is based upon a concern regarding the authenticity and integrity of the document. The premise underlying the rule is that alterations are more easily detected when the original document is examined.

Courts have taken a pragmatic approach to the use of electronic records in evidence. They have generally accepted electronic records into evidence, either pursuant to statutory or common law rules, where there is satisfactory evidence regarding the authenticity, reliability, and trustworthiness of the record.²²⁶ For example, in *R. v. Hall*,²²⁷ the Court stated:

²²⁴ For example, see *Canada Evidence Act*, R.S.C. 1995, c. E-10, s. 30; *Ontario Evidence Act*, R.S.O. 199, c. E.23, s. 35; *British Columbia Evidence Act*, R.S.B.C. 1996, c. 124, s. 42, and *Quebec Civil Code* arts. 2838 and 2870.

²²⁵ Sopinka, *supra* note 222 at note 214, chapter 16. *Quebec Civil Code* arts. 2860 and 2861 contain similar rules.

²²⁶ See J. Sopinka, N. Lederman & A. Bryant, *The Law of Evidence*, 2nd ed. (Markham, Ont: Butterworths, 1999) at chapter 6.173, 6.174, 18.24; *R. v. Bicknell* (1988), 41 C.C.C. (3d) 5455 (B.C.C.A.); *R. v. Rowbotham* (1977), 33 C.C.C. (2d) 411 (Ont. Co. Ct.); *R. v. Vanlerberghe* (1976), 6 C.R. (3d) 222 (B.C.C.A.); *R. v. McMullen* (1979), 100 D.L.R. (3d) 671 (Ont. C.A.); *R. v. Bell and Bruce* (1982), 35 O.R. (2d) 164 (Ont. C.A.), *aff'd* [1985] 2 S.C.R. 287; *R. v. Sunila and Solayman* (1986), 26 C.C.C. (3d) 331 (N.S.S.C.); *Tecoglas Inc. v. Domglas Inc.* (1985), 51 O.R. (2d) 196 (Ont. H.C.); *R. v. Cordell* (1982), 39 A.R. 281 (Alta. C.A.); *R. v. Sanghi* (1971), 6 C.C.C. (2d) 123 (N.S.C.A.); *The King v. Daye*, [1908] 2 K.B. 333; *R. v. Monkhouse*, [1988] 1 W.W.R. 725 (Alta. C.A.); *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1991), 40 C.P.R. (3d) 97 (B.C.S.C.); *R. v. Hall*, [1998] B.C.J. No. 2515 (B.C.S.C.); *R. v. Savino*, [1993] O.J. No. 2051 (Ont. C.J.); and *R. v. McCulloh*, [1992] B.C.J. No. 2282 (Prov. Ct.). For cases regarding pre-trial disclosure of electronic records, see *Tide Shore Logging Ltd. v. Commonwealth Insurance Company* (1979), 100 D.L.R. (3d) 112 (B.C.S.C.); *GEAC Canada Ltd. v. Prologic Computer Corp.* (1988), 24 C.P.R. (3d) 85 (B.C.S.C.); *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.* (1989), 25 C.P.R. (3d) 244 (Fed. T.D.); *Reichmann v. Toronto Life Publishing Co.* (1988), 66 O.R. (2d) 65 (Ont. H.C.); *Tecoglas Inc. v. Dombglas Inc.* (1985), 51 O.R. (2d) 196 (Ont. H.C.); and *Grant v. Southwestern and County Properties Ltd.*, [1975] 1 Ch. 185. Most of the general provisions of the federal and provincial evidence acts are broad enough to include electronic records. For example, the *British Columbia Evidence Act* business records provisions, s. 42, broadly

The law must be applied in accordance with the rapidly changing reality of today notwithstanding that it was drafted in the past. For this Court to hold ... that the [computer] printouts were not admissible would be to ignore the realities of the computer age, wherein technological change has rendered the former distinctions between originals and copies a moot distraction in many areas.²²⁸

In 1998, the Canadian *Uniform Electronic Evidence Act* (the "UEEA")²²⁹ was adopted as a model for the amendment of Canadian evidence statutes. It has been adopted by the Canadian federal government and a number of provinces.²³⁰ The objective of the UEEA is to allow for the use of electronic records in evidence in legal proceedings if there is sufficient evidence of their authenticity and integrity.²³¹ It achieves this objective by providing as follows:

1. The person seeking to introduce an electronic record into evidence has the burden of proving its authenticity through evidence that the electronic record is what the person claims it to be.²³²
2. An electronic record in the form of a print-out that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule.²³³

define *document* as including "any device by means of which information is recorded or stored." Similarly, the Ontario *Evidence Act* business records provisions define *record* as including "any information that is recorded or stored by means of any device" (s. 35).

²²⁷ [1998] B.C.J. No. 2515 (B.C.S.C.).

²²⁸ See also *King v. State of Mississippi*, 222 So.2d 393 (Minn. 1969); and *Pompeii Estates Inc. v. Consolidated Edison Co. of New York*, 397 N.Y.S.2d 577 (Ct. City of N.Y. 1977).

²²⁹ The *Uniform Electronic Evidence Act* may be found online: The University of Alberta Faculty of Law <<http://www.law.ualberta.ca/alri/ulc/current/eeeact.htm>> [hereinafter UEEA].

²³⁰ *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 31.1–31.8, as amended by the *Canadian Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (formerly Bill C-6) (effective 1 May 2000); *Ontario Evidence Act*, R.S.O. 1990, c. E.23, s. 34.1, as amended by the *Red Tape Reduction Act 1999*, S.O. 1999, c. 12; *Manitoba Evidence Act*, C.S.S.M. c. E150, ss. 51.1–51.8; *Saskatchewan Evidence Act*, R.S.S. 1978, c. SS-16, ss. 29.1–29.6; *Yukon Electronic Evidence Act*, S.Y. 2000, c. 11; *Civil Code of Quebec* arts. 2837–2839; *New Brunswick Evidence Act*, S.N.B. 1996, c. E-11, ss. 47.1–47.2; and *Prince Edward Island Electronic Evidence Act*, S.P.E.I. 2001, c. 32. *Model Law supra* note 5 at article 9 contains provisions regarding the admissibility and evidentiary weight of electronic evidence.

²³¹ UEEA s. 9 also provides for the repeal of statutory requirements for the retention of original paper documents after they have been converted to electronic records.

²³² UEEA, *supra* note 229 at s. 3. This provision codifies the common law regarding authentication.

²³³ *Ibid.* at s. 4(2).

3. The best evidence rule regarding an electronic record is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.²³⁴
4. In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed if there is evidence that establishes: (a) at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system; or (b) the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or (c) the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.²³⁵
5. For the purpose of determining whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice regarding how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record.²³⁶

The UEEA expressly provides that it does not modify any common law or statutory evidence rules, except the rules relating to authentication and best evidence.²³⁷ Accordingly, the use of electronic records in evidence is still subject to the hearsay rule and its statutory and common law exceptions.

Businesses engaged in electronic contracting should establish an electronic records management program that retains necessary electronic records and ensures the integrity of the records and the reliability and integrity of the systems in which they are maintained. In designing such a program, guidance may be found in standards published by industry groups and government agencies.²³⁸

²³⁴ *Ibid.* at s. 4(1). It will often be impossible to provide direct evidence of the integrity of an individual electronic record. Accordingly, this provision accepts system integrity as a surrogate for record integrity.

²³⁵ *Ibid.* at s. 5.

²³⁶ *Ibid.* at s. 6.

²³⁷ *Ibid.* at s. 2(1).

²³⁸ For example, Canadian General Standards Board Standard CAN/CGSB-72.11— *Microfilm and Electronic Images as Documentary Evidence*, 1993 and Canada Customs and Revenue

The use of an independent service provider may assist in the event of a dispute regarding the integrity of the record keeping system or its data.

In addition, notwithstanding the *UEEA* and similar laws in other countries, parties involved in electronic contracting may wish to agree expressly that certain electronic records are admissible into evidence in any dispute between them regarding the contract or its performance as *prima facie* evidence of the recorded information or certain portions of it. While the effectiveness of such an agreement is uncertain, it is commonly found in EDI agreements.²³⁹

X. CONCLUSION

ELECTRONIC CONTRACTS PRESENT SPECIFIC challenges to the application of traditional contract law principles. Many of the resulting business and legal risks and uncertainties have been addressed by Canadian lawmakers through electronic commerce laws based upon the *UECA* and electronic evidence laws based upon the *UEEA*. Those laws prescribe basic rules regarding the use of electronic communications to form valid and enforceable contracts (including the satisfaction of applicable legal formalities) and the use of electronic records as evidence in legal proceedings.

The basic rules stipulated in the *UECA* and other electronic commerce laws do not resolve all legal issues presented by electronic contracts. Also, differences and inconsistencies between electronic commerce laws in Canada and those in other jurisdictions around the world present additional risks. Accordingly, in many circumstances it will be appropriate and necessary for contracting parties to supplement electronic commerce laws with their own private-ordering rules that address legal and business risks, resolve uncertainties, and incorporate prudent business practices and standards.

Agency Information Circular IC78-10R3, *Books and Records Retention/Destruction*, 5 October 1998; and *Memoranda ET 102, 15.1 and 15.2*.

²³⁹ The Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary published by the Legal and Audit Issues Committee of the Electronic Data Interchange Council of Canada, 1990, contains the following provision:

Each party hereby acknowledges that a copy of the permanent record of the Transaction Log certified in the manner contemplated by this Agreement shall be admissible in any legal, administrative or other proceedings between them as *prima facie* evidence of the accuracy and completeness of its contents in the same manner as an original document in writing, and each party hereby expressly waives any right to object to the introduction of a duly certified permanent copy of the Transaction Log in evidence.

