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## **“JUST CLICK HERE”: A BRIEF GLANCE AT ABSURD ELECTRONIC CONTRACTS AND THE LAW FAILING TO PROTECT CONSUMERS**

MIKE BEISHUIZEN<sup>†</sup>

### **ABSTRACT**

*As e-commerce explodes around the world, consumers' rights have been left behind. Before the completion of virtually every transaction on the Internet, the onus is placed on consumers to read and agree to an onslaught of terms and conditions. Often hidden in the middle of this extremely lengthy list of terms are massive exemption and limitation of liability clauses that deny consumers most if not all of their rights as "equal" trading partners. The common law principle that all onerous clauses in a contract need to be brought to the attention of the consumer for them to be binding seems to have been lost with the invention of the "click here to agree" button for signing online contracts. As the courts in Canada have not provided clear guidance on this issue thus far, other means must be pursued in order to protect consumers from the near-tyrannical control of unencumbered electronic standard form contracts in e-commerce. This paper will describe the principle of sufficiency of notice as it applies to paper contracts, and then contrast it with the newer jurisprudence that has refused to apply the principle to electronic contracts. The reasons for the refusal will be explored, followed by an examination of why the principle of sufficiency of notice needs to be applied and strengthened to respond to the increasingly onerous provisions hidden in electronic contracts. Finally, some other options for achieving the goal of consumer protection from hidden onerous clauses will be briefly explored. These other options include introducing stiffer consumer protection legislation domestically, the creation of international treaties, developing voluntary standards of contracting, and relying on Internet self-regulation.*

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## I. THE PRINCIPLE OF SUFFICIENCY OF NOTICE HAS NOT BEEN APPLIED TO ELECTRONIC CONTRACTS

### 1. Paper Contracts

The basic rule in analyzing the legal force of any contract is that if the parties signed it, they will be bound by it.<sup>1</sup> In the widely accepted case of *L'Estrange v. F. Graucob Ltd.*, Lord Scrutton stated that:

[W]hen a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.<sup>2</sup>

The potential for misrepresentation is far greater in standard form contracts since there is generally no negotiation or discussion of the terms between the parties prior to signing.

Canadian courts have been open to finding misrepresentations in standard form contracts. Professor Waddams of the University of Toronto stated:

[Several cases subsequent to *L'Estrange*] suggest that there is a special onus on the supplier to point out any terms in a printed form which differ from what the consumer might reasonably expect. If he fails to do so, he will be guilty of a “misrepresentation by omission”, and the court will strike down clauses which “differ from the ordinary understanding of mankind” or (and sometimes this is the same thing) clauses which are “unreasonable or oppressive”.<sup>3</sup>

The Ontario Court of Appeal explicitly approved this statement of the law in *Tilden-Rent-A-Car Co. v. Clendenning*.<sup>4</sup> In addition, Dubin J.A., speaking for the majority of the Court in *Tilden*, elaborated upon the previous test by concluding that:

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<sup>1</sup> *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.).

<sup>2</sup> *Ibid.* at 403.

<sup>3</sup> Steven Waddams, comment, (1971) 49 Can. Bar Rev. 578 at 590, cited in *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), 18 O.R. (2d) 601 (C.A.) [*Tilden* cited to D.L.R.].

<sup>4</sup> *Tilden*, *supra* note 3.

In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.<sup>5</sup>

Since businesses should know that consumers rarely read part or all of a contract,<sup>6</sup> this rule basically means that onerous terms in standard form contracts will not be binding unless reasonable measures are taken to bring them to the attention of the consumer. The decision in *Tilden* has been generally accepted by courts in most Canadian jurisdictions,<sup>7</sup> thus bringing Canadian common law in line with previous British jurisprudence.<sup>8</sup> *Tilden* has not been overruled and is still an accurate statement of the law in Canada today for standard form paper contracts. However, the rule has not been applied to electronic contracts in Canada thus far.

## 2. Electronic Contracts

### i) *Rudder v. Microsoft*

In the 1999 decision of *Rudder v. Microsoft*,<sup>9</sup> consumers in Ontario attempted to bring a class action lawsuit against Microsoft Network on behalf of approximately 89,000 Canadians, claiming that Microsoft had

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<sup>5</sup> *Tilden*, *supra* note 3, at 408-409.

<sup>6</sup> See *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61 (H.L.) at 76, where Lord Reid stated, in reference to standard form contracts, that "the customer has no time to read them, and, if he did read them, he would probably not understand them."

<sup>7</sup> See *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24 (C.A.), 24 C.C.L.T. 6 (B.C.C.A.) [*Delaney*]; see also *Toronto Blue Jays Baseball Club v. John Doe* (1992), 9 O.R. (3d) 622 (Gen. Div.).

<sup>8</sup> See *Thornton v. Shoe Lane Parking Ltd.*, [1971] 2 Q.B. 163, [1971] 1 All E.R. 686 (C.A.); see also *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433, [1988] 1 All E.R. 348 (C.A.).

<sup>9</sup> [1999] O.J. No. 3778 (Sup. Ct.).

misappropriated their funds. The Ontario Superior Court dismissed the case as being out of their jurisdiction by upholding the forum selection and choice of law clause in the electronically-signed, “click here to agree”-type Microsoft Network account-opening agreement. The fairly typical clause that Rudder failed notice stated:

This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership.<sup>10</sup>

The Court found that even though the clause was not particularly well distinguished from the rest of the contract it was not equivalent to “fine print” in a paper contract, and therefore should be given effect. Perhaps to justify this slight deviation in the law, Winkler J. then stated that “forum selection clauses are generally treated with a measure of deference by Canadian courts.”<sup>11</sup> At best, *Rudder* does not reject the application of *Tilden* in electronic contracts, it merely carves out an exception for forum selection and choice of law clauses.

However, the decision in *Rudder* is particularly troubling beyond this simple exception. Winkler J. ruled that there was sufficient notice of terms because “all of the terms of the agreement [were] displayed in the same format...in other words, there [was] no *fine print* as that term would be defined in a written document.” [emphasis added]<sup>12</sup> Winkler J. seems to have missed the point that the size constraints of paper contracts that produce the need for fine print are inherently not present in electronic contracts. This is irrelevant for notice, however, as the *Tilden* rule requires more than simply *not* placing onerous terms in fine print; it requires that companies take “reasonable measures to draw such terms to the attention of the other party.”<sup>13</sup> To emphasize the difference between these two concepts, it is useful to examine the Microsoft Network agreement as it exists today.

To sign up for a Microsoft Network account, which is mandatory for using a Hotmail account, users are required to consent to four contrac-

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<sup>10</sup> *Ibid.* at para. 5.

<sup>11</sup> *Supra* note 9 at para. 8.

<sup>12</sup> *Supra* note 9 at para. 14.

<sup>13</sup> *Supra* note 3 at 408-409.

tual agreements.<sup>14</sup> These agreements form a combined 52 pages of terms and conditions. Among these terms is a condition that “it is the express will of the parties that this agreement and all related documents have been drawn up in English”; another that states “YOU SPECIFICALLY AGREE THAT MICROSOFT SHALL NOT BE RESPONSIBLE FOR UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS OR DATA”. Finally, of course, there is the all-encompassing exemption of liability clause: “IN NO EVENT SHALL MICROSOFT AND/OR ITS SUPPLIERS BE LIABLE FOR...[followed by 22 lines totally exempting Microsoft from any conceivable liability, whatsoever].”<sup>15</sup>

Of the approximately 2,100 printed lines in these combined agreements, 115 lines are in capital letters and 18 are in bold font. Interestingly enough, essentially the same forum selection and choice of law clause from *Rudder* is found *inconspicuously in the middle* of two of the four agreements, both times in regular font. No bold font, no capital letters. Surely this is not adequate notice of a clause that in essence denies consumers the practical right to sue Microsoft. Yet the *Rudder* decision suggests that there is sufficient notice for this and every other clause in the 52-page agreement simply because there are no terms printed in less than 12-point font.

ii) *Kanitz et al. v. Rogers Cable Inc.*

The reasoning in *Rudder* was subsequently followed and expanded upon by the same Ontario Superior Court in *Kanitz et al. v. Rogers Cable Inc.*<sup>16</sup> In this case the Court enforced an arbitration clause that was electronically added to a contract after it was signed. The clause effectively denied consumers the right to pursue a class action lawsuit against Rogers. In his reasons, Nordheimer J. also distinguished the *Tilden* rule as only applying to fine print, stating that the arbitration clause was “easily located by anyone who wishes to take the time to scroll through the

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<sup>14</sup> See online: Microsoft Network <<http://registernet.passport.net>>. These agreements are the Hotmail Service Agreement, MSN Privacy Statement, Passport Terms of Use, and the Passport Statement of Privacy.

<sup>15</sup> “Hotmail Service Agreement,” online: Microsoft Network <[https://registernet.passport.net/images/HMSA\\_1033.html](https://registernet.passport.net/images/HMSA_1033.html)>.

<sup>16</sup> [2002] O.J. No. 665, 58 O.R. (3d) 299 (Sup. Ct.) [*Kanitz*].

document”, and that it was “therefore not at all equivalent to the fine print on the back of the rent-a-car contract in the *Tilden* case.”<sup>17</sup>

What is more disturbing about *Kanitz*, however, is that Nordheimer J. found that consumers had been given adequate notice of the after-added clause simply because the original contract allowed Rogers to “change, modify, add or remove portions of the agreement”,<sup>18</sup> and because notice that amendments were made had been given to consumers. This notice consisted of a posted a message on the Rogers website and an email to its customers saying that Rogers had changed the terms of the agreement. Neither notice gave any further details as to how the agreement had been altered. Nordheimer J. stated that this constituted sufficient notice, even though it required consumers to click through five screens from the Rogers homepage and re-read the entire amended agreement in an attempt to figure out what terms had changed.

This poses a tremendous burden on consumers, as the same Rogers End User Agreement that was in contention in *Kanitz* is a whopping ten single-spaced pages in length today.<sup>19</sup> Considering that the average consumer has ongoing contracts with one or two email providers, their Internet service provider, telephone provider, credit card companies, banks, lease companies and a whole host of other companies, requiring them to re-read ten or 52 page-long agreements every time a change has been made to any of them is impractical, unrealistic and inequitable. The far more equitable alternative would be to simply require that companies provide consumers with a list of the exact amendments that they have made, drawing special attention to any onerous amendments.

*Rudder* and *Kanitz* are the only two cases in Canada thus far that have addressed the sufficiency of notice in electronic contracts. Both of the decisions have been adopted for peripheral reasons in other judgments;<sup>20</sup> however, due to the limited jurisdictional and precedential value of Ontario Superior Court decisions, this is not considered to be settled law in Canada. In contrast, the law is more settled in the United States.

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<sup>17</sup> *Ibid.* at para. 31.

<sup>18</sup> *Ibid.* at para. 18.

<sup>19</sup> “End User Agreement,” online: Rogers Yahoo! Hi-Speed Internet Services <[http://na.edit.client.yahoo.com/rogers/show\\_static?.form=eua](http://na.edit.client.yahoo.com/rogers/show_static?.form=eua)>.

<sup>20</sup> See *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 1961 at para. 28 (C.A.), 2004 BCCA 473; see also *Noble v. Noble*, [2002] O.J. No. 4996 at Para. 23 (Sup. Ct.).

iii) *American Jurisprudence*

The common law in the United States contains a rule similar to that in *Tilden*, although not as stringent, which requires that onerous clauses be “reasonably communicated” to consumers.<sup>21</sup> However, the same dismissal of this requirement in electronic contracts as seen in Canada is also seen in American jurisprudence. The D.C. Superior Court in *Forrest v. Verizon Communications*<sup>22</sup> decided that there was sufficient notice of a forum selection clause that was written in regular font in the middle of a 13-page agreement. The Court determined that adequate notice had been given simply because at the top of the agreement Verizon had written “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY.”<sup>23</sup> This decision is probably attributable to the weaker American notice requirement. For example, a similarly-worded paper ticket stating, “IMPORTANT PLEASE READ FOLLOWING TERMS OF PASSAGE CONTRACT” has also been found to adequately notify passengers of onerous terms in a shipping company’s paper-based agreement.<sup>24</sup>

Although several courts have hesitantly refused to enforce shrink-wrap agreements<sup>25</sup> in the United States,<sup>26</sup> none so far has refused to acknowledge terms in an electronic contract because of the lack of notice.<sup>27</sup> Therefore, just like in *Rudder* and *Kanitz* in Canada, a distinction

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<sup>21</sup> See *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7 (2d Cir. 1995); see also *Lieb v. Royal Caribbean Cruise Line, Inc.*, 645 F. Supp. 232, 234 (S.D.N.Y. 1986); see also *Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 732 A.2d 528 (App. Div. 1999), where in a case almost identical in facts and outcome to *Rudder*, *supra* note 9, the forum selection clause in Microsoft Networks’s User Agreement was deemed to have been reasonably communicated.

<sup>22</sup> 805 A.2d 1007, 2002 D.C. App. LEXIS 509 (D.C. Super. Ct.) [*Verizon* cited to A.2d].

<sup>23</sup> *Ibid.* at 1010.

<sup>24</sup> *Melnik v. Cunard Line Ltd.*, 875 F. Supp. 103, 107 (N.D.N.Y. 1994); see also *Cooper v. Carnival Cruise Lines*, 1992 U.S. Dist. LEXIS 8054, 1992 WL 137012 at 2 (S.D.N.Y. 1992).

<sup>25</sup> Kevin W. Grierson, “Enforceability of “clickwrap” or “shrinkwrap” agreements common in computer software, hardware and internet transactions” 106 A.L.R.(5th) 309 at footnote 2 defines this term: “A “shrinkwrap” agreement consists of written conditions on a card or paper sheet which appears when the user opens packaged hardware or software, which card or sheet purports to condition use of the hardware or software on the user’s implicit agreement to abide by the conditions specified thereon.”

<sup>26</sup> See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 41 U.C.C. Rep. Serv. 2d 1059 (D. Kan. 2000); see also *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 22 U.C.C. Rep. Serv. 2d 70 (D. Ariz. 1993).

<sup>27</sup> See Grierson, *supra* note 25 for a thorough list of American cases that have shown sufficient notice in “clickwrap” agreements.



has been drawn in the United States between notice in paper contracts and notice in electronic ones. An accurate description of the current law of electronic contracts in the United States is stated in *Verizon*, which notes that “absent fraud or mistake, one who signs [an electronic] contract is bound by a contract which he has an opportunity to read whether he does so or not.”<sup>28</sup>

### 3. Unconscionability

It is important to note that consumers are still protected from exceedingly onerous terms in electronic standard form contracts by the doctrine of substantive unconscionability. In *Robet v. Versus Brokerage Services Inc. (c.o.b. E\*Trade Canada)*,<sup>29</sup> consumers lost money because of an error in E-Trade’s online trading system. The defendant claimed that their extremely onerous electronic contract absolved them of liability. Using the principles set out in *Tilden*, the plaintiff claimed that there was a lack of sufficient notice of the relevant liability exemption clauses. The Ontario Superior Court found for the plaintiff. However, in doing so it did not refer to either the principle of sufficiency of notice or the *Tilden* decision in its reasoning. In fact, the Court was extremely vague in describing why it did not allow the exclusion clauses to take effect.

The Court seemed to base its decision on the utter unreasonableness of some of the terms in the contract. Wilkins J. notes sarcastically that “the wording of clause 16(h) of the agreement is almost such as to constitute the creation of a license fee for the defendant to be reckless in its provision of services.”<sup>30</sup> He then goes on to state that “the difficulty I have with the case at bar, is that the wording of the contractual arrangement would appear to be broad enough to encompass almost any form of activity which might be engaged in by the defendant which, in effect, could defeat the very purpose and intention of the overall relationship between the parties.”<sup>31</sup> According to this reasoning, it seems that Wilkins J.’s decision is based more on a vague application of the

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<sup>28</sup> *Nickens v. Labor Agency of Metro. Washington*, 600 A.2d 813, 817 n.2 (D.C. 1991), as cited in *supra* note 22 at 1010.

<sup>29</sup> [2001] O.J. No. 1341, [2001] O.T.C. 232 (Sup. Ct.) [*Robet*].

<sup>30</sup> *Ibid.* at para. 58.

<sup>31</sup> *Ibid.* at para. 61.

doctrine of substantive unconscionability<sup>32</sup> than on the very different principle of sufficiency of notice that was advanced by *Tilden*.<sup>33</sup> Soon after the *Robet* decision, in 2002 the California District Court explicitly found substantive unconscionability in the electronically-signed contract in *Comb v. Paypal, Inc.*<sup>34</sup>

The Court in *Comb* found that an arbitration clause that was added to the agreement after it was signed was substantively unconscionable. The Court stated that “although it is true that forum selection clauses generally are presumed *prima facie* valid, a forum selection clause may be unconscionable if the “place or manner” in which arbitration is to occur is unreasonable taking into account “the respective circumstances of the parties.”<sup>35</sup> After finding that the arbitration clause was unconscionable, the Court found it unnecessary to address the issue of whether the clause was sufficiently brought to the plaintiff’s attention. Regardless, the decisions in both *Robet* and *Comb* serve to demarcate the outer limits of onerous terms that will be allowed in electronic contracts through the doctrine of unconscionability and without reference to the principle of sufficiency of notice.

## II. WHY THE PRINCIPLE OF SUFFICIENCY OF NOTICE HAS NOT BEEN APPLIED TO ELECTRONIC CONTRACTS

There are three main reasons why the principle of sufficiency of notice has not been applied to electronic contracts in Canada so far. First, there is an erroneous assumption that consumers have more time to read the contents of contracts when they are displayed on their home computers. Second, courts in Canada have also erroneously confined the principle of sufficiency of notice to contracts with fine print. And third, none of

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<sup>32</sup> See *Fraser Jewellers (1982) Ltd. V. Dominion Electric Protection Co.* (1997), 148 D.L.R. (4<sup>th</sup>) 496 (Ont. C.A.) for an application of the doctrine of unconscionability in a similar fact situation.

<sup>33</sup> See *Zhu v. Merrill Lynch HSBC*, [2002] B.C.J. No. 2883, 2002 BCPC 535 [*Zhu*] where in an extremely similar case, the British Columbia Provincial Court adopted the outcome of *Robet*, yet was equally ambiguous as to whether the result was because of unconscionable terms or because of a lack of sufficient notice.

<sup>34</sup> 218 F. Supp. 2d 1165 (Cal. D.).

<sup>35</sup> *Ibid.* at 1177.

the cases advanced in Canada so far have provided an obvious opportunity to utilize the principle.

## 1. Rushed Contracts

In the past, Canadian courts have been sympathetic to consumers who have been rushed into signing standard form contracts with onerous liability release clauses.<sup>36</sup> It seems natural to assume that this situation is effectively avoided when consumers contract electronically from the comfort of their home computers. Superficially, this assumption partly explains why the principle in *Tilden* has not been applied to electronic contracts.<sup>37</sup> However, this assumption is erroneous.

One of the reasons for the Internet's sweeping success is that it allows rushed consumers to purchase goods and services quickly and easily. Much of the time, if consumers weren't so rushed, they would be shopping at stores and malls instead of on the Internet. Companies that do business online are highly aware of this. In fact, they know that their online business depends on the efficiency and speed of the transaction. This is why most online businesses place their terms and conditions on a separate page, hyper-linked to the agreement. While hyper-linking the terms of a contract placates rushed consumers, it should constitute misrepresentation by omission or a lack of sufficient notice, as it creates the illusion of a simple contract with no onerous terms. At a very minimum, the whole contract should be displayed for the consumer before agreement is made. This would at least ensure that rushed consumers do not entirely miss the fact that there is a long list of terms in the contract.

## 2. Fine Print

In both *Kanitz* and *Rudder*, the Ontario Superior Court found that consumers had been given sufficient notice of the onerous clauses in the electronic contracts primarily because they were not written in fine

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<sup>36</sup> See *Tilden*, *supra* note 3; see also *Delaney*, *supra* note 7.

<sup>37</sup> George Takash, author of *Computer Law*, 2nd ed. (Toronto: Irwin Law, 2003), suggested in an oral conversation with me on December 9<sup>th</sup>, 2004 that this is probably the main policy reason as to why Canadian courts have been reluctant to extend the principle in *Tilden* to electronic contracts.

print. As discussed earlier, this is not a correct application of the principle in *Tilden*, which requires that “reasonable measures” be taken to draw onerous terms to the attention of the other party.<sup>38</sup> While not writing onerous terms in fine print may be considered to be a “reasonable measure” in some circumstances, it certainly cannot mean that it will be considered reasonable in every circumstance. For example, printing an onerous term plainly in regular font at the top of a one-page long contract will usually be seen as being adequate notice of that term. In contrast, placing that same onerous term in regular font in the middle of a 52-page agreement can hardly be seen as a reasonable measure to draw the term to the attention of the other party. The Court in *Kanitz* and *Rudder* failed to make this logical extension, and therefore failed to understand and apply the precedential logic from *Tilden* correctly.

### 3. Lack of Suitable Plaintiffs

The third possible reason why courts in Canada haven’t applied the principle in *Tilden* to electronic contracts is because none of the cases thus far has presented a compelling fact situation to which the courts might feel sympathetic.

*Rudder* was a case brought by two recent law school graduates for 75 million dollars. The Court likely presumed that because of their legal education, these students were not innocent, unequal partners to the bargain as compared to ordinary consumers with no legal training.<sup>39</sup> Also, the Court may have seen the claim for 75 million dollars in damages as a money and publicity grab rather than a *bona fide* instance of a powerless consumer unwittingly consenting to onerous conditions – the situation which the principle in *Tilden* was originally developed to remedy.

In *Kanitz*, the plaintiff based his claim that there was not sufficient notice of the onerous terms partly on the extreme difficulty of navigating from the Rogers homepage through five linked web pages to reach the amended End User Agreement. However, the Court simply did not believe “the plaintiffs’ characterization as to the magnitude of difficulty involved in finding the user agreement,”<sup>40</sup> because the plaintiff had a

<sup>38</sup> *Tilden*, *supra* note 3 at 408–409.

<sup>39</sup> Teresa Scassa & Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, (Toronto: CCH, 2004) at 14.

<sup>40</sup> *Supra* note 16 at para. 28.

Master's degree in computer science and should have been familiar with browsing through websites using the method of trial and error.

In the most blatant dismissal of an action so far, in *1267623 Ontario Inc. v. Nexx Online Inc.*,<sup>41</sup> the Ontario Superior Court denied a company the right to send 200,000 pieces of SPAM per day from their account even though it was not expressly forbidden in the agreement with their service provider. The question of whether the service provider had given sufficient notice of this prohibition did not even appear as an issue in the judgment, despite its clear significance to the case. This is apparently because the Court was so opposed to the idea of letting a spamming company continue to operate that it actually cited an article named "Why is Spam Bad?"<sup>42</sup> in its reasons.

As eCommerce expands to encompass new industries, a new trend in cases involving bona fide complaints from ordinary consumers is emerging. The evidence of this trend is already apparent in the up-turn in lawsuits against online brokerages. However, as discussed, the two cases that have been decided in this area so far have not needed to deal directly with the issue of sufficient notice as the terms in those agreements were so unquestionably onerous that they were struck out for a reason resembling unconscionability.<sup>43</sup>

### III. WHY THE PRINCIPLE IN *TILDEN* NEEDS TO BE STRENGTHENED AND APPLIED TO ELECTRONIC CONTRACTS

The principle of sufficiency of notice needs to be applied and strengthened for use in electronic contracts for four reasons. First, electronic contracts are generally much lengthier than paper contracts. Second, there are usually no company representatives available to point out and clarify onerous terms in electronic contracts prior to signing. Third, as consumers rarely read or fully understand long contracts, a new approach is needed to ensure that a true meeting of the minds has taken place. And fourth, most retail stores doing business on the Internet do not currently

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<sup>41</sup> 45 O.R. (3d) 40, [1999] O.J. No. 2246.

<sup>42</sup> John Levine, "Why is Spam Bad?", online: Fight Spam on the Internet! <<http://spam.abuse.net/overview/spambad.shtml>>.

<sup>43</sup> See *Robot*, *supra* note 29; also see *Zhu*, *supra* note 33.

require that customers explicitly accept any of the terms that are placed on the transaction, relying instead on the clickwrap button.

## 1. Longer Electronic Contracts

Electronic contracts are generally longer than paper contracts because they are less constrained by size and cost, they have less of a psychological effect on consumers, and they need to address potential legal challenges from multiple legal regimes around the world. The principle of sufficiency of notice should become more and more relevant the longer a contract gets, as it becomes easier for consumers to miss onerous provisions.

The first reason why electronic contracts tend to be longer is that they are cheaper than paper contracts. A proper economic analysis of the costs associated with contracting by paper as opposed to contracting electronically has not been attempted by academics thus far, and is well beyond the scope of this paper. Yet it is obvious that the ink, paper, printing, maintenance and storage costs involved with paper contracts is far greater than the cost of purchasing a small amount of bandwidth and storage for electronic contracts.

Unconstrained by the prohibitive costs of using long paper contracts, businesses have generally expanded the size of their contracts for online users.<sup>44</sup> This in turn increases the possibility that terms may be “hidden” in the contract, and therefore not adequately brought to the attention of consumers.

The second reason why electronic contracts tend to be longer than paper contracts is that consumers react differently to the two types of contracts. Consumers may be shocked out of pursuing a service agreement or making repeat purchases from a store if they are asked to read and agree to the contents of a 52-page booklet of terms and conditions that is handed to them. In contrast, most electronic contracts would not

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<sup>44</sup> See for example Futureshop, whose terms and conditions displayed in their stores are much shorter than the terms and conditions displayed on their website: “User Agreement,” online: <<http://www.futureshop.ca/informationcentre/en/useagreement.asp>> and “Online Policies,” online: Futureshop <<http://www.futureshop.ca/informationcentre/en/onlinepolicies.asp>>. Also compare the terms listed at Chapters-Indigo Books’ stores to the terms listed on their website: Chapters-Indigo online: <<http://www.chapters.indigo.ca/article.asp?Section=home&ArtCode=legal>>.

have this effect as they hyper-link the terms and conditions to the agreement screen of the transaction. This simple-looking hyper-link obscures the reality of the often complex and extremely onerous set of terms that are present in the contract. The illusion created by hyper-linking allows companies to vastly lengthen their standard electronic contracts without much consumer backlash. This implicit deception creates a strong need to apply the principle of sufficiency of notice in cases where agreements do not adequately warn consumers that the hyper-link leads to a list of onerous conditions.

The third and final reason why electronic contracts tend to be so much lengthier than paper contracts is because of the globalized eCommerce marketplace. Most online businesses depend on their contracts to defend them against legal challenges that may arise under any jurisdiction in the world. Forum and language selection clauses are therefore common in electronic contracts in addition to generally longer exclusion and limitation clauses.

With the length of electronic contracts expanding and almost completely unconstrained, the principle in *Tilden* may not be enough to protect consumers against excessively lengthy electronic contracts. This is because while MSN could conceivably give sufficient notice for every onerous term in its 52-page account opening agreement, requiring consumers to read 52 pages just to open an email account is completely unrealistic and unfair. Therefore, courts should extend the principle of sufficiency of notice and unconscionability in general to apply to excessively long electronic contracts, which should be deemed unconscionable regardless of the notice given.

The determination of what makes a contract unconscionably long should be made on a case-by-case basis, with consideration given to the proportionality between the length of the contract and the complexity of the transaction. Factors that a court could use to analyse this proportionality could include the total dollar amount of the transaction, the degree of repetition of terms in the contracts involved, and the inherent complexity of the goods or services provided. To avoid rigidity in applying this new principle, an objective standard of reasonable proportionality should be adopted.

## 2. No Human Presence

Companies have no human interaction with consumers when they contract online. As electronic contracts typically utilize highly onerous and legalistic language, consumers may need to have the significance of some terms clarified before they feel comfortable signing. Often however, there are no opportunities for clarification as some companies, like Microsoft Network, do not post telephone numbers or email addresses for customer support services directly on their websites. This creates obvious problems for contracting in general, because if there is no sales representative from the company to point out and help clarify the terms of a contract, courts may find that there was no meeting of the minds and therefore no agreement. This leads into the third reason why electronic contracts need a strengthened principle of sufficiency of notice: many terms in these contracts are completely inaccessible to the average consumer.

## 3. Inaccessible Terms

In 1966, Lord Reid described the reality of standard form contracts in general by stating that “[usually] the customer has no time to read them, and, if he did read them, he would probably not understand them.”<sup>45</sup> This statement was later quoted and approved by the Ontario Court of Appeal in *Tilden*. After making an identical assertion years later, Todd Rakoff added that “virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion, and the few empirical studies that have been done have agreed.”<sup>46</sup> This widely accepted acknowledgement that consumers would not understand the terms of a contract even if they were to read it is extremely troubling.

Courts should either expand the principle of sufficiency of notice or create a new legal principle that would strike down any terms in a contract that are clearly inaccessible to consumers who do not have a legal background. New protection is more necessary now than ever before in dealing with standardized contracts signed online by unsuspecting

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<sup>45</sup> *Supra* note 6 at 76.

<sup>46</sup> Todd D. Rakoff, “Contracts of Adhesion: An Essay in Reconstruction,” (1983) 96 Harv. L. Rev. 1174 at 1179.



consumers. This is because electronic contracts have gotten longer and more complex, and they usually lack the customer-service infrastructure to help consumers who demand clarification of vague and inaccessible terms. The courts have probably not addressed this issue yet because eCommerce is in its infancy and there have been relatively few cases before the courts, none of which have yet dealt with a “typical” powerless plaintiff that the courts could feel truly sympathetic towards. However, it is inevitable that such plaintiffs will start to appear in court after suffering real and quantifiable damages because of onerous terms in contracts that they could not reasonably have been expected to notice or understand – and at this point, the courts will be forced to address this issue.

#### **4. No Sufficient Notice by Online Retail Stores**

At the moment, consumers make purchases from most of the Canadian stores that are online without ever being told that a list of terms applies to the transaction.<sup>47</sup> Of course, there are often upwards of ten pages of terms and conditions that apply to most retail sales online. The burden is often placed on the consumer to notice that all of these terms are contained in an inconspicuous 6.5-point font hyper-link entitled “Legal Notices and Terms of Use” at the bottom of the page.<sup>48</sup>

Canadian retail stores doing business online probably show this lackadaisical attitude towards giving consumers sufficient notice of onerous terms because the Canadian courts have failed to apply the principle in *Tilden* to electronic contracts thus far. If the principle was applied and adapted to the new circumstances surrounding electronic contracts, these online stores would be compelled to begin to behave in a more equitable manner towards consumers.

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<sup>47</sup> See online: Futureshop <<http://www.futureshop.ca>>; see also online: Chapters-Indigo <<http://www.chapters.indigo.ca>>.

<sup>48</sup> See Chapters-Indigo, *supra* note 44.

## IV. ALTERNATIVE FUTURE ACTIONS THAT COULD BE TAKEN TO ENSURE THE PROTECTION OF CONSUMERS

Thus far, I have centred the discussion on the role of the courts in providing consumer protection online. However, there are several other means to achieve this same end. These means include government-imposed consumer protection, internationally-imposed consumer protection, 3<sup>rd</sup> party standards of contracting, and finally Internet self-regulation. In this section, I will briefly describe each of these alternative means that could be taken and the drawbacks that each presents.

### 1. Government-Legislated Consumer Protection

Various jurisdictions across Canada have opted to enact consumer protection legislation specifically targeted at electronic contracts. This paper will discuss the relatively progressive *Nova Scotia Consumer Protection Act*.<sup>49</sup> The *Internet Sales Contract Regulations*,<sup>50</sup> which were made under the *Act*, list the key provisions relating to the notice of terms found in an online sales agreement. Specifically, the *Regulations* state:

(3) For the purposes of Section 21X of the Act, a supplier shall disclose the following information to a consumer before entering into an Internet sales contract with the consumer:

...

(i) the terms, conditions and method of payment

...

(m) any other restrictions, limitations or conditions of purchase that may apply.<sup>51</sup>

The use of the term “shall disclose” is fairly vague. And since the *Regulations* just came into force in December, 2003, Nova Scotian courts have not yet determined whether this implies that companies will be required to explicitly state the provisions of the agreement, or whether

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<sup>49</sup> R.S.N.S. 1989, c. 92.

<sup>50</sup> N.S. Reg. 91/2002.

<sup>51</sup> *Ibid.* s. 3.

it will suffice to simply make the terms of the agreement available on their website.

The more interesting provision in the *Act* states:

21Z(1) A supplier shall provide a consumer who enters into an internet sales contract with a copy of the contract in writing or electronic form within fifteen days after the contract is entered into.<sup>52</sup>

The *Regulations* then follow up by stating:

5(1) A copy of an internet sales contract provided by a supplier pursuant to Section 21Z of the Act shall include

(a) the information required by Section 3;...<sup>53</sup>

In sum, these sections require companies contracting online to send consumers confirmation of the contract within 15 days. This confirmation “shall” include all of the items listed in section 3 of the *Regulations*, including “(i) the terms, conditions and method of payment” and “(m) any other restrictions, limitations or conditions of purchase that may apply.”<sup>54</sup>

It is extremely rare for a consumer to receive a confirmation email that makes reference to any of the onerous terms in the contract. None of the confirmation emails that I have personally received in the past from Chapters.Indigo.ca, Amazon.com, or from Powells.com have made any implicit or explicit reference to any restrictions, limitations or conditions, or even to general terms of use or terms of sale. Each of these companies imposes forum selection, arbitration and substantial limitation of liability clauses. These clauses are only accessible by clicking on the six- to eight-point font “Terms of Use” or “Conditions of Use” hyper-link at the bottom of the page on each company’s website.<sup>55</sup>

The main shortcoming of the *Nova Scotia Consumer Protection Act* is the limited scope of remedies that it provides. The only remedy that

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<sup>52</sup> *Ibid.* s. 21Z (1).

<sup>53</sup> *Ibid.* s. 5(1).

<sup>54</sup> *Ibid.* s. 3.

<sup>55</sup> See for example online: Powells <<http://www.Powells.com>>; online: Chapters-Indigo <<http://www.chapters.indigo.ca>>; and online: Amazon at <<http://www.amazon.ca>>.

the *Act* makes available to consumers if a seller does not comply with s. 21Z(1) is the right to cancel the contract.<sup>56</sup> There are no punitive damages awarded to deter companies from contracting in violation of the *Act* as their standard practice. This solution will also be hindered by the inherent limitation of creating legislation to address problems. It often takes years to implement legislation due to bureaucratic delays, and it is extremely difficult to reach the consensus across every jurisdiction necessary to make the legislation truly effective.

If the courts in Canada continue to reject the application of principle in *Tilden* to electronic contracts, governments will be increasingly pressured to enact stronger consumer protection legislation to fill in the gaps in law.

## 2. Internationally-Imposed Consumer Protection

It is clear that international agreements concerning eCommerce thus far have been focused almost exclusively on the logistics of establishing a workable and reliable globalized marketplace on the Internet.<sup>57</sup> No major international agreements have addressed the law of sufficiency of notice in electronic contracts yet. However, as most of the fundamental logistics of eCommerce have now been worked out, international bodies may move to address specific consumer protection issues next.

## 3. Third-Party-Created Standards of Contracting

Many international organizations set standards for different industries. The most widely known and used of these is the International Organization for Standardization (ISO). ISO creates standards to make systems more efficient and compatible, and has created standards for hundreds of different industries from computer technology to shoe laces. Thus far, no international organization has attempted to develop a standard contract for any particular consumer-based industry. The creation of such

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<sup>56</sup> *Supra* note 51, s. 6(1)(a).

<sup>57</sup> See the work of the United Nations Commission on International Trade Law (UNCITRAL), online: UNCITRAL <<http://www.uncitral.org>>; see also UNCITRAL, "Online: Model Law on Electronic Signatures (2001)," online: <<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>> for a specific example.

standards, however, may be a partial solution to the problem of heavily onerous electronic contracts.

If standards were set for the format, basic contents, and allowable provisions in contracts in a certain industry, companies may choose to adopt the standard. A specific example that would address the problem of insufficient notice is to make a standard that mandates hyper-linked tables of contents at the top of electronic contracts. Such a standard would change the way contracts are viewed online by taking advantage of the Internet's inherent hierarchical structure. Some of the previously discussed problems with hyper-linking could easily be avoided by naming the hyper-links appropriately. For example, naming a hyper-link "additional provisions" would not give sufficient notice to an onerous exclusion clause within; whereas naming the same hyper-link "X company is excluded from liability for doing Y activity" would give sufficient notice.

Companies would adopt contractual standards to conform to industry norms, eliminate uncertainty about the legality of its own contracts, and to vastly reduce the legal costs involved in independently creating and maintaining its own contracts. Consumers would benefit from standardization because with a quick glance at the ISO symbol at the top of an electronic contract they would know that there are no unconscionable terms, and no onerous clauses "hiding" in the middle of the contract. If applied correctly, standards would mitigate the fact that most consumers do not read contracts by effectively guaranteeing fair contracts.

The limitations of voluntary standards are obvious. Without adequate incentives and pressure, industry will not likely create these standards on their own. Also, because they are voluntary standards, there would be no substantial penalty for breaching the standard, or for failing to adopt the standard at all.

#### 4. Internet Self-Regulation

Since none of the above-mentioned methods have come even close to effectively protecting the rights of consumers since the dawn of the Internet, market forces in some industries have created an extremely effective system of self-regulation. The pioneering example of this system is eBay.<sup>58</sup>

eBay works on a system of feedback between buyers and sellers. Everyone is required to open an account before they can take part in the marketplace of eBay. Every time a transaction takes place on eBay, the seller and buyer have the option to rate one another. Users can view the ratings and comments that every other user has received in the past. In short, if a seller on eBay tries to hold a buyer to onerous terms without first giving reasonable notice, the buyer will likely give that seller a negative rating, and complain in the comment field. Other potential buyers will see this rating, and may choose to buy from another, who would usually be easy to find since eBay and Internet sites like it provide an almost perfectly elastic marketplace.

eBay also provides a type of standard for sellers that consumers can trust. All sellers that meet certain criteria and obtain a 98% or higher satisfaction rating from buyers during the previous month are designated as a "Power Seller."<sup>59</sup> This designation works well to achieve the goal of fair trading in two different ways. First, it motivates sellers to act fairly in all of their transactions to obtain the standard. And second, it almost guarantees that buyers will get a fair deal with a contract that is absent of hidden onerous terms.

In sum, eBay's system of mutual feedback works extremely well in regulating transactions for consumer goods, and has been reproduced in many other marketplaces on the Internet.<sup>60</sup> However, no such system has been implemented to protect consumers from service contracts on the Internet. As service contracts are rapidly expanding on the Internet, especially in the banking, insurance and gambling industries, other action needs to be taken to protect consumers in these areas.

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<sup>58</sup> See online: eBay <<http://www.ebay.com>>.

<sup>59</sup> See online eBay <<http://pages.ebay.com/services/buyandsell/welcome.html>> for further details about the Power Seller system.

<sup>60</sup> See for example online: BizRate <<http://www.bizrate.com>>.

## V. CONCLUSION

The problem of huge electronic contracts filled with onerous provisions is very real, and is getting worse as contracts lengthen over time and eCommerce expands to encompass newer and more sophisticated industries. With no human customer-service representatives available online, powerless consumers are often left alone to decipher hugely complex contracts that may take lawyers hours to understand.

This is a large-scale problem that cannot be adequately addressed by any one corrective measure. In light of Canadian courts' refusal to apply the principle of sufficiency of notice to electronic contracts thus far, increased attention must be paid to examining alternative means to achieve the same goal of consumer protection. Introducing domestic consumer protection legislation and creating an international consensus on consumer protection online could effectively address the problem, but these methods are typically frustrated and hindered by bureaucratic delays and the difficulty of reaching consensus across many jurisdictions. Another solution is to pressure industry to create voluntary standards. This could be effective, but this effort would be limited by industry motivation and the inherent inability for anyone to enforce these standards. Finally, Internet self-regulation has proven to be quite an effective and promising method of ensuring an equitable marketplace for *goods* purchased online; however, this method has thus far failed to respond to the rapidly emerging marketplace for online *services*.

It is clear that none of these solutions taken alone can adequately protect consumers from hidden onerous terms in online transactions in every circumstance. However, using a combination of these different approaches and techniques could remedy the problem effectively. Therefore, until Canadian courts start applying a more rigorous and expanded principle of sufficiency of notice to electronic contracts, this multi-faceted approach will be the only way to ensure that consumers will be protected from onerous provisions hidden in absurd electronic contracts in the future.