

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

**JURISDICTION AND CONSUMER PROTECTION
IN ELECTRONIC COMMERCE PROJECT**

REPORT OF THE WORKING GROUP

**Fredericton, NB
August 10-14, 2003**

Report of the Working Group

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BACKGROUND

[1] The need to address Internet jurisdictional issues in relation to consumer matters was recognized by the Uniform Law Conference of Canada. In 2001, the Conference and the Consumer Measures Committee (“CMC”) co-sponsored two significant research papers on the subject.¹

[2] A ULCC working group was established to examine legislative options for addressing Internet jurisdictional issues and to work with CMC in addressing Internet jurisdictional issues in relation to consumer matters. In November 2001, the ULCC Working Group formed a joint working group with members of the CMC (the "Joint Working Group").

[3] At its 2002 annual meeting in Yellowknife, NWT, the Conference considered a Consultation Paper prepared by the Joint Working Group. The paper included draft rules that address both:

- (a) which court has jurisdiction to hear the dispute (choice of forum); and
- (b) which province or territory’s law governs the resolution of the dispute (choice of law).

[4] Following discussion, the Conference resolved that:

- (a) the Consultation Paper be adopted for the purposes of consultations over the next year; and
- (b) that a draft Act and commentaries be prepared for consideration of the Conference at its 2003 meeting.

OVERVIEW OF ACTIVITIES

[5] The 2002-2003 ULCC Working Group was composed of Frédérique Sabourin, Natalie Giassa, Peter Lown, Tim Rattenbury, Hélène Yaremko-Jarvis, John Lee, Lynn Romeo and Karen Pflanzner.

¹ Geist, Michael. “Is There A There There? Toward Greater Certainty for Internet Jurisdiction.” 2001. Uniform Law Conference of Canada. Available online at <http://www.ulcc.ca/en/cls/index.cfm?sec=4>;

Tasse, Roger, O.C., Q.C. “Online Consumer Protection: A Study on Regulatory Jurisdiction in Canada.” Maxime Faille, Gowling Lafleur Henderson LLP, July 2001. Uniform Law Conference of Canada. Available online at <http://www.ulcc.ca/en/cls/index.cfm?sec=4>.

I. Consultation Process and Summary of Responses

[6] In accordance with the direction of the Conference, the Joint Working Group continued to consult with business and consumer groups, as well as the legal community, in the fall of 2002. The Joint Working Group received comments from a number of business and consumer organizations.

[7] For the most part, business organizations were generally opposed to the proposal, preferring an approach that provides for freedom to contract, self-regulation, and a reduced amount of multi-jurisdictional compliance. On the other hand, consumer organizations were in favour of the proposed rules, but some expressed a preference to see even stronger jurisdiction of destination rules.

[8] The Joint Working Group Co-chairs, Karen Pflanzner and Lynn Romeo, presented the Consultation Paper to the Deputy Ministers Responsible for Consumer Affairs at their meeting in Winnipeg in November 2002.

[9] The Deputies approved the draft rules and asked the Joint Working Group to follow up with the three major stakeholders who did not respond to the initial Consultation Paper or to a further formal request for responses. The three business groups were the Retail Council of Canada, the Canadian Marketing Association and the Canadian Federation of Independent Business.

[10] In February 2003, the Joint Working Group Co-chairs and representatives from the federal government and Ontario met with representatives from the three groups who expressed significant opposition to the proposed rules. Although the Joint Working Group had anticipated this opposition and the arguments that would be made, it became very clear during the meeting that these business groups were strongly opposed to the proposed rules.

[11] The Joint Working Group Co-chairs will be providing a summary report of the main comments received from respondents at the August meeting of the ULCC in Fredericton. In addition, copies of all responses received will be available for consideration at the August 2003 meeting.

[12] The Deputy Ministers Responsible for Consumer Affairs have been informed of this opposition and have directed CMC to report back to the Deputies following the August meeting of the ULCC in Fredericton.

II. Draft Act and Commentaries

[13] While the additional consultation process and CMC reporting process was ongoing, the Joint Working Group continued to work on the proposed rules. Between September 2002 and June 2003, the Joint Working Group held a series of conference calls with a view to completing its discussions on the matters to be dealt with in the draft act and commentaries. In particular, the rules were amended to take into account a number of comments made by stakeholders during the main consultation process.

[14] Revisions to the proposed rules presented to the Conference in August 2002 are highlighted on Appendix I attached to this report. The main revisions are:

- (a) clarifying that the choice of forum rule governs the venue of the proceedings;
- (b) making minor amendments for clarification and consistency;
- (c) balancing the interests of consumers and vendors in both online/distant selling transactions and offline transactions. The rules are intended to provide consumers with the protection of the mandatory provisions of their consumer laws in certain circumstances. The 2002 rules required that, in addition to being solicited in the consumer's jurisdiction, the consumer must have "*taken all necessary steps for the formation of the consumer contract in the consumer's jurisdiction.*" However, in course of considering the revised rules, the Joint Working Group concluded that:
 - on the one hand, including the "necessary steps clause" would impose a burden on the consumer in online and distant selling transactions to establish that the necessary steps for contract formation were taken in the consumer's jurisdiction;
 - on the other hand, deleting the clause would likely be unduly harsh to vendors in the offline environment as consumers could claim the protection of their own laws even when traveling and making purchases out of their jurisdiction.

Based on this, the rules have been revised to delete the necessary steps clause and to add a section providing that the rules do not apply to contracts concluded when the vendor and the consumer are in each other's presence in the vendor's jurisdiction;

- (d) clarifying that the onus is on the vendor to show that it took reasonable steps to avoid contracting in the consumer's jurisdiction; and

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- (e) clarifying that each jurisdiction should determine what definitions are required for consistency with applicable consumer protection and related legislation.

[15] The Joint Working Group also considered what form the draft Act should take. Consideration was given to including the provisions by way of amendment to the *Uniform Court Jurisdiction and Proceedings Transfer Act*. This approach appeared problematic for several reasons, including:

- (a) consumer contracts are defined in that Act, whereas the proposed rules provide that each jurisdiction will determine what definitions are required for consistency with applicable consumer protection and related legislation. This is the same approach followed by CMC in the Internet Sales Contract Harmonization Template;
- (b) the Act does not deal with the Internet which is a key element of the proposed rules; and
- (c) the choice of law rules would not fall within the scope of the Act and would be need to be dealt with separately.

[16] In addition, the Joint Working Group noted that only three jurisdictions have enacted the *Uniform Court Jurisdiction and Proceedings Transfer Act* to date and none of these jurisdictions have proclaimed the Act . In the circumstances, jurisdictions may be more likely to enact rules that are presented in a consumer-focused form, particularly if the Ministers Responsible for Consumer Affairs eventually approve the rules. The Joint Working Group therefore recommends proceeding by way of stand-alone provisions to be adopted in each jurisdiction's consumer protection legislation. This is the same approach followed by the Conference for the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*.

[17] Based on the assumption that the Conference will want to proceed by way of uniform legislation to be added as a part to each jurisdiction's consumer protection legislation, the Working Group has prepared a preliminary draft *Uniform Jurisdiction and Choice of Law Rules in Consumer Contracts Act*. A copy of draft and commentaries is attached as Appendix II to this report. The draft act is submitted for consideration purposes and is not intended to foreclose or limit discussion on the issues raised above or any other questions that may be raised.

[18] Subject to modifications arising from the Conference's discussion and deliberations with respect to above-noted issues, the preliminary draft will need to be reviewed and revised by legislative drafters in collaboration with the members of the Joint Working Group.

RECOMMENDATION AND NEXT STEPS

[19] The Working Group seeks guidance from the Conference on the draft act and commentaries and, in particular, recommends the adoption of the draft *Uniform Jurisdiction and Choice of Law Rules in Consumer Contracts Act* in principle with provision for circulating a revised version to its members for comment and further drafting suggestions before finalization.

[20] The Working Group also seeks guidance from the Conference on its continued participation in the ULCC/CMC Joint Working Group. In this regard, the Joint Working Group has had preliminary discussions regarding alternative dispute resolution and the enforcement issues raised by Ontario at the 2002 Annual Meeting in Yellowknife respecting consumer concerns with the *Uniform Enforcement Acts* and the *Uniform Court Jurisdiction and Proceedings Transfer Act*, but has not had an opportunity to fully address these matters. It is recommended that the Conference direct the Working Group to study these matters and provide a report for consideration at the 2004 Annual Meeting.

Appendix I to the Report of the Working Group

August 2003

Rules governing Choice of Forum in consumer contracts

[1] This rule would be used to determine ~~when a~~ in which courts the parties to a consumer contract may bring proceedings when may assert jurisdiction to hear a dispute ~~arising arises~~ in respect of a consumer contract:

1. In circumstances where :

- (a) subject to section 3, the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor ~~vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction~~; or
- (b) the consumer's order was received by the vendor or its agent in the consumer's jurisdiction; or
- (c) the consumer was induced by the vendor or its agent to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor or its agent;

the consumer has the option to bring proceedings against the vendor either in the courts of consumer's jurisdiction or in the courts of the vendor's jurisdiction.

2. For the purposes of subsection 1(a), a consumer contract is deemed to have resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor, unless if a the vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with consumers resident in a particular that jurisdiction, ~~it is deemed not to have solicited business in that jurisdiction.~~

3. Subsection 1(a) does not apply where the vendor or its agent and the consumer are in the presence of each other in the vendor's jurisdiction when the contract was concluded.

3.3.4. A vendor may bring proceedings against the consumer only in the courts of the consumer's jurisdiction.

45. The provisions of section 1 may be varied by agreement only if the agreement:

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- (a) is entered into after the dispute has arisen; or
- (b) allows the consumer to bring proceedings in courts other than those provided for in section 1.

Rules governing Choice of Law in consumer contracts

[2] This rule would be used to determine which jurisdiction's laws should apply to determine the rules applicable to a dispute in respect of a consumer contract.

1. The parties to a consumer contract may agree that the law of a particular jurisdiction will apply to the consumer contract.
2. No agreement as to the law applicable to the consumer contract will deprive a consumer of the protection to which he or she is entitled under the law of the consumer's jurisdiction provided that:

- (a) subject to section 5, the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor ~~vendor and the consumer took all the necessary steps for the formation of the consumer contract in the consumer's jurisdiction~~; or
- (b) the consumer's order was received by the vendor or its agent in the consumer's jurisdiction; or
- (c) the consumer was induced by the vendor or its agent to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor or its agent.

(Note: This provision recognizes that the parties cannot contract out of the essential elements of a consumer contract. Similarly, parts of the process of forming and enforcing a consumer contract may be essential. The appropriateness of contracting out of this process by way of mediation or dispute resolution provisions in consumer contracts should be addressed in the future.)

3. If there is no agreement as to the applicable law in a consumer contract, the law of the consumer's jurisdiction shall apply provided that at least one of the conditions set out in section 2 is met.

4. For the purposes of subsection 2(a), a consumer contract is deemed to have resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor unless the ~~if a~~ vendor clearly demonstrates that it took

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reasonable steps to avoid concluding contracts with consumers resident in a ~~particular that jurisdiction, it is deemed not to have solicited business in that jurisdiction.~~

5. Subsection 2(a) does not apply where the vendor or its agent and the consumer are in the presence of each other in the vendor's jurisdiction when the contract was concluded.

Definition of "consumer contract"

[3] For consistency with applicable consumer protection and related legislation each jurisdiction will determine what definitions are required. This is the same approach followed by CMC in the Internet Sales Contract Harmonization Template.