

Foreign Influences in Canadian Electronic Commerce Legislation

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Electronic commerce is the high point of economic globalization. It is by its nature borderless, universal, ubiquitous.¹ Its principal characteristic is the use of electronic communications systems, mainly the Internet, which gives little or no reliable evidence of the location of the participants. Another important characteristic is the immediacy of communications. A third is the increasing ability to communicate value through these communications, rather than depending on physical delivery of goods or in-person provision of services. Many kinds of value are turning into forms of information, which can be digitized at will.

One result of these features is to make much more difficult than in the past the determination where a particular transaction takes place. The complexity of the physical infrastructure adds to this difficulty. Most participants in Internet commerce gain access to the network through intermediaries, and many businesses that do online business directly rather than over the Net nevertheless use service providers, processing bureaus, encryption agents, and the like, to move their communications along. The Internet itself communicates through “packet switching”, which breaks down messages into small packets and routes them on different paths around the world in whichever way the network finds easiest or least encumbered, putting them together again at the destination.

As a result, any particular transaction may involve multiple agents, sorters, carriers, and other intermediaries, and the communications may

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¹ This is not to say that access to electronic communications is universal. Half the population of the world has not made a telephone call, much less used the Internet. The nature of the communications on the Net is potentially as described, and users cannot tell who has access and who has not.

pass through many different countries, besides those of the businesses that are legally parties to the transaction. The picture is further complicated by the use of the World Wide Web, which permits people around the world to have access to information and to do business with ... a robot, an “electronic agent”, an automated program that receives, processes and sends information without human intervention at the time of the transaction. Robots may make deals with robots.²

Whose laws apply to the transaction, then? What rules govern the validity of the transaction, the determination of performance, the enforcement of penalties? Who governs the incidents of commerce: trade marks, copyright, patents, trade secrets? Who ensures proper conduct, decides what is criminal or acceptable, what is unfair trade, what oppresses the consumer?

The answers to these questions are among the hardest posed by electronic commerce.³ The rules that help decide whose laws apply to international dealings are difficult even in the physical world. They become particularly intractable in cyberspace. One of the traditional methods of avoiding having to answer them is to harmonize the laws of different countries. If the substantive laws are the same, then it matters much less whose laws apply to a particular transaction or a particular dispute.⁴

² The use of automated programs to deal with incoming messages, or even to send them from one party and to process them at the other end, is not unique to the World Wide Web; EDI transactions often have recourse to them. However, the very large numbers of transaction websites, almost all of this are automated, and the large number of individuals who enter transactions with the robots without benefit of prior agreement about the consequences, tend to make the status of the electronic agent a novel legal question.

³ See “Jurisdiction and the Internet - Are Traditional Rules Enough?” by Ogilvy Renault on the Uniform Law Conference of Canada website, <http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm> . [NOTE: the Uniform Law site is bilingual – French versions are on the site for most or all documents cited here.] See also the study by the American Bar Association at <http://www.kentlaw.edu/cyberlaw>.

⁴ It does continue to matter for some important reasons, of course, such as the trustworthiness of the courts that may decide disputes, the enforceability of orders of those courts, accessibility of dispute resolution, the cost of communications, and so on. Delocalizing dispute resolution has produced active recourse to international

What are these substantive laws? In particular, are they satisfactory to handle the kinds of issues that electronic commerce presents? Until recently, it is fair to say that the world's legal systems have by and large not kept up to the technology. They still tend to presume that legal relationships will be created on or evidenced by paper and authenticated with ink signatures. They still look to original documents, though in the digital world, every version of a document is equal, in that copies cannot be distinguished from the version from which it was copied. The language and the concepts cause difficulty in knowing whether current business practices are effective in law and enforceable in court.

Naturally the business people, and later the consumers as well⁵, wanted to see the laws changed to accommodate electronic communications. The first line of attack was the amendment of individual statutes to authorize the new media for their particular purposes. For example, registrations under personal property security laws have been allowed to be done electronically for many years.⁶ Electronic land registration has come later.⁷ Likewise, governments legislated for their own purposes. In Ontario, all the taxation statutes were amended in the

arbitration. E-commerce has stimulated serious interest in taking dispute resolution online. See Christine Hart, "Dispute Avoidance and Dispute Resolution in Electronic Commerce", <http://www.law.ualberta.ca/alri/ulc/current/hart.htm> .

⁵ Electronic communications between businesses date from the 1970s and arguably are an evolution of electric communications that preceded them: telegram, telephone, telex, and so on. The use of computer communications increased the automation of the messages. Electronic data interchange (EDI) grew rapidly in the 1980s, particularly among large businesses. The opening of the Internet to commercial use in the mid-1990s, and the development of the World Wide Web that made its use much more accessible, brought consumers into electronic commerce for the first time (though cross-border transactions through mail-order and later telephone order catalogue sales have been around for much longer.)

⁶ In Ontario, the authority for this is found in the *Electronic Registration Act (Ministry of Consumer and Commercial Relations Statutes) 1991*, S.O. 1991 c.44. Regulations extended the Act to the *Personal Property Security Act* and later the *Repair and Storage Liens Act*.

⁷ In Ontario, the *Land Registration Reform Act* was amended in 1994 for this purpose, though the registration system itself started going live on a county-by-county basis in 1999. See S.O. 1994 c.27 s. 85.

early 1990s to ensure proper authority for electronic handling, storage and reproduction of taxpayers' information.⁸

More comprehensive approaches to internal law reform grew in the 1990s. An early example is Ontario's *Business Registration Reform Act, 1994*⁹ which authorizes regulations to prescribe electronic manners of communicating with government under any business information statute of the government. Other provinces also have this kind of legislation.¹⁰ Similar narrow-focus laws were made in other countries as well.

International efforts at law reform began to take shape about the same time, though they developed slowly. In 1985 the United Nations Commission on International Trade Law (UNCITRAL) first examined the impact of national legal systems on the increasing use of electronic communications in international trade.¹¹ The report urged member countries to examine their own laws and to amend them to accommodate modern communications. Very few accepted the invitation.

During the late 1980s, the initiative was taken by the private sector. The principal users of electronic data interchange developed fairly consistent practices among themselves, in trading partner (or interchange) agreements, and these were standardized on a national scale and in the

⁸ See for example section 93 (6.1 - 6.3) of the *Corporations Tax Act*, R.S.O. 1990 c. C.40, as amended by S.O. 1994, c.14 s. 42(1).

⁹ S.O. 1994 c.32.

¹⁰ See for example the *Business Electronic Filing Act*, S.N.S. 1995-96 c.3; *The Electronic Filing of Information Act*, S.S. 1998 c. E-7.21; the *Business Paper Reduction Act*, S.B.C. 1998 c.26.

¹¹ See "The Legal Aspects of Automatic Data Processing", UN document A/CN.9/254 and "The Legal Value of Computer Records", UN document A/CN.9/265.

early 1990s across national boundaries.¹² A handful of other international initiatives grew up as well.¹³

However, these actions were ultimately considered inadequate, for a number of reasons. For example, some requirements of law as to form could not be derogated from by contract. Commercial parties could not by contract reach all the relevant participants in their activities. Judicial interpretation of statutes and contracts is a very slow, partial and unreliable path to comprehensive reform, and impossible for many countries at the same time.¹⁴ As a result, UNCITRAL returned to the field. In 1992 its Working Group on International Payments began a study of the best legal regime for international uses of electronic communications in business. The group was much influenced by the standard forms of EDI trading partner agreement, and many of the provisions ultimately adopted by UNCITRAL show their roots in a closed system – one in which all of the parties are bound by common contracts and technology – with sophisticated partners. As late as 1994 the outcome of the discussions was seen as a collection of model rules for the use in international EDI.¹⁵ However, the use of electronic communications in commerce was fast broadening as the working group deliberated. As noted earlier, the commercial use of the Web dated from about this time. The final product of this work was the UNCITRAL Model Law on Electronic Commerce, adopted in 1996.¹⁶

Since the Model Law was adopted, UNCITRAL has been refining the work in this area. The working group, now named the Working Group

¹² The Canadian standard was the EDI Council of Canada's *Model Form of Electronic Data Interchange Trading Partner Agreement* (1990). A US model is found at 45 *Business Lawyer* 1645 (1990). International efforts were made through the United Nations' Economic Council for Europe. See a summary of the international picture as of 1993 in A.H. Boss and J.B. Ritter, *Electronic Data Interchange Agreements: A Guide and Sourcebook* (Paris, ICC, 1993).

¹³ For example, the Comité maritime international (CMI) adopted rules in 1990 for international electronic bills of lading, though their use has been sporadic. *CMI Rules for Electronic Bills of Lading* (Paris, CMI).

¹⁴ A.H. Boss, "The Emerging Law of International Electronic Commerce", 6 *Temple Int'l and Comp.L.J.* 293 (1992).

¹⁵ See United Nations Document A/CN.9/WG.IV/WP.62, 20 July 1994.

¹⁶ UN Document A/51/17. <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>

on Electronic Commerce, finished a set of Uniform Rules on electronic signatures in September 2000; these Rules will be presented to the full Commission in June 2001. The working group will meet in March 2001 to consider where it should go from there.

Meanwhile the field has become more crowded. A number of other international bodies, private or public, have been developing rules or standards or model laws or conventions on legal aspects of electronic communications. Without pretending to be exhaustive, one can mention

- the Organization for Economic Cooperation and Development (OECD)¹⁷, which has worked on standards of authentication and consumer protection, among other things;
- the International Chamber of Commerce (ICC)¹⁸, which has developed secure signature standards and electronic versions of its widely-used standard terms for international trade contracts (Incoterms);
- the World Intellectual Property Organization (WIPO)¹⁹, which created two conventions on copyright in data bases in the electronic age and which more recently has developed a popular on-line arbitration system for disputes over Internet domain names;
- the World Trade Organization (WTO)²⁰, which is considering the impact of electronic delivery on its General Agreement on Tariffs and Trade and its General Agreement on Trade in Services²¹; and
- the Hague Conference on Private International Law²², which held a special workshop in Geneva in the fall of 1999 to figure out how to take a share of this topic. (Its long-standing work on the jurisdiction of civil courts and the enforcement of civil judgments has recently started to think about these matters in the context of electronic communications.)

¹⁷ <http://www.oecd.org>

¹⁸ <http://www.iccwbo.org>

¹⁹ <http://www.wipo.org>

²⁰ <http://www.wto.org>

²¹ At least WTO would like to consider these matters, but it has had some difficulty in getting agreement on an agenda, because of the protests that have arisen inside and outside its recent meetings.

²² <http://www.hcch.net>

Further, new international organizations are being created to handle the new issues. The most formal of them is the Internet Corporation for Assigned Names and Numbers (ICANN)²³, which has taken over from a United States government agency the governance of domain names on the Internet.²⁴

As the international efforts developed during the 1990s, domestic lawmakers started to become more systematic in removing legal barriers to the use of electronic communications. They slowly realized that electronic commerce presented common difficulties in many areas, and that piecemeal approaches driven by the needs of a particular interest group or particular government department's programs was in the long term a recipe for fragmentation and frustration of technology and law.

Some of these efforts began earliest in the United States, partly because of the early adoption of electronic technology there, partly because of the existence of a common basis of business law in the Uniform Commercial Code that influenced them to seek out shared principles, partly because the size of the Bar produced a critical mass of people interested in the field—if it was a field!²⁵ In Canada, the Uniform Law Conference of Canada asserted the importance of dealing with this kind of issue at its 1993 meeting²⁶. That meeting launched the Conference's work on electronic evidence, which culminated in the *Electronic Evidence Act*²⁷ in 1998, a statute now enacted federally²⁸ and in two provinces²⁹, with more in the wings³⁰.

²³ <http://www.icann.org>

²⁴ A very important group that does not make law by that name but whose protocols define the Internet itself is the International Engineering Task Force (IETF) (<http://www.ietf.org>), a volunteer body which works on consensus. It has been said that the Internet does not exist, it is merely the result of a collection of protocols (standards) by which computers may communicate with each other.

²⁵ The definitive study of how the US law of electronic commerce influenced and was influenced by international developments is by Professor Amelia Boss, "Electronic Commerce and the Symbiotic Relationship between International and Domestic Law Reform", 72 Tulane L.R. 1931(1998).

²⁶ See "Electronic Data Interchange: Legal Issues for Governments" in the 1993 Proceedings of the Uniform Law Conference of Canada, Appendix G, 198.

²⁷ <http://www.law.ualberta.ca/alri/ulc/acts/eeeact.htm>.

Even before the UN Model Law on Electronic Commerce was adopted, the discussion and drafts at UNCITRAL influenced Canadian law reform. This was due partly to its being almost the only work carried on in the field, partly because of the high quality of the discussions, and partly because of the minimalist approach it took, which made it readily adaptable to a multitude of uses in member states' legal systems. The approach in what was eventually Article 9 of the UN Model Law had a direct impact on drafts of the *Uniform Electronic Commerce Act*.³¹ The discussions of electronic signatures found their way into regulations under Ontario's *Provincial Offences Act* on electronic filing of charges for provincial offences.³²

Once the Model Law was adopted, many countries took it up in earnest. Projects were begun in Canada, the United States, Australia, and Singapore, to mention a few of the early efforts in mainly common law countries. Even without these projects, there was influence. British Columbia amended its *Offences Act* in 1997 to authorize electronic documents and signatures, and used the concepts and to a large extent the language of the Model Law to do so.³³

The direct results of these projects are known. Canada and many other countries have legislation to implement the UN Model Law on

²⁸ Part 3 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c.5. http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-6/C-6_4/C-6_cover-E.html

²⁹ Ontario amended its *Evidence Act* in the *Red Tape Reduction Act 1999*, S.O. 1999 c.12, Schedule B, section 7 (in force June 30, 2000) http://www.ontla.on.ca/Documents/StatusofLegOUT/b011_e.htm. Saskatchewan passed its *Evidence Amendment Act*, Bill 34, in June 2000. <http://www.legassembly.sk.ca/bills/HTML/bill034.htm>

³⁰ Manitoba's bill that will among other things amend its *Evidence Act* is at <http://www.gov.mb.ca/chc/statpub/free/pdf/b31-1s00.pdf>

³¹ The author of this note chaired the working group that developed the Uniform Electronic Commerce Act. The Uniform Act ultimately diverged from the Model Law, but some of the drafts of the Uniform Act show the influence clearly.

³² See O.Reg.497/94, and John D. Gregory, "Electronic Documents in Ontario's Photoradar System", (1995), 6 J.M.V.L. 277.

³³ S.B.C. 1997 c.28 s 13.

Electronic Commerce, usually for domestic as well as international legal communications. Canada has the *Uniform Electronic Commerce Act*, adopted in 1999.³⁴ The United States has the *Uniform Electronic Transactions Act*, also adopted in 1999.³⁵ Australia adopted its *Electronic Transactions Act* for the Commonwealth in 1999, and some states have adopted harmonized legislation in 2000.³⁶ Singapore was first in the world to adopt the Model Law, in its *Electronic Transactions Act* in 1998.³⁷ Many other countries have followed.³⁸

The direct influence of the Model Law is not a surprise. The legislation was designed and marketed for adoption by member states of the United Nations, and it filled a clear need in a flexible and practical way.³⁹ The novel feature of the domestic statutes that implemented the Model Law is the continuing interaction of different legal systems and law reform processes as the statutes were developed. To a significant extent the collaboration of nations that began at UNCITRAL has kept going afterwards.

A number of factors support this new collaboration. One is the common personnel in the international and domestic efforts. Many of the delegates to UNCITRAL were involved in consulting on and drafting the e-commerce legislation in their home states. As the Working Group continued its work on electronic signatures, the meetings provided a forum

³⁴ <http://www.law.ualberta.ca/alri/ulc/current/euecafa.htm>. The UECA has been adopted in Saskatchewan <http://www.legassembly.sk.ca/bills/HTML/bill038.htm> and introduced in Manitoba <http://www.gov.mb.ca/chc/statpub/free/pdf/b31-1s00.pdf>, Ontario <http://www.ontla.on.ca/Documents/documentsindex.htm>, and British Columbia http://www.legis.gov.bc.ca/2000/1st_read/gov32-1.htm.

³⁵ <http://www.law.upenn.edu/bll/ulc/uecicta/eta1299.htm> and for commentary, <http://www.uetaonline.com>

³⁶ <http://www.ag.gov.au/ecommerce> gives legislation and policy sources for Australia.

³⁷ <http://www.cca.gov.sg/eta/index.html>

³⁸ A list of current electronic commerce legislation can be found at the Baker & McKenzie website at <http://www.bmck.com/ecommerce/>

³⁹ See John D. Gregory, "The United Nations Model Law of Electronic Commerce in Canada", (2000), 4 Cdn Int Lawyer 34 and "La Loi type des nations unies sur le commerce électronique", <http://www.interlog.com/~euclidav/loitype.html>.

for discussion of the work being done at home on the Model Law. Drafts and final statutes were exchanged.

Another factor was the desire to keep up with advances in markets and technology, while respecting the impulse to global harmonization that the Model Law itself had been created to promote. The Model Law had not addressed a number of practical issues that many states faced, and its provisions were problematic on some other issues, notably the attribution rules of Article 13.⁴⁰ Sometimes states wanted to go further, such as to develop rules about agencies that certify electronic signatures. As a result, there was much food for conversation at the meetings, and incentive to continue the conversations from home.

A third factor was the nature of electronic communications themselves. It was easier now than in the past to keep in touch, to watch what other countries were doing, thanks to electronic mail and legislative web sites. The Canadian and Australian projects made use of the World Wide Web to post discussion papers and draft documents.⁴¹ The American project got considerable assistance from Internet mailing lists and from web sites; all the drafts appeared on line with discussion documents on the main issues.⁴² The Canadian project was much assisted by a mailing list that included key foreign observers from the United States, the United Kingdom, Australia, New Zealand, Sweden, the EU, and elsewhere. Individual queries, comments and encouragement were also possible as problems arose. In short, the discussions heard many voices.

⁴⁰ Most implementing states have left Article 13 alone, or have adopted only its first two, uncontentious, paragraphs, which say that an electronic document (“data message” in the Model Law) is the act of a person if the person creates it or authorizes someone else to create it. The rules that allow attribution of a document based on the fault of the holder of a signing key have not been so popular, for a number of reasons beyond the scope of this paper.

⁴¹ See the Uniform Law Conference of Canada web site at <http://www.law.ualberta.ca/alri/ulc/eindex.htm>. The working paper there on jurisdiction and the Internet is the single most visited document on the site. See also <http://www.law.gov.au/ecommerce> for much background on the Australian work.

⁴² The drafts of the National Conference of Commissioners on Uniform State Laws are on line at <http://www.law.upenn.edu/bll/ulc/ulc.htm>. The work was supported on the American Bar Association site, through <http://www.abanet.org/buslaw/cyberlaw/home.htm> and privately at a site now known as <http://www.uetaonline.com>.

Finally, the private sector users lobbied for harmonization in implementing the Model Law as well. As its name suggests, the Model Law is only a model, whose provisions are expected to be adapted by countries that incorporate it into their own legal systems. It does not purport to answer every question for every system.⁴³ Certainly in Canada we were frequently urged to pay attention to what was happening in our major trading partners, notably the United States. Recent examples of this pressure are found in the hearings of the Ontario Legislature on the proposed *Electronic Commerce Act 2000*, and in speeches about that bill.⁴⁴

The international influences were widely recognized by those who benefitted from them. The first reading version of the *Singapore Electronic Transactions Act* had a note stating the source of each section, giving credit to the UN, to the American uniform statute, to several U.S. state statutes on matters of digital signatures, and to other sources. A similar document is available for the newer Indian Electronic Commerce bill.⁴⁵

Canada had some special connections that influenced its work. The most important was the institutional and personal connection between the Uniform Law Conference of Canada and the National Commission on Uniform State Laws in the United States. The ULCC's leader on e-commerce issues was present at the meeting where NCCUSL first considered its uniform project, and subsequently attended almost all of the meetings of the Drafting Committee that developed the UETA. The personal links with the chair of that committee dated from an earlier NCCUSL meeting. Some of the participants in the US work were or became members of the US delegation to UNCITRAL, where the Canadian project leaders could meet them. The Chair of the NCCUSL

⁴³ The Guide to Enactment does caution enacting states about going too far afield, however. The minimalist approach is an important feature of the Model Law. Guide, para 13, 29

⁴⁴ See the submission of George Takach to Ontario's Standing Committee on Justice and Social Policy, August 28, 2000, in <http://www.ontla.on.ca/hansard/hansardindex.htm>. For other forums, see Barry Sookman's presentation to the seminar at the University of Toronto on September 7, 2000, at <http://www.innovationlaw.org/pages/Sookman%20E-commerce%20final.ppt>

⁴⁵ See India's *Electronic Commerce Act* bill at <http://commin.nic.in/doc/ecact1.htm>. Singapore's annotated edition is no longer on line.

Drafting Committee attended the meeting of the ULCC when the UECA was adopted.

At home, the main Canadian delegate to UNCITRAL during the Model Law discussions was a key member of the ULCC working group. She brought her connections and her views formed from the international meetings to the work.

What traces did these foreign influences leave on the Canadian legislation? At the general level, they reinforced the working group's decision to keep to minimalist enabling legislation, since our principal contacts were doing the same. They also supported our inclination to deal expressly with some matters only implied in the Model Law, or omitted from it. One of these was the role of consent in electronic communications. The Guide to Enactment of the Model Law says that no one should be compelled by its provisions to use electronic communications.⁴⁶ The Canadian, American and Australian statutes all spell this out, though in slightly different terms.⁴⁷ Another is the special needs of government bodies, for authority to use electronic communications and for control over the format of what comes in to them electronically. Again, all three national models include provisions on the subject, where the Model Law said nothing.⁴⁸ The list of matters excluded from the scope of the statutes has much in common too, though the final picture differed in detail. The Canadian Conference provided a member for a NCCUSL working group on scope and exclusions in the UETA.

The UECA picked up some sections from the UETA that would not have been included without the US influence. The most prominent is UECA section 22 on correcting errors in dealings between individuals and electronic agents (UETA section 10). Another is the limit that documents are not considered capable of being retained if the sender inhibits their

⁴⁶ Guide to Enactment paragraph 43. The Guide, a very useful handbook to the thinking behind the Model Law and its likely operation, is published on paper and electronically with the Model Law itself.

⁴⁷ UECA section 6; UETA section 5; ETA (Australia) repeats the provision in several sections.

⁴⁸ UECA definition of "Government" and sections 7 through 11 and others; UETA sections 17 to 19; Australian ETA sections 5, 6, 9 to 12.

storage or printing. A reciprocal influence is found in UECA section 8 on providing documents to someone. The need for a section on this topic, separate from the section on how to meet a writing requirement electronically, was noted by the Canadian working group and adopted in the US. However, the wording of the applicable test, originally proposed in Canada as “within the control of the addressee”, became in both countries the American choice “capable of being retained” (UETA section 8 “capable of retention”).⁴⁹

The Australian *Electronic Transactions Act* provided several drafting points for the Canadian statute as well. The most important was the treatment of government documents. Australia applied its rules only to documents coming into government electronically; outgoing documents would have to meet the general standards for such communications. Since the reason for special rules was largely to ensure compatibility with existing systems and reliability for government purposes, this limit seemed reasonable. The term “information technology standards” that the UECA applies to such government rules is taken from the Australian statute too.

In addition, the Australians in my view got right the rule about the time of receipt of electronic messages in systems not designated by the recipient for such messages. The Model Law says that such messages are received when they enter an information system controlled by the addressee. This means they are essentially treated the same as those sent to designated systems. The UETA in the US is silent on undesignated systems. The UECA borrowed the Australian concept: the message is presumed received when it enters an information system from which it is accessible to the addressee, and when the addressee becomes aware that it is there. There is no duty to check for electronic legal messages in a system that one has no reason to believe will contain any. However, one cannot ignore a message once one has notice that is available.

⁴⁹ It is arguable that the UETA’s use of “intent to sign” in its definition of electronic signature was due in substantial part to the urgings of the Canadian observer; the phrase is used in the UECA. The parallel statute in the US, the Uniform Computer Information Transactions Act (UCITA), speaks of intent to “authenticate”, a term much less helpful in the context, and even less so in Canada than in the US because we have no equivalent use of that term in other law. Uniformity in the two countries’ e-commerce statutes is a benefit.

When the UECA working group was considering Part Two of the Model Law on the carriage of goods, its work was assisted by the United Kingdom delegate to UNCITRAL, who had been involved in electronic shipping documents for three decades. He was also very helpful when Ontario revised the uniform provisions in its own implementing statute.

Besides the enabling legislation to implement the Model Law, foreign influences have been felt in two closely related areas. The first is the protection of privacy, the second consumer protection.

Privacy laws almost all stem from Guidelines for the use of personal information promulgated by the OECD in 1980. These Guidelines underlie the public sector privacy laws now in force in the federal government and in most provinces; they also shape the rules in Quebec's private sector privacy legislation⁵⁰, and the federal government's recent *Personal Information Protection and Electronic Documents Act*. In addition, the newer privacy legislation is prepared with an eye on the European Union's Data Protection Directive⁵¹, partly out of principle—it states an updated concept of the principles of “data protection”—but mainly out of concern that failure to comply with the EU standards will impede commercial exchanges of information between Europe and Canada.

Protection of the consumer in electronic commerce has been a concern since commerce came to the Internet in 1995. Federal, provincial and territorial consumer measures officials have been developing principles in this field, with the assistance of business and consumer advocates. The work has made long strides on its own, but those involved have kept close track of parallel efforts at the OECD, whose principles have in turn been affected by Canadian thinking.⁵² The Canadian working

⁵⁰ *Act respecting the protection of personal information in the private sector*, S.Q. 1993 c. 17

⁵¹ Directive 95/46/EC, 24 October 1995.
<http://europa.eu.int/scadplus/leg/en/lvb/l14012.htm>

⁵² The OECD held a large-scale ministerial conference on electronic commerce in Ottawa in 1998, at which its principles of consumer protection were further developed. This was mainly a case of an international organization doing its own work, but the advances of the host country made the bilateral influences also

group keeps in touch with the developing EU directive on the subject, and the work of the Federal Trade Commission in the United States.⁵³ Indeed in this field mutual influences extend to administrative cooperation, as Canada and many other countries participated in an FTC-led project to scan the Internet for fraudulent representations in early 2000.

The future of electronic commerce legislation will predictably continue to show these foreign influences. It will prove to have been a precursor to much of our legislative process, rather than an exceptional case. Legal research is increasingly on line, and—as noted at the outset of this paper—when one is on line, one can be anywhere in the world. The resources available to policy developers are vastly greater than they were. The web sites and mailing lists will grow⁵⁴, and e-mail contacts will develop from and turn into personal contacts that spread expertise.

In addition, people will seek out the appropriate influences. In the summer of 2000, the Commonwealth Secretariat constituted two expert working groups to advise Commonwealth Law Ministers on civil and criminal aspects of electronic communications. The work is conceived especially to benefit smaller countries without the policy development resources to make the rules up on their own. Building an appropriate legal framework can help reduce the disparities in accessibility of electronic communications in general.

Canada chaired one group and was active on the other. Our knowledge, acquired from the international sources discussed in this paper as well as from internal work and technical experience, is actively solicited to become a foreign influence on other nations' electronic commerce legislation.

important in this field. Its guidelines are at <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm>.

⁵³ For the FTC, see <http://www.ftc.gov/opa/2000/09/gobalcommfin.htm> and for the EU see the recent comprehensive report at http://europa.eu.int/comm/dgs/health_consumer/library/pub/cv/cv992/cv992-07_en.html. These principles will not come as a surprise to anyone familiar with the Canadian federal-provincial-territorial work with businesses and consumers: see <http://strategis.ic.gc.ca/SSG/ca01180e.html>. Compare the American Bar Association's guidelines at <http://www.safeshopping.com>

⁵⁴ A comprehensive list of legal mailing lists ("Lyo's lists") is found at <http://www.lib.uchicago.edu/~llou/lawlists/info.html>

This is of course a promise, not a threat to anyone's legal traditions, economy, or political culture. The ubiquity of electronic communications gives everyone a voice in the dialogue on law. The ability to join the conversation is inexpensive. The effect of the multiple voices will be positive.

[September 2000]