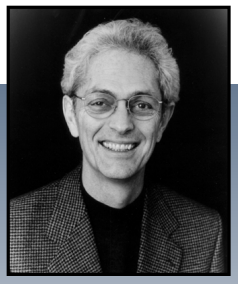

Canada gets its e-Acts together

by Robert C. Worthington

For the world's second or third (depending upon who you talk to) most wired nation in the world, Canada is not doing too badly in e-commerce legislation. We now have provincial/territorial legislation in all of Canada, almost all of it quite similar in nature (Quebec excepted). We also have federal legislation in place to help fill in the gaps in provincial laws, which, in the area of protection of personal privacy seems to annoy provincial legislators.

Provincially (Quebec in part excepted), we have the *Electronic Commerce Acts*, almost all based upon the United Nations' *Model Law on Electronic Commerce*, developed by the United Nations Commission on International Trade Law (UNCITRAL). These provincial statutes, essentially designed to enable e-commerce to work legally, are all quite similar but not identical. Some provinces have made changes, so it is critical to ensure you are using your own province's statute.

The Acts are "technology neutral," meaning the laws do not specify which technology is to be used, but instead tells the courts what to look at to determine if the particular system meets the requirements. The Acts are also "minimalist" and "enabling," meaning the laws merely describe the standards to be met while allowing flexibility in the manner that the standard is achieved. The Acts also preserve freedom of choice in the method of contracting, by requiring any person who wants to electronically contract to consent, expressly or impliedly, to using electronic media to form legally binding agreements.

The Acts are binding upon the Crown, but allow the Crown to specify how it will accept e-filing, thus allowing government departments some control over when and how this electronic revolution unfolds for them.

Perhaps the hardest parts of these Acts, in practice, will be the issues of: 1) consent to e-contracting (especially in the area of e-tendering where only e-versions of the invitation/request and the bid are allowed); 2) when electronic messages are deemed received (when an electronic message becomes capable of being retrieved, not when the recipient becomes aware of the message); and, 3) the requirements for proving an electronically stored document is an acceptable document to the court (in the Act's words, when "…there exists a reliable assurance as to the integrity of the information…").

Regarding consenting to the use of electronic media, the Acts state the consent may be *expressed* (wherein the user clicks on the "I agree" icon) or it may be *implied* (wherein the user initially contacts the other party via electronic media). But whether an Owner issuing an e-invitation or e-request can require e-bidding only is still a question, especially in public tendering where there may be an implied obligation to allow the "public" to bid.

Regarding the "deemed receipt" rules for electronic messages, the legislators seem to feel electronic messages are almost instantaneous and are therefore "received" as soon as they are capable of being retrieved and downloaded. In those situations where time of receipt is critical (eg. bid closing times), Owners will have to decide on how this all will work in practice and will have to plan for some last minute rushed activity at bid closing time to be able to *prove* when bids were received.

Regarding the proof of integrity of the stored document, we don't know *exactly* what the court will want. The Acts speak of "reliable" and "accurate representation" but what those mean in practice is still uncertain.

E-contracting, involving electronic agents (i.e., computers) accepting offers without human involvement is also enabled under these Acts, but will only be valid and enforceable if the system allows for correction of "material errors." How that will unfold may be problematic for such things as competitive bids, which are irrevocable and unchangeable by the bidder after close of bidding.

Federally, we have the *Personal Information Protection and Electronic Documents Act* (*PIPED Act*). The second part of the Act deals with electronic documents and does essentiality the same things as the provincial Acts (i.e., enable e-commerce to function legally) for matters under federal jurisdiction.

Unfortunately, neither the federal nor provincial/territorial legislation deals directly with the scourge of the Internet – spam! Unlike our southern neighbours who are getting increasingly angry at the trash filling up their email and are rushing into new systems for blocking spam and fining spammers, our politicians are forming committees to examine the issue. So don't hold your breath waiting for a home-grown solution to that one.

Also unfortunately, in the area of protection of personal privacy, the federal solution (Part I of the *PIPED Act*) and the provincial solutions (so far) are in conflict. The federal government went wide and long while the provinces (or some of them) tried narrow and short … on details, coverage, and, most especially, on penalties for violations of personal privacy. Another 'neverendum' in the works!

Nonetheless, in pure e-commerce, Canadians have largely sensible rules from both levels of government and the stage has been set for the e-revolution. And so far, even judges are in sync. It looks like a smooth ride ahead.

Now, if we can just find time to do actual work, in between deleting spam and replying to all those cc: emails.

Next time, back to the Courts' side of the law, where some interesting cases have recently changed the tendering and construction contracting landscape…again!

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