

A bargain or a technical problem?

Pricing errors in Canada's e-commerce

RESEARCH REPORT

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montréal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, by offering them budget consultation and information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option Consommateurs at www.option-consommateurs.org

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Summary

Every year, on the Internet, companies mistakenly advertise products for sale at less than market value. When they realize their mistake, most companies simply cancel any orders that have been placed – only sometimes offering consumers compensation. This choice is easy to understand. On the Internet, it only takes a few minutes for thousands of consumers to order a product at the wrong price, and this can result in very significant losses for the merchant.

But is it legal? When can merchants justifiably invoke the principle of error for not respecting their commitments? In Canada, one province – Québec – has established rules that seem to adequately address the issue of online pricing errors. In fact, the *Consumer Protection Act* and the *Civil Code of Québec* provide that any consumer who purchases a good at an erroneous price is entitled to keep it.

It is in the interest of the other provinces to legislate quickly. Erroneous prices posted on the Internet affect a significant number of consumers – 24% of the 1000 respondents in our survey had already bought a product online for which the advertised price was wrong. And as online retail activity continues to grow, the number of pricing errors grows with it. In 2017 alone, we recorded a dozen such cases.

In reaction to this situation, companies have introduced restrictive conditions of sale. We studied the websites of 50 companies visited by Canadians and came across a number of disturbing clauses. One merchant refused to be bound by the representations made on its website. Another gave itself the right to demand a higher price than the one advertised. Yet another offered consumers only very limited recourse. Clauses such as these represent significant impediments to access to justice.

In the search for solutions, an attempt must be made to reconcile the rights of consumers and the needs of electronic merchants. The consumers in our focus groups were more conciliatory toward small enterprises and those who react quickly, apologize, and offer compensation. They also showed some openness in cases when the difference between the wrong price and the market value of a product was significant and the error was obvious.

Option consommateurs recommends that provincial legislators amend their respective laws in order to specify that it is forbidden to sell a good at a higher price than the advertised price and that the contract is concluded the moment consumers submit their order online. It also recommends that Canadian jurisdictions adopt a Price Accuracy Policy 2.0 that specifies a price threshold at which an order should be honoured or refused. We also recommend to the federal legislator that the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* be updated in order to clarify the procedures for dealing with pricing errors.

These changes seem necessary to ensure that cases involving errors in advertised prices are handled in a fair and transparent manner, both for consumers and for businesses wishing to conduct electronic commerce in Canada.

Introduction

“L’erreur est humaine, même pour les machines”

Albert Brie

Consumers are increasingly likely to purchase goods and services on the Internet. Of the 1000 people we surveyed across Canada, 87% had made at least one purchase online in 2017.¹ They appreciate the convenience of the Internet, the variety of products they find there and the ease with which they can compare prices. Canadian companies are fast adapting to this new reality along with all its advantages (including the ability to reach a large customer base) and all its drawbacks (such as fierce competition).

In the online business world, everything happens at dizzying speed. Consumers can place orders at any hour of the day. Delivery times are short.² Prices are adjusted in real time depending on demand or even the time of day. Trading online therefore requires flexibility and greater speed of execution; it must also adapt to consumers' needs and be constantly on the lookout for competitors. In such circumstances, there are times when everything goes too fast.

Take for example the case of the company Sears, which in 2015, mistakenly advertised the toy Little Tikes at \$12.99, whereas it should have sold for \$129.99.³ Within hours, the news spread on social media and hundreds of customers took advantage of what they thought was an amazing bargain and placed an order. Although some of them subsequently received email confirmation, Sears finally decided not to honour those orders and apologized to consumers.

That is not an isolated event. Every year there are several cases recorded in which companies mistakenly post products for sale online at a price below their market value. When the errors are not detected, the consequences can be disastrous for the company, both financially and for their image. Because, contrary to what happens in the brick-and-mortar retail world, the Internet lets thousands of consumers order the product before the company can detect the error and correct the problem.

When such errors occur, should merchants refuse orders or should they honour them? Should the good faith of consumers who take advantage of such mistakes be put in question? Do Canadian laws apply to this phenomenon? If so, how? Are there equitable solutions for both consumers and merchants? Errors in prices of products displayed on

¹ The results of the survey, conducted by Internet, are presented in Section 2.

² The company Amazon offers a premium service in selected Canadian cities that allows subscribers to receive certain products the same day they place the order.

³ <https://www.lejournaldejoliette.ca/actualites/actualites/211394/sears-refuse-dhonorer-une-erreur-de-prix>.

the Internet call into question the appropriateness of concepts such as good faith, inexcusable error or the time required to conclude a contract, concepts at the very heart of consumer law. These are the questions and underlying concepts we will be exploring in this research report.

We began our research by conducting a press review to assess the magnitude of the phenomenon of online ads that display the wrong prices. The press review was carried out in the fall of 2017 and covered the period from 1997 to 2017. The results are presented in **Section 1**.

We then wanted to question Canadians to better understand their experiences and their perceptions of these kinds of errors. We therefore hired a specialized firm to conduct an omnibus survey of 1000 Canadian consumers. We also dialogued with Canadians in four focus groups held in Montréal and Toronto. The answers and opinions offered by the respondents and the participants in the focus groups are presented in **Section 2**.

We next concentrated on the legal implications of displaying erroneous prices online. Our analysis focused first on Canada's federal laws and those of four provinces: Québec, Ontario, Alberta and British Columbia. We then studied the relevant legal framework in two foreign jurisdictions: the United States and France. The results of our legal analysis are presented in **Section 3**.

We then went on to examine the practices of online merchants. We took a sample of 50 of the busiest commercial websites in Canada, and examined the contents of the terms and conditions posted by merchants. The results of this analysis are presented in **Section 4**.

We wanted to complement this analysis with interviews with Canadian companies that do business online. We contacted the major Canadian business associations⁴ and the merchants in our sample. Unfortunately, our requests almost always went unanswered.⁵

All these steps allowed us to make some observations and formulate a number of tentative solutions that we consider fair for both consumers and businesses. These findings and recommendations are presented in **Section 5**.

⁴ We contacted the Retail Council of Canada, the Québec and Canadian divisions of the Canadian Federation of Independent Business, the Conseil Québécois du Commerce du Détail, the Retail Merchants' Association of Canada, l'Association québécoise de commerce électronique, the Electronic Retailing Association and the Interactive Advertising Bureau of Canada.

⁵ Only the Conseil Québécois du Commerce du Détail (CQCD), which we would like to thank, accepted our request for an interview. Although we have not quoted this organization, its participation was helpful for our study.

1 The context

Just before Christmas every year, since the second half of the nineteenth century,⁶ countless Canadians would leaf through catalogs offering a wide selection of toys, clothes and other goods. Long before Amazon, Canadian companies such as Eaton, Simpsons, or Dupuis Frères shipped their goods all across Canada. Catalogue shopping, the ancestor of online commerce, offered Canadians of the day, especially those living far from urban centers, the possibility of obtaining a host of otherwise inaccessible products. They were around for a long time, but finally, the urbanization of the country and increased international competition have caused these companies to declare bankruptcy.

In 2017, it was the turn of another Canadian commercial giant, Sears Canada, to declare defeat. One of the major contributing factors to the company's demise was a new reality: online commerce. This development was especially surprising, since the company had been one of the first to experiment with Internet sales in Canada as far back as 1998.⁷

This transformation in the world of commerce is proof of the changing consumption habits of Canadians, for whom the Internet has become indispensable. Tellingly, the Canadian Internet Registration Authority (CIRA) estimates that 3 of 4 Canadians will not buy a house in a region that does not offer high-speed Internet.⁸ It is not surprising that online business is flourishing in Canada. From 2016 to 2017, Canadian online retail sales grew from \$12.3 billion to \$15.7 billion, an increase of 27%.⁹ For Canadian companies, this new reality means that they have to adapt continually to increasingly sophisticated business practices. Many are adjusting their Internet service offerings based on consumer profiles. Prices of goods may now be adjusted automatically based on the client's Internet browsing profile, a practice known as dynamic pricing.¹⁰

The growing use of algorithms and automation might lead one to think that online mistakes are things of the past. This would be to forget that humans are the originators of these algorithms and other strings of computer code. The risk of an employee making an inputting error is ever present. Moving a single comma can sometimes cause a company a huge headache. Such a simple slip can have an enormous impact when it

⁶ See, for example the Library and Archives Canada file. Online: <https://www.collectionscanada.gc.ca/mailorder/029006-200-e.html>

⁷ Online: <https://www.thestar.com/business/2017/10/10/from-catalogues-to-collapse-the-history-of-sears-canada.html>

⁸ Online: https://cira.ca/factbook/canadas-Internet-factbook-2017?_ga=2.251116738.575457448.1533076451-936398926.1533076451

⁹ Statistics Canada, CANSIM Table 0800033.

¹⁰ See for example the study by the Consumers Council of Canada, *Request for Dynamic Pricing - Can Consumers Achieve the Benefits They expect?* (2017).

affects the focus of interest in this study: prices displayed¹¹ on the Internet. Throughout this report, our focus will be on situations in which products are put up for sale at a price far lower than their market value.

Pricing errors do not just occur online, but when they do, their impact is particularly dramatic. On the Internet, it only takes a few moments for the news of the “bargain” to get out, and for a very high number of consumers to attempt to take advantage of it. If the company does not respond quickly, it risks incurring major losses.

As a first step in our study of this problem, we naturally wanted to get an idea of how widespread this problem of error rates on the Internet actually is. Do consumers experience this phenomenon frequently? How long has it existed? When it happens, how do companies react?

To find out, we conducted a press review in order to obtain a historical overview of the situation.¹² It should be noted that our results underestimate the actual number of cases of pricing errors, since the mainstream media report only the ones that affect a large number of consumers. Besides, the press review did not cover all the references to case law on this subject in Canada.¹³ Despite this, we shall show in what follows that far from being a marginal phenomenon, errors in displayed prices have been around since the early days of online commerce and their numbers have multiplied as it has grown.

1.1 Error rates yesterday...

The oldest cases of erroneous prices displayed online date back to a time when about half of the Canadian population did not yet use the Internet.¹⁴ In fact, only two cases were reported in the media in 1999.

First, in February 1999, the company Buy.com incorrectly displayed a computer monitor for the price of \$164.50, whereas its market value was closer to \$588. The *LA Times*¹⁵ wrote that the news then spread on Internet forums and over 1600 orders were placed in the space of 48 hours. The reaction of the company was first to meet the orders for the 143 monitors in stock and, to the dismay of many consumers, then to cancel the rest

¹¹ In this study, we will use the terms “price display errors,” “errors in the price displayed” and “pricing errors” interchangeably.

¹² The press review was conducted mainly with the use of the Google search engine. We searched through news sites using keywords such as “price error,” “price glitch” or “pricing error.” Only the first 100 results of each year since 1997, the earliest year available, were considered. We used the same keywords to access major Canadian media archives (including CBC, Radio-Canada and *La Presse*).

¹³ Of all the case law discussed in Section 3, only three are contained in the sample.

¹⁴ Statistics from the International Telecommunication Union (ITU) show that in 2000, approximately 51% of Canadian individuals were using the Internet.

¹⁵ Online: <http://articles.latimes.com/1999/feb/15/business/fi-8318>

of the orders. The article also reports that Buy.com's terms and conditions were quickly amended to clarify this:

In the event a product is listed at an incorrect price due to typographical error or error in pricing information received from our suppliers, Buy.Com shall have the right to refuse or cancel any orders placed for product listed at the incorrect price.... If your credit card has already been charged for the purchase and your order is canceled, Buy.Com shall immediately issue a credit to your credit card account in the amount of the incorrect price.¹⁶

In the same year, the British company Argos advertised a Sony TV on sale for £3, far less than its market value of £299.99.¹⁷ In a very short time, hundreds of orders were placed – including one for 1700 sets – for a total of over £1 million. Argos finally apologized to consumers and decided to cancel all the orders, claiming that no contract had been concluded for TVs priced at £3.

The following year, it was the turn of the future giant Amazon to be affected by the pricing error phenomenon.¹⁸ One toy, normally sold for \$29.99, was advertised at the price of \$2.49. Amazon reacted by cancelling the orders and offering a \$5 gift certificate.

The oldest online pricing error in Canada that we were able to identify occurred in 2003. That year, Dell incorrectly advertised computers on sale at \$89 and \$118 instead of \$379 and \$549 respectively. The next day, Dell blocked access to its Web pages and cancelled consumers' orders. This case, which will be discussed in more detail in our analysis of the legal framework, went as far as the Supreme Court.¹⁹

1.2 ... and today

Between 1999 and 2017, we identified a total of 94 cases of pricing errors displayed on the Internet. Of these 94 cases, we found 11 that affected Canadian consumers, including 4 cases that occurred in 2015. The United States and the United Kingdom are the two jurisdictions in which the highest number of cases were reported: 37 and 31 respectively. This was followed by France, with 3 cases. The history of reported cases is presented in the chart below.

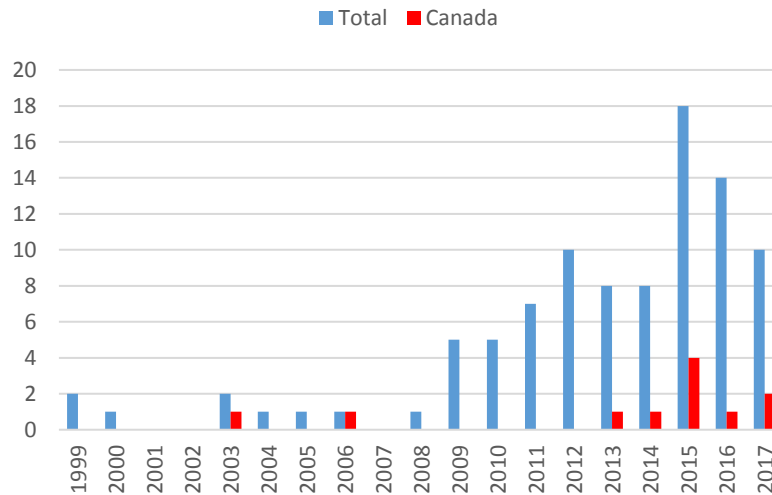
¹⁶ A simple query on Google shows that this terminology is used today, almost word for word, by several websites.

¹⁷ <http://news.bbc.co.uk/2/hi/business/441426.stm>

¹⁸ <https://www.computerworld.com/article/2596686/retail-it/amazon-com-hit-with-pricing-glitch.html>

¹⁹ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2374/index.do>

Figure 1 - Cases of price display errors

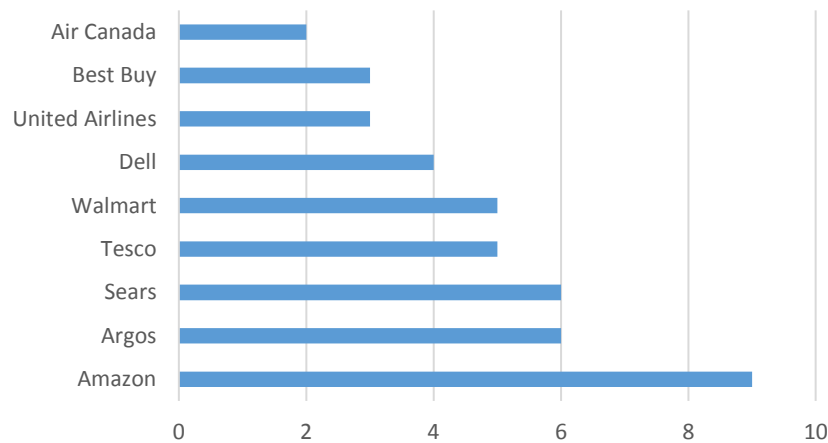


The number of cases tended to multiply in the late 2000s to reach 18 in 2015, marking a high point. No doubt the proliferation of cases of pricing errors in those years was partly due to the growth of online businesses and the number of companies selling their products over the Internet. However, it is difficult to determine what might explain the lower number of cases reported for the years 2016 and 2017.

1.3 Repeated errors

There are some companies that have been affected on numerous occasions by price display errors. These companies are presented in Figure 2, along with the number of errors,

Figure 2 - Repeated cases of price display errors



As can be seen, the champion in this regard is the company Amazon, with a total of 9 separate cases. Its latest error occurred with the Echo Dot smart speaker, which was

posted at a price of \$0.00 for a few hours in August 2017.²⁰ Amazon canceled all the orders and offered consumers \$5 credit.

In Canada, the prize goes to Sears. In 2015 alone, the website of the Canadian division of Sears was hit by three distinct pricing errors.^{21, 22, 23} In two of these cases, many consumers were told that the advertised price was right and that the company would fulfil the orders. Sears Canada finally canceled the orders in all three cases.

1.4 Merchants' reactions

When a pricing error occurs, merchants' reactions tend to vary. Some prefer to honour the orders and absorb the cost of the error in order to maintain their good standing with their customers. Others, believing the mistake to be too costly, decide to cancel orders. The analysis of our sample permits us to identify certain trends in this regard.²⁴

A large majority of companies decide to cancel orders. In fact, almost 69% make that choice. When they cancel orders, companies are likely to offer consumers financial compensation, often in the form of a gift voucher. This is what happened in the recent case of the French company Leclerc, which posted a video game console at a price of €30 rather than its market value of €300.²⁵ Even though customers received confirmation of their order by email, Leclerc decided to cancel all orders and offered consumers a check for €10.

Nearly 22% of the companies in our sample honour such orders. In these cases, companies often explain that they do not want to disappoint consumers. John Winning, the founder of the Australian company Appliances Online, explains: "We have a clause in our terms and conditions stating that we reserve the right to refund customers when there are genuine errors, but we're not in the business of disappointing customers."²⁶ Appliances Online made the mistake of posting kitchen equipment on its website for \$281 instead of \$799. About 200 consumers benefitted from that windfall.

²⁰ https://www.phonearena.com/news/Error-allows-consumers-to-grab-the-Amazon-Echo-Dot-for-free-Amazon-cancels-the-orders_id97219

²¹ <http://www.journaldeMontréal.com/2016/01/06/sears-doit-payer-pour-son-erreur-de-prix>

²² <http://torontosun.com/2015/02/10/price-error-on-sears-website-angers-Québecers/wcm/c80a4cd5-b344-4aaf-94e1-17038028d3f9>

²³ <http://www.journaldeMontréal.com/2016/01/06/sears-doit-payer-pour-son-erreur-de-prix>

²⁴ We were able to validate the reaction of 88 of the 94 companies in our sample.

²⁵ <http://www.lefigaro.fr/conso/2017/11/21/20010-20171121ARTFIG00185-leclerc-vend-par-erreur-des-playstation-a-30-euros.php>

²⁶ <https://www.smartcompany.com.au/industries/retail/what-appliances-online-john-winning-did-when-he-realised-a-pricing-error-would-cost-nearly-100000-in-sales/>

Finally, the remaining 9% of our sample is made up cases in which the companies partially honoured the orders - while supplies lasted - or if the consumer had taken possession of the property before the error was detected. For example, in 2017, the video games developer Devolver Digital mistakenly applied a discount of 90% rather than 25% to a game it was selling on the Steam platform.²⁷ Approximately 1,000 consumers took advantage of the opportunity before the error was corrected.

1.5 Cases brought before the courts

Our analysis of cases in our pricing error sample shows that only a very small fraction of cases appear to be taken to court. This was confirmed by our research into the case law of the various jurisdictions as part of our analysis of the legal framework.

Prominent among the cases that have been subject to judgments is the 2009 decision by the Consumer Protection Commission of Taiwan, which ordered Dell to honour the orders of about 26,000 consumers who bought a computer monitor for \$15 rather than its actual price of \$146.²⁸

In another case that went to court, 400 customers sued the French group 3 Suisses. The company had erroneously advertised a TV online for €180 instead of €1900. The claims of the 400 customers were ultimately rejected, the judge ruling that [TRANSLATION] “it is not a question of deciding whether the original selling price of the TV is real and serious, but the discounted price that generated the sales contract. This discounted price is the result of computer error; it is sold at a much higher price by other merchants and the price posted is ridiculous, since the expected return on the sale at such a price is non-existent.”²⁹

In Canada, our sample mainly contained cases of pricing errors that had not yet been subject to a judgment (the cases were pending before the court). We present the case law of the various Canadian jurisdictions in Section 3.

1.6 Highlights of the press review

Our press review permitted us to make a few observations with regard to pricing errors. First, the phenomenon is not new. On the contrary, it first made an appearance in the early years of online business and intensified toward the end of the 2000s. In total, we identified 94 separate cases of pricing errors reported by the media. The problem

²⁷ <https://www.pcgamer.com/shadow-warrior-2-pricing-error-briefly-drops-it-to-4/>

²⁸ <https://www.computerworld.com/article/2526294/government-it/dell-ordered-to-sell-19-inch-lcd-displays-for--15-in-taiwan.html>

²⁹ <https://www.clubic.com/television-tv/television-lcd/actualite-372014-90-suisses-obtiennent-gain-cause.html>

affects businesses and consumers in several countries, including Canada, where 11 cases have been reported. Some companies, including Amazon and Sears, have been affected several times by erroneous advertised prices. In most cases, they cancel the orders, often providing consumers with a small compensation. Some prefer to honour orders to ensure that they maintain good a relationship with their customers. Finally, the cases that we identified have rarely been the subject of a decision by the court.

This portrait of pricing errors would be incomplete if we did not include the experience of Canadian consumers. In fact, the press review identified cases reported in the media that often affected several hundred consumers. It is also possible, however, that Canadian consumers have experienced other pricing error situations that were not publicized and were settled amicably. Moreover, we thought it interesting to be able to discuss their experiences with them and get their views on the phenomenon of pricing errors displayed on the Internet. This led us to conduct a survey and hold focus groups, the main results of which we present in the next section.

2 Consumers and pricing errors

2.1 Survey

To gauge the extent of this phenomenon in Canada, we conducted a survey on 1,000 Canadian adults aged 18 and above. We asked the participants five questions. Our aim was to find out about their experience of pricing errors and their perception of merchants' reactions. The survey took place online in December 2017 and was conducted by the firm BIP. The results were weighted to ensure that they were representative of Canadians as a whole. We present here the outcomes that are most significant statistically³⁰ according to the participants' sex, age and region of residence.³¹ The survey questionnaire and a brief discussion of the methodology appear in Appendix 1 of the French version of the report.

2.1.1 Canadians and online shopping

Our survey began with an introductory question aimed at obtaining a better understanding of Canadian consumers' Internet shopping habits. We asked respondents if they had made a purchase over the Internet in the past year.³² As shown in Figure 3, a large majority of respondents (87%) purchased at least one product in the past year. This is slightly higher than the result obtained by a survey conducted by the Canadian Internet Registration Authority (CIRA), which, after obtaining answers to the same question, reported the proportion to be 82%.³³

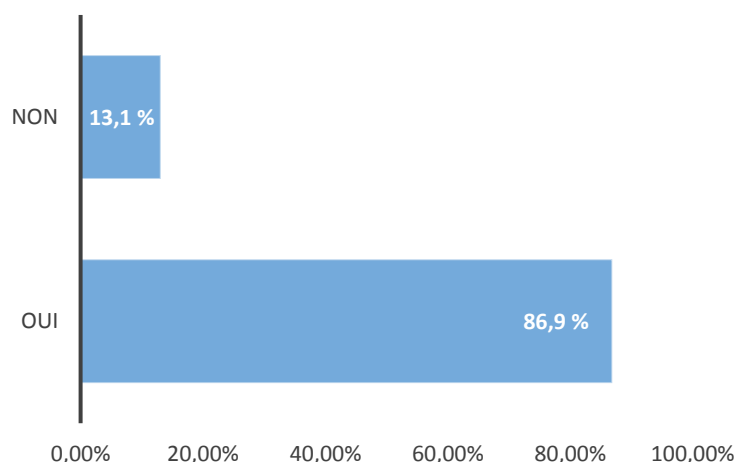
³⁰ Non-parametric (chi-square) tests were carried out by the firm BIP.

³¹ To simplify the presentation, we have not included in the statistical tables the Province of Newfoundland and Labrador, as the results for this region were not significantly different from other regions.

³² The wording of the question was, "Have you made a purchase on the Internet during the past year?"

³³ Online: <https://acei.ca/dossier-documentaire-Internet-2017-de-l-acei/Appendix-tendances-liees-au-cybercommerce-au-canada#sup33>.

Figure 3 - Proportion of Canadians who shopped online in the past year



Our results show statistically significant differences in terms of sex, age and region. Men are more likely to have made a purchase online. For example, 90.1% of men did so compared to 83.9% of women. We observed statistical differences for the age groups 25 to 34, 35 to 44 and 65 and over. Respondents aged 25 to 44 are more likely to have made a purchase online. In contrast, those aged 65 and over reported having purchased over the Internet in a smaller proportion (71.2%) in the past year.

Table 1 – Online shopping by gender and age

	Gender		Age					
	Male	Female	18 to 24	25 to 34	35 to 44	45 to 54	55 to 64	65 or over
Yes	90.1%	83.9%	91.0%	97.3%	96.1%	86.2%	85, 9%	71.2%
No	9.9%	16.1%	9.0%	2.7%	3.9%	13, 8%	14.1%	28.8%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

In terms of regions, statistically significant differences were observed for Ontario and the Prairies. Ontario residents are therefore more likely (89.7%) to have purchased online in the past year. Prairie residents are rather less likely (79.5%) to have made a purchase online.

Table 2 – Online shopping by region

	Maritimes	Québec	Ontario	Prairies	Alberta	British Columbia
Yes	84.7%	85.4%	89.7%	79.5%	88.3%	88.7%
No	15.3%	14.6%	10.3%	20.5%	11.7%	11.3%

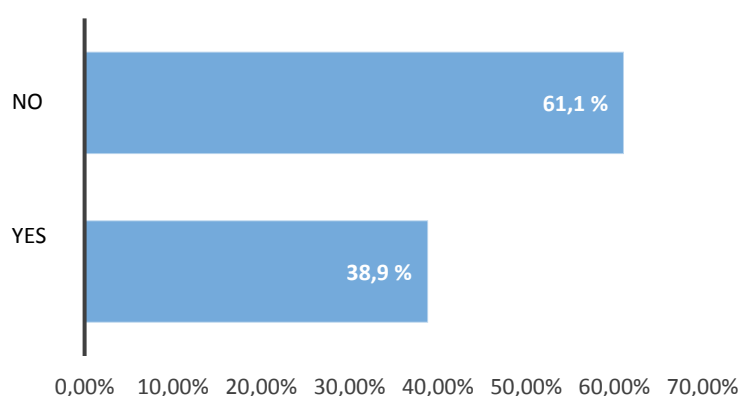
Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

2.1.2 Errors in displayed prices and the experience of Canadians

The following questions were posed in an attempt to measure the experience of Canadians about errors in advertised prices. After explaining the concept of pricing errors with the use of a short situational example,³⁴ we asked the participants three questions.

The first question measured whether, generally, Canadians had heard of a problem related to the displayed price of a product.³⁵ A minority of respondents answered this question in the affirmative. In fact, 38.9% said they had heard of a pricing error, as shown in Figure 4.

Figure 4 – Percentage of Canadians who have heard of a pricing error



We found statistically significant differences in terms of age and region among those surveyed. With respect to age, the differences appear partly to reflect the online buying habits outlined above. In fact, those aged 25 to 44 are more likely to have heard of a

³⁴ We presented as a preamble the following passage: "It can happen that a price posted on the Internet is wrong because of a technical problem or a human error. For example, the price of a plane ticket may appear to be \$ 100 while it is \$ 1,000."

³⁵ The wording of the question was: "Have you ever heard of an error in the pricing of a product sold on the Internet?"

pricing errors. In fact, 55.9% of participants from 25 to 34 and 46.8% of participants from 35 to 44 fall in this category. In contrast, older participants are proportionately less likely to have heard about pricing errors. Only 21.2% of those 65 and older are in this category. The results according to age group are presented in Table 3.

Table 3 – Percentage of Canadians who have heard of a pricing error by age

	Age					
	18 to 24	25 to 34	35 to 44	45 to 54	55 to 64	65 or over
Yes	50.0%	55.9%	46.8%	35.6%	33.6%	21.2%
No	50.0%	44.1%	53.2%	64.4%	66.4%	78.8%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

As for the regions, a significant difference was observed for Ontario, where a higher proportion (45.1%) of respondents indicate they have heard of a pricing error. There was no significant difference between the other regions of Canada.

Table 4 – Percentage of Canadians who have heard of a pricing error by region

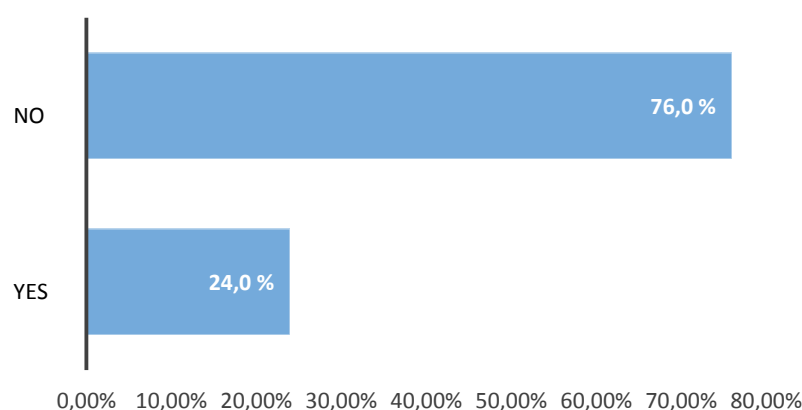
	Maritimes	Québec	Ontario	TPrairies	Alberta	British Columbia
Yes	32.0%	35.6%	45.1%	38.7%	32.2%	37.8%
No	68.0%	64.4%	54.9%	61.3%	67.8%	62.2%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

The following question attempted to accurately measure the experience of Canadians. We asked and the participants if they had bought a product advertised at the wrong price before.³⁶ To this question, about one in four (24%), responded in the affirmative.

³⁶The wording of the question was, "Have you ever bought a product for which the displayed price was wrong?"

Figure 5 - Percentage of Canadians who bought a product listed at the wrong price



Again, significant differences were observed for age and regions. The results are similar to those for the previous question. For example, those aged 25 to 44 are more likely than those aged 55 and over to have purchased a product whose displayed price was wrong.

Table 5 – Percentage of Canadians who bought a product listed at the wrong price

	Age					
	18-24	25-34	35-44	45-54	55-64	65 or over
Yes	38.5%	36.7%	29.1%	20.7%	16.2%	12.2%
No	61.5%	63.3%	70.9%	79.3%	83.8%	87.8%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

Similarly to the previous question, respondents from Ontario are proportionally more likely (27.7%) to have purchased a product whose price was wrong. A significant difference also exists in the province of Québec, where people are less likely to have purchased a product at the wrong price.

Table 6 – Percentage of Canadians who bought a product listed at the wrong price by region

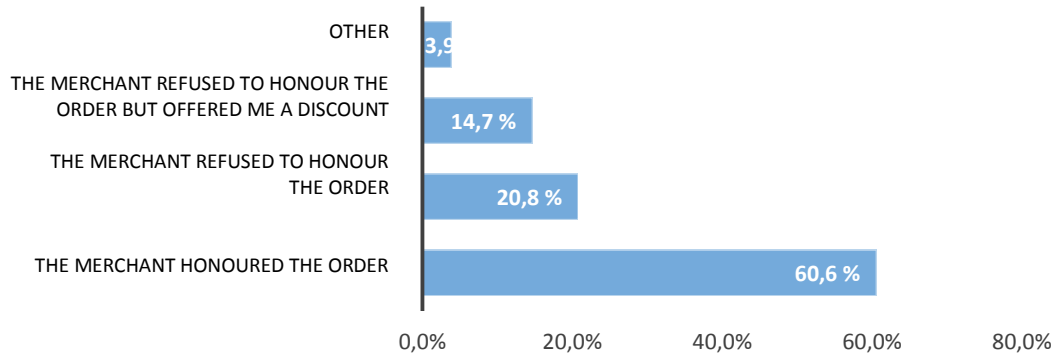
	Maritimes	Québec	Ontario	Prairies	Alberta	British Columbia
Yes	28.3%	18.9%	27.7%	20.0%	23.8%	24.4%
No	71.7%	81.1%	72.3%	80.0%	76.2%	75.6%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

We then asked a sub-question to the respondents who said that they had purchased a product at the wrong price. We were attempting to measure their experience in relation to the reaction of the merchant.

A majority (60.6%) indicated that the merchant had honoured their order. This result is contrary to what we obtained from our press review. One hypothesis is that there are several isolated cases and that these are managed individually by the company, and that an error that benefits only a few consumers is less expensive and therefore more likely to be honoured. As for the other answers, 20.8% of respondents reported that the company refused to honour their order and 14.7% reported that although the company refused to honour their order, it offered them a discount.

Figure 6 – Canadians' experience of merchants' reactions



We noticed significant differences in terms of regions. For example, it was in British Columbia where respondents were most likely (77.0%) to have their command honoured. In contrast, it was in Ontario they were most likely (27.1%) to have their order refused.

Table 7 – Canadians' experience of merchants' reactions by region

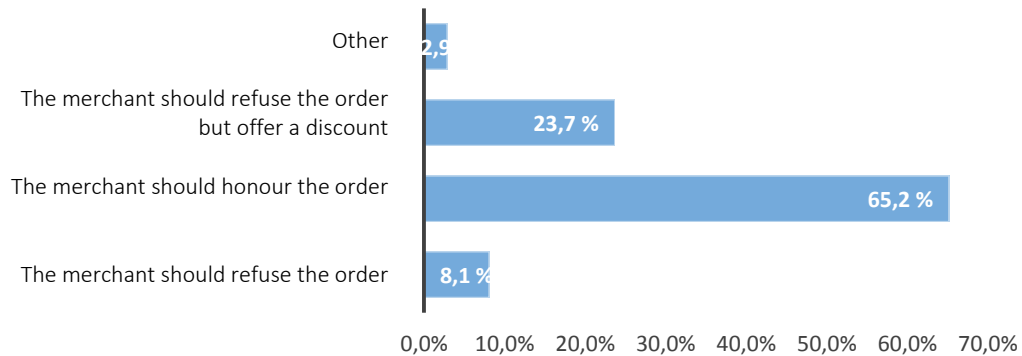
	Maritimes	Québec	Ontario	Prairies	Alberta	British Columbia
The merchant honoured the order	49.30%	51.40%	53.90%	86.50%	72.90%	77.00%
The merchant refused to honour the order	14.50%	29.50%	27.10%	0.00%	16.10%	5.30%
The merchant refused to honour the order but offered me a discount	36.20%	16.60%	13.10%	13.50%	7.00%	14.70%
Other	0.00%	2.50%	6.00%	0.00%	3.90%	3.10%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

2.1.3 The opinions of Canadians regarding merchants' reactions

Finally, we asked respondents how merchants should react to a pricing error. The results are presented in Figure 7.

Figure 7 - Canadians' opinion of merchants' reactions



A majority of respondents (65.2%) want companies to honour orders when they are guilty of a pricing error. Conversely, only 8.1% of participants believe that companies should refuse the order. About a quarter of the participants, or 23.7%, felt instead that the company should refuse the order but offer compensation.

Table 8 - Canadians' opinions on the reaction of merchants by gender

	Male	Female
The merchant should refuse the order	11.1%	5.4%
The merchant should honour the order	59.1%	71.1%
The merchant should refuse the order but offer a discount	28.1%	19.6%
Other	1.8%	4.0%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

There were differences depending on the respondents' gender. For instance, women are more likely than men (71.1% against 59.1%) to suggest that the merchant should honour the order. Men, on the other hand, are more likely to think that merchants should refuse the order or refuse the order but offer a discount. These differences are statistically significant.

Table 9 - Canadians' views on the reaction of merchants by region

	Maritimes	Québec	Ontario	Prairies	Alberta	British Columbia
The merchant should refuse the order	9.6%	4.3%	5.0%	30.0%	10.8%	11.3%
The merchant should honour the order	61.4%	66.5%	69.8%	50.0%	62.5%	59.5%
The merchant should refuse the order but offer a discount	25.2%	25.8%	21.9%	17.9%	25.7%	26.7%
Other	3.8%	3.4%	3.4%	2.1%	1.0%	2.5%

Note: Statistically significant results between groups are shown in colour. The colour red indicates a positive statistical difference while the colour blue indicates a negative statistical difference.

Some statistically significant differences exist between the regions. First, respondents in Ontario are more likely to feel that the merchant should honour the order. In contrast, respondents living in the Prairies are less likely to have that opinion. It was in Québec and Ontario (4.3% and 5.0%, respectively) where the fewest respondents thought that the merchant should cancel the order.

2.2 Results of the focus groups

2.2.1 In context

The preceding sections show that errors in prices displayed online are not an isolated problem. More Canadians than ever are shopping online and, consequently, are more likely to be faced with this problem. In order to learn about their experiences and their perceptions of the phenomenon, we held four focus groups, two in Montréal (in French) and two in Toronto (in English). The participants we selected had all regularly purchased goods and services online³⁷ and a quarter of them had experienced an incident of price display error.³⁸ The participants' sociodemographic characteristics are presented in Appendix 2 of the French version of the report.

The discussions took place in four phases. We first tried to ascertain the habits of the participants and discover the criteria they consider important when deciding to make a purchase online. We then discussed their own experiences with a price display error on the Internet with them, in particular to assess their perception of the problem. Subsequently, they were presented with two cases of pricing error that occurred in Canada and were invited to express their opinions, particularly as regards how the companies managed the errors. Finally, participants were asked to read a clause taken from the terms of use, then say what it meant, whether they felt it was justified, and whether they thought it was legal. The discussion guide related to these four points can be found in Appendices 3 (French version) and 4 (English version).

2.2.2 Highlights

The participants in the four focus groups had shopped regularly on the Internet in the past year; some had done so often, up to several times a week. They had bought various types of products from a range of websites.

The participants said they trust merchants whose products are rated positively by other consumers and who operate "real" rather than merely "virtual" stores. When they shop online, they say, they pay close attention to prices and shipping costs. Not all the participants read the terms and conditions they encounter on the Internet. Those who do, however, take particular notice of the return policies for the products they buy. For most participants, an order is finalized the moment the merchant transmits a confirmation email. For others, it is more the time the order is sent or when the product is received. Finally, several participants reported that they subscribed to electronic

³⁷ The selected participants made at least one purchase per quarter in 2017.

³⁸ The choice of this criterion was based on the results of our survey as described in Section 2.

mailing lists or social media groups to keep abreast of savings, a habit particularly prevalent among participants in the Toronto groups.

Participants who had encountered errors in displayed prices arrived at a variety of conclusions. For some, the experience was frustrating because it meant they could not receive the product they ordered or because they believed that the merchant had not reacted in an acceptable way. Others had a more positive perception, especially when the company offered them compensation following the error. Several participants expressed appreciation that a company recognized its mistake and apologized. Compensatory offers, such as discounts for other products that the merchant sells, were particularly appreciated, especially when the participants considered themselves to be loyal, regular consumers. Many of the participants drew parallels between what happens online and what happens in a regular store, and they demonstrated good knowledge of the applicable laws when pricing errors occur somewhere other than on the Web. Finally, several participants felt it was possible that companies deliberately post ridiculous prices to attract customers to their websites.

We also presented participants with three separate cases of pricing error that occurred in Canada. As we shall see later, the ensuing discussions illustrated the importance they attach to the company's reaction to a pricing error. They found the speed with which the merchant corrects his mistake and contacts the customer to be very important. Moreover, the difference between the advertised price and the actual price plays a role in the participants' attitudes towards the companies who make such mistakes.

Other factors influencing the participants' opinions are the total value of the good and the size of the company. For example, several participants said they would be more lenient towards a small company than towards a giant such as Amazon. When asked what was a reasonable time for the company to correct the mistake, they said that it was generally 8 to 48 hours. Several said they would not hesitate to post a comment on social media if they felt that the company had acted in bad faith when the pricing error occurred. Finally, nearly all the participants thought that intermediaries such as Expedia or service providers such as Trivago should also be liable when errors occur in the prices listed.

The focus groups ended with the participants being asked to read a clause that several companies include in their terms of use. This clause provides a good illustration of the rights that companies give themselves in pricing error situations.³⁹

³⁹ The clause shown to participants read: "While every effort is made to maintain the prices shown, we reserve the right to adjust prices when necessary and also to substitute or discontinue any item which may become unavailable. We also reserve the right to correct any printing or technical errors."

For the most part, the participants reacted negatively. They thought that it was unjust for companies to grant themselves the right to adjust prices at any time, and they felt powerless in the situation. Participants in Montréal were more likely than those in Toronto to question the legitimacy of a clause like this within the terms of use. Some participants in Toronto said that consumers are nevertheless free to buy the product from another merchant.

When asked about the legality of this type of clause, the participants in the Montréal groups felt that it violated the law in Québec. On the other hand, they felt that it was probably legal in foreign jurisdictions such as the United States. The participants in the Toronto groups were divided on this issue. In addition, all the participants in the four groups thought the clause was too vague. They would have liked it to be more precise, namely by specifying a maximum deadline for the company to correct the error, by including a statement of how the company intends to correct it, and by detailing the rights of consumers in such situations.

2.2.3 Participants' online consumer habits

The first part of the focus groups was aimed at arriving at a better understanding of the participants' online shopping habits. We first briefly explained the topic that would be discussed at the meeting. We then asked them which websites they visited to buy products, how often they bought, and what types of products they bought. We also asked them what information they thought was important to consider when shopping, whether they took the time to read the legal notices on merchants' sites and when they consider a transaction to be completed.

The majority of participants said they bought goods and services on the Internet on a regular basis. Some even made it "a way of life" and bought "practically everything online," as this participant stated:

I do a lot of shopping online, everything you can name I buy online. In the last year, the number of times I went shopping online is infinite.

These participants shop online often, sometimes several times a week. They love the diversity and the new products they find on the Internet. They also appreciate the convenience of shopping online, which means that they avoid having to travel. As one participant said: "It gives me more time to spend with the children." Those who shop infrequently do so about once every two months and on "special occasions" such as in anticipation of the holiday season or for cultural events. A small number of participants want to continue visiting traditional stores and make certain purchases from local businesses.

Participants visit a variety of sites and buy an equally varied range of products. Among the purchases mentioned most regularly are clothing and shoes, electronics products,

accommodation, jewelry, airline tickets, books and music, and tickets for events. Buying food online also seems to be a new trend for some participants.

Participants typically make their purchases on the sites of large companies specializing in online commerce (e.g. Amazon, Aliexpress or eBay), price comparison sites (Kayak and Trivago) or cultural product sites (e.g. Evenko, Admission or Archambault). The majority of the sites that participants mentioned are widely known and well established within their respective markets.

When we asked whether they trust certain companies more than others, the majority of participants said they rely on comments left by other consumers. One participant said, "If they don't have any feedback, it's hard for me to trust them," while another said, "I'll check how many stars each vendor gets." Many research the products they intend to buy by watching videos or by asking questions to friends and colleagues. Some also make sure that the sites where they want to buy are safe. They are particularly vigilant when it comes to expensive products such as airline tickets, and clothing they are not certain of being able to return. For some participants, it is important that the companies also have a real store, because "when there's a brick-and-mortar store, it creates trust."

On this point, one participant expressed himself as follows about what he calls "a physical presence":

An online store with a physical presence is very significant for me, and an excellent customer service department. I want someone to be able to talk to in case something goes wrong. If they don't have that I won't shop there, there's nothing more frustrating than something going wrong and having no way to redress it, without anybody to talk to because email is not always good.

Several participants said that price and delivery costs are the two most important criteria when shopping online. Other frequently mentioned criteria are the return policy and the delivery date. One participant put it this way: "When I see a product that says, 'usually ships in 1 to 2 months,' I don't buy it; I want it this week." The other criteria participants mentioned are the rating the vendor receives, the comments left by consumers, and modes of payment.

When asked if they take the time to read the conditions of service on the websites, we received a variety of answers. The majority said they read the products' return exchange policies. Some participants do this only on certain sites, either due to a previous bad experience, or when purchasing expensive items. In other cases, they put their trust in companies with an established reputation. In the Toronto groups, some found that the texts displayed on websites are long and difficult to read. One participant said: "They use very small font so nobody can read it, and nobody wants to read 5 pages of size 4 font."

We also asked the participants when they consider an order to be finalized. In all four groups, many believe that the transaction is concluded when they receive a confirmation email. Some said it was when they click “pay,” “place order,” or “submit” or when the amount is debited to their account or their credit card. Some participants also said that the order is not final until the product is in their hands. One participant explained that the order is finalized “when it comes to my door because there is still time to cancel the order.”

We completed the first part of the focus groups by attempting to determine whether consumers are kept actively informed about discounts and bargains offered on the Internet. The answers in this regard were more positive in the Toronto group, where almost all participants reported that they subscribed to social network groups or electronic mailing lists in order to be notified of sales and bargains. For example, one participant said, “I follow all of my favourite brands on Facebook and Instagram so I find out about sales on those Websites and I get all of their newsletters.” In Montréal, some participants said they wanted to avoid receiving too many promotional emails or even that they wanted to limit their consumption of goods and services. The sites most frequently mentioned in all four groups are RedFlagDeals, Wish and Groupon, and the social networks Facebook and Instagram. Some say they subscribe to groups for specific products, such as airline tickets.

2.2.4 Participants' knowledge and perception of errors in prices displayed on the Internet

In the second part of the discussion, we presented our main topic of interest: errors in prices displayed on the Internet. We then did a brief recap of the phenomenon with participants before asking them to discuss their experiences and what they felt were good or bad practices on the part of companies.

Although testimonies were more numerous in the Toronto group, participants in every group reported that they had personally experienced or had heard of a case involving the wrong price displayed on the Internet. It is difficult to measure how often these errors are encountered, but several participants agreed that they occur often with the purchase of airline tickets. One participant said, “It happens a lot with airline tickets, sometimes you click on what you think is a great deal but finally it never existed. It's a tactic to draw you in, that is mostly my experience. It's sort of frustrating because I make a lot of my decisions on pricing.”

This frustration, which others also reported, is often caused by the reaction of the merchant, as this participant explains:

One time I bought something that was canceled, I waited for the confirmation email and after a few hours they sent me an email saying “sorry, the price changed, it's not

available but we can give you this new ticket for the next day at the different price but the one that you wanted is no longer available." It was annoying because it was a last-minute thing that I was try trying to coordinate but I was wondering why it was wrong, if they don't have any tickets why was I able to buy it? Finally It was too expensive for me to get the ticket that I wanted.

Others were satisfied with the way the company reacted when the error was detected. One participant told us what happened to him as follows:

It happened to me. I went on Best Buy's Website. I bought something for my previous laptop's hard drive so I was looking for a certain enclosure. I went to the store to get the piece. The sales clerk advised me to go online because they did not have it in the store, they had to ship it from somewhere else. He gave me an average price which was \$10 per piece. I go online and the price was actually \$5 so I thought it was a good deal. I placed the order and after a couple of days I saw on my credit card statement that I had ordered 10 pieces which should have totaled \$50 plus tax but in reality it was \$150. When I called customer service they told me that the price was entered by mistake on their website. Finally the price was \$15 a piece. I called my bank to reverse the transaction and I went to the customer service in the Best Buy store and the senior manager gave me a refund for the difference. When I clicked during checkout the item was \$5 a piece, it was not advertised as a bargain. I like the way it was resolved.

The participants seemed to like it when merchants apologize. One participant claimed to be very pleased with the company's reaction: "It was okay for me because they admitted their error." In contrast, another participant reported having posted a negative comment about a company that ignored what was probably a mistake: "They never responded so I posted a negative review on Google with the proof and some people liked it. I'll never shop there again. They never charged me, their reason for cancelling was really shady. They didn't want to admit they made a mistake. "

After discussing the participants' experiences with them, we asked them how they thought a company should react when a pricing error situation arises. In every group, a majority of the participants was in agreement that merchants should apologize and offer compensation. One participant said that the company should be "very apologetic" and make a refund because "it's such a waste of time. When I buy something online I feel like I already have ownership of it when I paid, so it's not fair." Participants also said: [TRANSLATION]"Their reputation is at stake, they should pay close attention to negative word of mouth" and "social media are very quick to spread bad news." Many felt that the company should recognize the loyalty of their regular customers and be particularly vigilant when pricing errors affect them.

Interestingly, participants often drew a parallel between the situation encountered online and that what can happen in a real store. They rely on this comparison to insist that the companies offering online services should [TRANSLATION]"provide credit just like as at the grocery store." Or: "We have been conditioned that when we go in a store and

see our product with a sign that says \$7.99, as long as the sign is displayed the store must sell it to you at \$7.99 or you can go file a complaint.” Another participant said, “They should have at least recognized that they made a mistake. For example with a physical store, if the store puts out a flyer with a ridiculous price, they will put out a retraction on the cash register that says something like ‘there’s an error on page 3 of the flyer, the price should be that price instead’.”

A few participants mentioned that there can be exceptions. For example, one participant would have forgiven a small merchant more easily: [TRANSLATION] “I make an exception for Etsy, when it happens with a product made by hand by an artist. For example, for an error of \$1 on a handmade product, I give them a few hours to change their prices, but when it happens at Wal-Mart, I have no pity.” Another explained that, if the price difference is very large, he’ll realize it’s a mistake. He said: “It’s OK because I know it.”

To conclude the second part of the working sessions, we asked the participants if they thought it possible that some companies deliberately display certain products at extremely low prices in order to attract customers to their website. A large majority of participants responded in the affirmative and also to the associated practice of “bait and switch.”⁴⁰ Some described situations in which a product offered at a low price is no longer available after a certain time, while the same product in another colour is still available, but at a higher price.

2.2.5 Two cases of price display error

We presented the participants with two cases of pricing error that occurred in Canada.⁴¹ In each case, there were differences, particularly in the discrepancy between the wrong price and the actual value of the good in question, and also in the reaction of the company.

The first case involved Sears.⁴² We summarized it to the participants as follows:

⁴⁰ The participants used the English term here. In French, the term is “appât et substitution.” This practice involves advertising products at very low prices with no intention of selling - once in the store, consumers are directed to other products that are more profitable. This practice is prohibited in Canada. See Option consommateurs report published in 2012 on bait and switch selling at: <https://option-consommateurs.org/wp-content/uploads/2017/07/pratiques-commerciales-vente-prix-appel-mai-2012.pdf>

⁴¹ The participants were given a news article to read for each case. These articles were selected from our press review presented in Section 1.

⁴² <https://www.lejournaldejoliette.ca/actualites/actualites/211394/sears-refuse-dhonorer-une-erreur-de-prix>

The first case concerns a toy sold by Sears. The article reports that the toy was mistakenly advertised at \$12.99 rather than at the real price of \$129.99. Many Canadians bought the product and contacted Sears' customer service to get confirmation that the price was the right one. Even though some of them received confirmation, Sears then decided not to honour the orders.

After discussion, we presented another case. At the meetings held in Montréal, it was about the Canadian Appliance Source Company.⁴³ We summarized it as follows:

[TRANSLATION]The second case involves a dishwasher purchased on the Internet from Canadian Appliance Source in Ontario. The article reported that the dishwasher had been sold by mistake at a price of \$39 rather than the real price of \$1,149. About 45 minutes after debiting the amount from the buyer's credit card, the company sent him an email to inform him that his order had been cancelled.

The Toronto focus group⁴⁴ discussed the incident that occurred with Lenovo.⁴⁵ We summarize it as follows:

The second case involved the computer company Lenovo. In 2014, Lenovo mistakenly advertised a computer on its website at the price of \$279, whereas the real price was \$799. Thinking it was a great deal, some people went on to buy the computer. Their credit cards were billed and the company took weeks to correct the price on its website. Lenovo finally cancelled all the orders but offered customers a \$100 discount.

The reactions of the participants in the Sears case were for the most part negative, especially towards their business conduct. One participant said, "You just don't cancel the order, you have to send out an apology and a rebate for the wasted time and trouble," while another said more emphatically: [TRANSLATION]"I would get myself refunded and would never do business with them again." Another participant said what made the situation worse was that the representatives from Sears had confirmed to customers that the advertised price was correct:

Since they contacted a representative and they assured them that it was the right price, it makes it worse because I hate it when someone tells me something on the phone and then you talk with someone else and they tell you something else.

Several said that the company should have offered consumers a discount:

⁴³ <http://www.journaldeMontréal.com/2016/01/05/il-veut-son-lave-vaisselle-payé-40-au-lieu-de-1149>

⁴⁴ For the Toronto groups, we wanted to present an alternative case that of Sears, which was different from that of Montréal groups, to get the opinion of the participants in a situation in which the pricing error was smaller and the company's reaction to the error was different.

⁴⁵ <https://globalnews.ca/news/1355313/lenovo-canada-cancels-customer-orders-after-online-pricing-error/>

When there's a mistake online it involves a greater volume than in the store, if 10,000 people order the product, there is no way they can honour all of those orders so they should offer a coupon.

Finally, only one participant said that Sears was right to react as it did to the pricing error.

The discussions in the Montréal focus group about the second case, that of the Canadian Appliance Source Company, were more nuanced. Some participants were sympathetic to the company, particularly in view of its rapid reaction: [TRANSLATION] "They saw the error immediately. They did not wait a week." The big difference in price (\$39 vs. \$1149) was also a factor influencing their opinion, since [TRANSLATION] "when the price gap is too big, you know there's a problem." One participant echoed this, explaining that [TRANSLATION] "if you buy this product for \$40, everything in the store is going to be more expensive. The company responded well." Other participants felt that despite the significant price differential and the rapid reaction by the company, the order should have been honoured. One participant said simply [TRANSLATION] "that is the list price, so they must honour it," while another said, [TRANSLATION] "Stores shouldn't make mistakes; they can claim the insurance."

The case of Lenovo discussed in the sessions in Toronto raised a similar reaction to the Sears case, due to the company's response time: "They're not taking any responsibility for their actions, it looks like they're not responding. They should've acted on their error right away." One participant noted that it was strange that a company in the IT sector was unable to correct an error on its website. Another participant said:

They say they took weeks to correct the price, so basically they keep taking money from people, it says they just don't care about their customers, they're not trustworthy, they are in a cash flow situation and they're just collecting money that they need.

On the other hand, the participants felt that Lenovo offering a discount was fair, and that it was better than Sears' reaction.

We then asked participants if certain factors could change their opinion about pricing error situations. The factors proposed included the total value of the good, the company's response time and the size of the business. In the case of Lenovo, one participant said, "Maybe the laptop cost them more than \$299 to produce, so I'm more reasonable." Another added: "It depends if the mistake is really big and if the company can afford to give discounts. If it's a smaller company I'd be more sympathetic." What was important for many was good communication on the part of the merchant. One participant explained: "The question is about reputation and trust. Online shopping is like a store: if I feel they take advantage of me I go somewhere else." Others added: "If it's an error, it should be all treated in the same way."

Participants expressed similar sentiments when asked whether there were certain situations that could justify a merchant not honouring an order. One participant claimed to feel [TRANSLATION]“less greedy toward small merchants when it comes to respecting prices” and another stated, [TRANSLATION]“When the gap is too wide, I would feel dishonest.”

The majority of participants felt that a period of 8 to 48 hours is reasonable for a company to refuse to honour an order. A 12-hour period did not make sense to one participant, who said: “It gives enough time for the person in charge of the Website to go work and correct the mistake.” Again, the size of the company was a factor that influenced their opinion.

Several participants agreed with this idea, expressed in one of the Toronto groups:

It depends on the store I am buying from. I have no sympathy for Amazon if they trash my order, because they make a lot of money and they are a huge company. If it's a small or specialty store, I expect a prompt reply but I expect less to get something in return.

If they feel a company has acted in bad faith, many are willing to make negative comments publicly. One participant said, “I would tell everybody I know.” Another said: “I would go on social media.” Others said they would be ready to accept the error if they received an apology or a discount. [TRANSLATION] “It depends on the reaction, if they admit the error or offer something reasonable, I'll accept it.”

Finally, we asked participants whether intermediaries like Expedia or Trivago were as responsible for the error as the supplier. Almost all the respondents answered in the affirmative. However, one participant said: “I don't think so because they get the actual prices from the people who offer those deals. They just post it on their platform. They just exist to publish what you send them.”

2.2.6 Consumer perceptions of terms of use

For the last part of the discussion, we wanted to know how the participants perceived the legal statements pertaining to error rates that are contained within the terms of use and what they understand from them. To do this, we selected from our sample⁴⁶ two passages⁴⁷ that are representative of the formula commonly employed by online marketers to reserve the right to correct pricing errors. The selected passages were easy

⁴⁶ This is the sample of websites of online merchants used during the analysis in Section 4 and presented in Appendix 5 of the French version of the report. The extracts used for focus groups are taken from the Home Hardware website, online: <https://www.homehardware.ca/terms-and-conditions>

⁴⁷ One passage in French and one in English.

to read and understand. Participants were given a few minutes to read them. The facilitator then read them out loud.

Bien que tous les efforts possibles aient été consentis pour maintenir les prix indiqués, nous nous réservons le droit de corriger les prix lorsque cela est nécessaire, ainsi que de substituer ou d'abandonner tout article qui ne serait plus disponible. Nous nous réservons le droit de corriger les erreurs techniques ou les erreurs d'impression.

While every effort is made to maintain the prices shown, we reserve the right to adjust prices when necessary and also to substitute or discontinue any item which may become unavailable. We also reserve the right to correct any printing or technical errors.

The majority of participants in every group responded negatively. Several expressed surprise and a sense of helplessness. From among the participants' remarks, we retain: [TRANSLATION] "They protect themselves from everything, nothing is their fault," "it's a get out of jail free card", "it's frustrating", "that's not good faith" and [TRANSLATION] "they can change prices whenever they want." According to participants, the excerpts were too vague and companies give themselves too many rights.

Some participants said they would not buy a product on a website that makes such a statement. However, on reflection, some argued that similar extracts probably exist on all online shopping sites: [TRANSLATION] "It's probably something that all businesses have."

One consumer expressed helplessness, saying:

It's unfair, it's a blanket disclaimer. It means they're not going to care because you're not going to go somewhere else if it's the same policy everywhere. You're shopping in fear. If you're a corporation, you have a responsibility to provide the proper service. Without the customer, they would not exist "

When asked if it was legitimate for a company to include this type of extract in its terms of use, several participants said it was not, because they said that generally, no one reads legal disclaimers. The views expressed in the Toronto groups, however, were more nuanced. For example, one participant said, "After all, it's up to us to decide if we want to carry on with them or not." Another added: "It also depends on who's saying it. For example I trust The Bay so the odds of such a policy coming into play are very small but if it's Etsy I would be worried. If I'm familiar with the brand I will trust them more even if they had that policy."

When asked about the legality of such a clause, the participants in the Montréal groups made a distinction between Québec and other jurisdictions. They feel that consumers are well protected in Québec and feel that this type of clause is not legal there. They assume that, in other countries, such as the United States, consumers have less protection and that such a clause could be brought before a court. Again, participants in

Toronto groups were more nuanced in their responses; they believed for the most part that the clause was lawful. Some doubts were also expressed: "On the Internet, it's pretty tough to know because there's so many jurisdictions."

We finally asked the participants if modifications could be made to clauses related to pricing errors. Participants from all groups said that the clause [TRANSLATION] "should be clearer." For example, for one of them said "It needs to be more specific, it's very vague. It doesn't say that if they make a mistake they will take responsibility for it. Basically they're just covering themselves." The suggested solutions included adding information about how the company will correct the error, providing compensation to consumers or informing consumers of their rights. Several also raised the possibility of limiting the clause in time since it would be [TRANSLATION] "fairer to customers." For example, one participant suggested adding the following: "We will correct any pricing within 8 hours and in the event that your credit card has been charged, we will refund the amount charged within 24 hours." We note one final suggestion: that the company should include in its clause excuses in anticipation of a pricing error; something like: "We apologize for anything unexpected that may occur, we will attempt to make it right."

3 Legal framework

3.1 Preliminary discussion

Because the Internet tends to eliminate commercial barriers online, Canadians can visit the Websites of companies located all over the world. However, the laws that apply to consumer protection may vary significantly from one jurisdiction to another. To better understand how much protection Canadian consumers have against pricing errors displayed online, we shall devote this section to an analysis of the laws and regulations in place in Canada and in four provinces. We will also study the legal framework in the United States and France, where many cases of pricing error have occurred, as stated in Section 1.

After studying the regimes in Québec, Ontario, Alberta and British Columbia, and the decisions that have been issued by the courts, we make our first observation: the situation in Québec differs widely from what exists in the three common law provinces.

While each of these provinces has legislation to prohibit false or misleading representations, Québec alone has a provision that gives consumers the right to accurate pricing. Section 224c) of the *Consumer Protection Act* (hereinafter CPA), prohibits merchants from demanding a higher price for a good or service than that advertised and this, by any means whatsoever. Québec is the only jurisdiction to determine clearly when a contract is concluded online in virtue of CPA Section 54.1. This section establishes an irrebuttable presumption that an electronic merchant has made an offer to enter into a contract on its website as soon as the merchant's proposal contains all the essential elements of the proposed contract, whether or not there is an indication of the merchant's willingness to be bound in the event that it is accepted and even if there is evidence to the contrary. It is not surprising, therefore, that Québec is the only province where we have found judgments in cases of online pricing error. However, as we shall see later, the jurisprudence emanating from the Small Claims Division is sharply divided.

One of the first online pricing error cases to come before Canadian courts was in Québec in 2003, in a case that pitted l'Union des consommateurs and Olivier Dumoulin against the Dell Computer Corporation (hereinafter Dell). Dell had offered two handheld computers for sale on its website at the erroneous price of \$89 and \$118 instead of \$379 and \$549. When the company became aware of the error, it canceled all orders for the computers. The Union des consommateurs and Mr. Dumoulin asked the court to order Dell to honour the offer it made on its website and to pay \$100 in damages and \$1,000 in punitive damages to each of the class members. This case has never been heard on its merits because the facts occurred before the entry into force of Section

11.1 of the *Consumer Protection Act* (CPA).⁴⁸ The Supreme Court of Canada ruled that the mandatory arbitration clause in the contract was applicable and referred the parties to the dispute to an arbitrator.

Let us now look at the legal provisions that Canadians can rely when they are victims of online pricing errors.

3.2 Canadian jurisdictions - Federal

Federally, the *Competition Act*⁴⁹ contains a provision that is potentially applicable to situations involving pricing errors. In fact, Section 74.01 provides that “A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever [...] makes a representation to the public that is false or misleading in a material respect [...]”.

In this regard, since the legislator intended to integrate a civil rule into criminal law⁵⁰ no evidence of an intention to mislead is required. All that is needed is that a false or misleading impression of representation emerges that it is likely to influence the decision of the ordinary citizen about whether or not to purchase the product offered.⁵¹ To our knowledge, there is no jurisprudence to show that the courts have applied this provision to a case of pricing errors displayed online.

In addition, there is the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*⁵² that issued from the discussions of the Working Group on Electronic Commerce and Consumers, which is composed of representatives from various sectors of the economy such as consumer associations, government agencies and industry representatives.⁵³ This code was endorsed in January 2004 by the federal government, the provinces and the territories. It is non-binding. The *Code*, which is relatively old for a document that provides a framework for such a constantly changing sector, establishes

⁴⁸ This Section states in its first paragraph that “Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action, is prohibited.”

⁴⁹ RSC (1985), c. C-34. Online: <http://laws.justice.gc.ca/eng/acts/C-34/FullText.html>

⁵⁰ House of Commons of Canada, *Publications of the House*, 36th Parliament, 1st Session, Edited Hansard • Number 74, Monday March 16, 1998 @ 1300. Online: <http://www.ourcommons.ca/DocumentViewer/en/36-1/house/sitting-74/hansard>

⁵¹ Principle notably confirmed in *Commissioner of Competition v. Sears Canada Inc.*, 2005 CACT 2 (CANLII).

⁵² Online: [http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/\\$FILE/EcommPrinciples2003_e.pdf](http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/$FILE/EcommPrinciples2003_e.pdf)

⁵³ See the full list of participants on the Consumer Measures Committee Website. Online: <http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00074.html>

thresholds that we believe are just the minimum that should be attained. In particular, it states:

1.2 Vendors shall ensure that their marketing practices, information and links on their Web sites are current, accurate and not deceptive or misleading to consumers, and that all objective claims can be substantiated.

[...]

3.5 Vendors shall maintain effective controls designed to ensure that transactions are billed and completed as agreed, to promptly rectify any mistakes in transaction records, and to ensure that consumers are notified of any such correction

It seems we can infer from the wording of the last principle that the mistakes merchants intend to correct are those that make the transaction non-compliant with agreed terms and conversely therefore, in the present context, the merchant would not be allowed to correct pricing errors committed before the order was placed.

Finally, since Canada is a member country of the Organization for Economic Cooperation and Development (OECD), it is reasonable to believe that it wants merchants who do business on its territory to respect *the Recommendation of the Council on Consumer Protection in E-Commerce*, last updated in 2016.⁵⁴ While this instrument is also not binding, it is relevant here to emphasize that it requires that:

16. Businesses should ensure that advertised prices do not misrepresent or hide the total cost of a good or a service. [...]

25. Online disclosures should be clear, accurate, easily accessible and conspicuous so that consumers have information sufficient to make an informed decision regarding a transaction [...]

36. Businesses should ensure that the point at which consumers are asked to confirm a transaction, after which time payment is due or they are otherwise contractually bound, is clear and unambiguous, [...]

It goes without saying that Canadians are not directly protected by this text, but it seems that Canada has a moral duty to set in place legislative and regulatory structures capable of achieving these objectives.

3.3 Canadian jurisdictions - Québec

In Québec, the laws that may be applied to online pricing errors are primarily the *Civil Code of Québec* (CCQ) and the *Consumer Protection Act* (CPA).

⁵⁴ OECD *Consumer Protection in E-commerce, Legal Instruments on Policies for the Digital Economy*, March 24, 2016, 22 pages. Online: <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>

In this regard, it is worth mentioning that, with the exception of its public order of protection, the CCQ is supplementary, that is to say, it fills the gaps when no other law provides for the situation or where the contract does not mention it.

For its part, the CPA is a law of public order of protection, and whatever is contrary to it is relatively null.⁵⁵ For instance, consumers cannot waive the protections offered by the CPA, even by agreement.⁵⁶ Also, Section 54.2 CPA provides that a distance contract that is entered into at the consumer's address will have precedence over the supplementary provision of the *Civil Code* providing that a contract is formed in the place where acceptance of an offer is received.⁵⁷

This example is not trivial because in the context of electronic commerce, any consumer who, over the Internet, buys a good or a service located in any part of the world, is assured of the protection of Québec laws. A company or corporation located elsewhere in the world performing the same transaction would have its contract governed by the jurisdiction in which the offer was received, which potentially means any jurisdiction on the planet.

3.3.1 False or misleading representations

In Québec as in other provinces, false or misleading representations are prohibited by law.⁵⁸ On the face of it, this obligation does not seem to raise any major interpretive challenges.

We should mention, however, a number of criteria that have been established by the courts and the doctrine for determining what constitutes a false or misleading representation.

First, it is not necessary that there be intent to deceive on the part of the merchant for a representation to be against the law. If a price is displayed incorrectly, either deliberately or by mistake, it therefore constitutes a prohibited practice.

Another point in common with the other provinces is that it is forbidden to deprive consumers of their legally recognized rights. On the other hand, although certain

⁵⁵ Pierre-Claude Lafond, *Droit de la protection du consommateur : Théorie et pratique*, Éditions Yvon Blais, 2015, p. 31, para. 76.

⁵⁶ *Consumer Protection Act*, RSQ, ch. P-40.1, ss. 261-262. Online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/P-40.1>

⁵⁷ *Civil Code of Québec*, ch. CCQ-1991 Art. 1387. Online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>

⁵⁸ *Consumer Protection Act*, RSQ, ch. P-40.1, s. 219 Online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/P-40.1>

remedies are sometimes the same and although the procedural vehicles are similar, the similarities end there.

Let us now look in closer detail at the two provisions that make the Québec regime so specific.

3.3.2 Section 224 c) of the CPA

This provides that:

No merchant, manufacturer or advertiser may, by any means whatever: c) charge, for goods or services, a higher price than that advertised... (Emphasis added)

With regard to online pricing errors, the Court has recognized two ways of interpreting this article.

The first is to claim that by simply cancelling a sale tarnished by a price display error, the merchant is not charging a price higher than the one advertised, since this section of the Act contains no obligation to sell. This was the position adopted by Justice Bradley of the Court of Québec⁵⁹ in the case between Francine Néron and Sunwing Vacations⁶⁰ for a 14-day trip to Cancun purchased online at a price of \$805 per person.

With all due respect for the opinion of Judge Bradley, we believe that this interpretation does not hold water. Indeed, it is well established, both in doctrine and in case law, that the CPA should be interpreted broadly and liberally. We must therefore favour the second interpretation, which is that when the sale is cancelled, a consumer who still wants to purchase the good or service would be forced to pay a higher price since the merchant would require him to pay the corrected, “real” price. So this constitutes a way of doing indirectly what one cannot do directly: demanding a price that is higher than the advertised price. Consequently, there is a violation of the law due simply to the fact of refusing to honour an order at the price that was displayed in error. Consumers are justified in believing that when a contract is concluded, it will be executed.

To conclude otherwise would obviously undermine the principles of binding contracts and the stability thereof.⁶¹ Indeed, the law attaches great importance to the binding force of a validly formed contract.

The notion of the binding nature of contracts validly formed, as codified in Articles 1434 and 1439 C.C.Q., is of fundamental importance to the economy of this province and to

⁵⁹ Small Claims Division

⁶⁰ *Francine Neron v. Sunwing*, 2014 QCCQ 1615.

⁶¹ *Civil Code of Québec*, ch. CCQ-1991 Arts. 1434 and 1439. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>

fabric of our legal system. This notion, along with those regarding the stability of contracts and the legitimate expectation that their provisions will be respected, form the cornerstone of contract law in Québec. They are notions essential to the proper and orderly functioning of commercial relations in a global economy and a free market society.⁶²

3.3.3 Section 54.1 of the CPA

As explained earlier, this Section of the CPA states that there is presumption of an offer when a website contains all the essential elements of the proposed contract. Thus, a consumer who orders a product or service online would still be in the position of someone who accepts the offer and, therefore, concludes the contract. In Québec law, placing an order is always synonymous with concluding a contract.

Some judgments, however, have rejected this provision, asserting that the merchant's website does not constitute an offer to contract, basing this in particular on the former Section 20 CPA. We find this argument in at least three decisions by the Small Claims Division⁶³ in cases of pricing error. The judges cite authors Nicole L'Heureux and Marc Lacoursière:

[TRANSLATION]The offer to contract possesses certain attributes specific to electronic commerce. Essentially, it is a question of determining whether it was the merchant or the consumer who initiated the offer to contract. The definition provided in 54.1 para. 1 therefore retains the essence of the former Section 20 CPA, but omits the last sentence of that provision which stated: "provided that the offer has not been solicited by a particular consumer," which would have made it easier to understand this new provision. If the consumer himself visits a Web site to examine the characteristics of a product, and later chooses to buy it online, this involves the phenomenon called "pull media." We must then consider that the consumer has himself taken steps to "pull" the information towards him. Conversely, when the merchant sends its offer directly to the consumer, this involves the technique called "push media" because the merchant "pushes" information - and therefore the offer to contract - towards the consumer.⁶⁴

With respect, we believe that this reasoning is unacceptable. It is true that the last sentence of former Section 20 of the CPA⁶⁵ has been removed, but it was for a reason. The legislator expressly intended to eliminate the requirement that the consumer should solicit the offer in order for a distance contract to be concluded. Indeed, if we

⁶² *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, 2014 QCCS 3590 (CANLII), para. 561.

⁶³ *Yannik Faucher v. Costco Wholesale Canada*, 2015 QCCQ 3366, *Josée Therrien v. Sears Canada Inc.*, 2015 QCCQ 13168, and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

⁶⁴ Nicole and Marc L'Heureux Lacoursière, *Droit de la consommation*, 6th ed., Cowansville, Yvon Blais, 2011, No. 21, p. 29.

⁶⁵ Section 20 of the CPA, now repealed, read: "A distance contract is a contract between a merchant and a consumer which are in the presence of one another or in the offer, that addresses one or more consumers, or upon acceptance, provided that the offer was not solicited by a particular consumer."

return to the debates of the National Assembly of Québec surrounding the adoption of Section 54.1 CPA, we find the following statement by André Allard, Director of Legal Affairs at Québec's Office de la protection du consommateur:

[TRANSLATION] **Mr. Allard (André):** Good. 1388 (CCQ) does in fact define what constitutes an offer, but it also states that the one who forms it must be able to express his intention to be bound by it. And what this provision (54.1 CPA) attempts to correct is a particular usage that runs counter, so to speak, to the logic of the retail trade, which is typified by the sort of statement that we see increasingly often that says: this is not an offer ... [...] when in fact it is one. So what the merchants want is that it will be the consumer who forms the offer to buy the product that you just mentioned to me. And the reason for this practice is so that the merchant can avoid the obligation of selling a product that has been wrongly priced. [...] ⁶⁶ “ (Our additions)

Following such an analysis, it is difficult to see how Section 54.1 CPA could be interpreted the way it was in those judgments.

3.3.4 Recourse

Section 272 CPA provides several remedies against merchants who do not respect the CPA. In fact, the consumer may request the court to order the performance of the obligation, permission to execute it at the merchant's or manufacturer's expense, have his obligation reduced, have his contract rescinded, have the contract set aside or annulled, voided, without prejudice to his claim for damages in all cases. He may also seek punitive damages.⁶⁷

In the case of pricing errors displayed online, the consumer will presumably request a performance of the obligation or damages.

The Supreme Court of Canada has already ruled on how the mechanics of this Section shall be articulated:

[...] where the recourse provided for in s. 272 C.P.A. is available to a consumer, his or her burden of proof is eased because of the absolute presumption of prejudice that results from any unlawful act committed by the merchant or manufacturer. This presumption means that the consumer does not have to prove that the merchant intended to mislead, as would be required in a fraud case in civil law. [...] a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 C.P.A. The court

⁶⁶ *Journal des débats de la Commission des institutions*, 37th Parliament, 2nd Session (14 March 2006 to 21 February 2007), Tuesday 5 December 2006 - Vol. 39 No. 35, detailed study of Bill 48 - *An Act to amend the Consumer Protection Act and the Collection of Certain Receivables Act*. Online:

<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/ci-37-2/journal-debats/CI-061205.html>

⁶⁷ *Consumer Protection Act*, RSQ, ch. P-40.1, s. 272. Online:

<http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/P-40.1>

can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.⁶⁸

Some, however, would argue that in the context of pricing errors displayed online, the damage should never exceed the amount of the difference between the advertised price and the amount paid by the consumer to purchase the goods or service. Otherwise, this would amount to granting damages for loss of opportunity, for which the burden of proof is very heavy.

We partly agree with this reasoning. Indeed, when a pricing error is displayed online, there are typically two faults committed almost simultaneously that need to be distinguished, both of which can give rise to the remedies specified under 272 CPA. The first fault is false or misleading representation and the second is the attempt to sell at a higher price than was advertised. As far as the second fault is concerned, it is true that awarding damages in excess of the price difference could be likened to awarding damages for loss of opportunity. On the other hand, any damages to be awarded for false or misleading representations are, in our opinion, independent, and the total damages for the two offenses could exceed the difference in price. In these circumstances, granting higher damages would be perfectly justifiable.

Finally, the CPA provides that the Attorney General may institute proceedings against any merchant who breaks the law. Any merchant so convicted could face a fine of up to \$100,000.⁶⁹

3.3.5 Defenses

a. The mistake defense

Merchants who have published incorrect prices on their website often invoke error so as to avoid the obligation to honour orders that have been made. It is interesting to note that the current provisions governing electronic commerce⁷⁰ relate only to cases when the consumer makes a mistake and would like the contract to be rescinded, rather than when the merchant makes the mistake and the consumer wants to the contract to be enforced.

Could making an error in the price displayed online be grounds for cancelling an order? Some believe that when the error is obvious, the merchant should be able to correct it.

⁶⁸ *Richard v. Time Inc.*, 2012 SCC 8, para. 128.

⁶⁹ *Consumer Protection Act*, RSQ, ch. P-40.1, s. 278. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/P-40.1>

⁷⁰ 54.1 et seq. CPA

After all, making a mistake in good faith does not constitute a fault within the meaning of the *Civil Code*.

The *Civil Code of Québec* provides that error vitiates consent in certain circumstances. If there is no free and informed consent because it is vitiated by error, it becomes difficult to claim that a contract was concluded:

1400. Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.

An inexcusable error does not constitute a defect of consent.⁷¹

The second paragraph of this Article stipulates an exception to errors that vitiate consent: an inexcusable error. When does a mistake becomes inexcusable? Authors have been very interested in the notion of error, and many academic articles have been written on the subject. We will try to summarize these while remaining concise.

First, one should differentiate an economic error from a labelling or pricing display error. An economic error occurs when a vendor misunderstands the market value of the item he is selling and advertises it at a lower price than it would have sold at if he had known its true value. A labeling or pricing display error occurs when the vendor knows the value of the product he is advertising, but due to a typing error, the price displayed is not the one it should be.

The appropriate remedy for the latter type of mistake is to go to court to request that the contract be annulled.⁷²

However, as correctly noted by Professor Nicolas Vermeys in an article written in 2006:

[TRANSLATION] Now, although there is a difference between a pricing error and an economic error, it nonetheless remains that the manifestation of the two types of error is the same: the price indicated in the contract is less than the value of the good or service. Moreover, the evidence will be the same in both cases: the party requesting the annulment of the contract will submit evaluations, reports and expert testimony to establish that it is impossible that anyone could really intend to charge the price stated in the contract. How then will the judge be able to determine whether it is an economic error rather than a pricing error? Therefore, as pointed out by Chouinard J of the Court of Appeal in *Beaurivage and Méthot Inc. v. Hospital Corporation of Blessed Sacrament*: to admit the mistake about the price in this matter would be to admit to an error of economic assessment and, consequently, to the resulting injury. This however, is not

⁷¹ *Civil Code of Québec*, ch. CCQ-1991 Art. 1400. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>

⁷² *Civil Code of Québec*, ch. CCQ-1991 Art. 1407. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>

allowed between majors under our law. Indeed, to accept that a pricing error can vitiate consent under Article 1400 CCQ is to open a Pandora's box that would allow any contractor who makes an economic mistake to claim that it is a pricing error and thereby significantly undermine the stability of contracts.⁷³ “(Citations omitted)”

We agree with this reasoning, which in particular is consistent with the principles set forth in the CCQ and the CPA according to which a contract must be interpreted in favour of the consumer.⁷⁴ To plead a display error is therefore to plead lesion. It will be recalled that lesion involves such an imbalance between the obligations of the parties that it is tantamount to exploitation. Now, according to the CCQ, lesion can only vitiate the consent of minors and protected adults.⁷⁵ The CPA also permits consumers to plead lesion to cancel a contract or reduce their obligation.⁷⁶ But in no case has the legislator provided that the merchant can use this defense.

Although this argument was not accepted, we believe that displaying erroneous prices online remains an inexcusable error that cannot vitiate the merchant's consent. Consequently, he cannot have the contract nullified despite a price display error. Here is why.

Generally an inexcusable mistake is described as one that could easily have been avoided by taking a few precautions that the victim⁷⁷ did not take.⁷⁸ [TRANSLATION] “Even more inexcusable is an error with no other cause than the act of the contractor who claims to be the victim of it”⁷⁹ (emphasis added) Some such errors resemble the inexcusable error of gross negligence.⁸⁰

According to authors Jobin and Vézina, we see in this rule a very clear sign of equity, [TRANSLATION] “If the victim's mistake turns out to be the real cause of his error, it is

⁷³Nicolas Vermeys, *Le poids des virgules - Étude sur l'impact des erreurs matérielles en droit des contrats*, La Revue du Barreau du Québec, Automne 2006 - Tome 66, p. 291-332. Online: <https://www.barreau.qc.ca/pdf/publications/revue/2006-tome-66-2.pdf>

⁷⁴ *Civil Code of Québec*, ch. CCQ-1991 Art. 1432. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991> and *Consumer Protection Act*, RSQ, ch. P-40.1, ss. 261 and 262. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

⁷⁵ *Civil Code of Québec*, ch. CCQ-1991 Article 1405. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>

⁷⁶ *Consumer Protection Act*, RSQ, ch. P-40.1, section 8. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

⁷⁷ In this case, the merchant.

⁷⁸ Didier Lluellas and Benoît Moore, *Law of Obligations*, 2nd Edition, Carswell, 2012, para. 540.

⁷⁹ *Dunn v. Williams*, 2010 QCCA 2168, EYB 2010-182778, para. 27, quoted in Didier Lluellas and Benoît Moore, *Law of Obligations*, 2nd Edition, Carswell, 2012, para. 540.

⁸⁰ Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th Edition, (2013), Éditions Yvon Blais, EYB2013OBL29 para. 215.

actually unjust to annul the contract and thereby deprive the other party in good faith of his benefit.”⁸¹

Can a price display error be classed as a fault within the meaning of CCQ? Under the circumstances, we believe that it can. In fact, the fault is the behaviour of the person who causes harm to others by lack of respect for the rules of conduct which, according to circumstances, usage or law, are binding on him.⁸² However, the CPA requires the merchant not to make any false or misleading representations, and at no time may he request a higher price for a good or service than the one that was advertised.⁸³ Given these legal requirements, both the circumstances and usage should require that electronic merchants set in place robust measures to ensure the accuracy of the prices posted on their websites.

Moreover, it is recognized in both case law and doctrine that to be defined as inexcusable, the error must be assessed in light of all the circumstances surrounding its commission.⁸⁴ Thus, the quality of the vendor should be taken into account. It is reasonable to expect that professionals should implement measures to ensure the accuracy of the prices they display. We should therefore focus on such measures. In fact, [TRANSLATION] “an error committed by people with experience in a field of activity that is considered their own will more easily be considered inexcusable than one that is committed by an inexperienced person.”⁸⁵ The more qualified the one who was in error is, the more the judge will tend to be tough on him by finding the error inexcusable.⁸⁶ So we must ask what the merchant did to avoid the error, and what measures were implemented. After all, it has long been recognized that the burden of informing consumers rests on the shoulders of the merchant: “The measures to protect consumers from fraudulent advertising practices are one expression of a legislative intent to move away from the maxim *caveat emptor*, or “let the buyer beware.” As a result of these measures, merchants, manufacturers and advertisers are responsible for the veracity of the information they provide to consumers [...].”⁸⁷

⁸¹ Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th Edition, (2013), Éditions Yvon Blais, EYB2013OBL29 para.215.

⁸² *Civil Code of Québec*, ch. CCQ-1991 Art. 1457. Online: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>.

⁸³ *Consumer Protection Act*, RSQ, ch. P-40.1, ss. 219 and 224 c). Online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/P-40.1>

⁸⁴ Including: *Île Perrot Nissan v. Howard Holocomb* 2003 CanLII 39504 (QC CA), *Comtois v. Sunwing Vacations inc.*, March 10, 2015, Court of Québec, EYB 2015-251054. Also Pierre-Gabriel Jobin and Michelle Cumyn, *La vente*, 4th Edition, Section 16, Éditions Yvon Blais, 2017, EYB2017VEN3, Patrice Garant, *Droit Administratif*, 7th edition, s. 5.1.2.1 E. Carswell, 2017, EYB2017DRA28 and Didier Lluelles and Benedict Moore, *Droit des obligations*, 2nd edition, Carswell, 2012 EYB2012THM30, para. 546.

⁸⁵ Patrice Garant, *Droit administratif*, 7th Edition, 2017, Carswell.

⁸⁶ Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nd Edition, Carswell, 2012, para. 547.

⁸⁷ *Richard v. Time inc.* 2012 SCC 8, citing *R. v. Colgate-Palmolive Ltd.*, [1970] 1 CCC 100: “This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the

Moreover, in the specific case of pricing errors displayed online, the merchant is in control of all the parameters: he writes the terms of use and conditions of sale; he chooses and displays the price himself. [TRANSLATION] “Normally, merchants who trade online rely on a large team to manage the sale of products online. It follows that the consumer is safe to assume that well before being posted online to billions of consumers, [an ad] has gone through a process of price verification.”⁸⁸

Moreover, as we have seen earlier, with the technological tools⁸⁹ available today, it is easy for merchants to avoid upstream price display errors and limit their downstream consequences. For example, they can limit the number of orders that can be accepted when they have only a limited number of objects for sale, so that orders will not be accepted by the system once stocks are exhausted. They can schedule alerts in order to prevent new orders being placed when X items are sold in a very short period of time. They can prevent, at source, prices being entered below a certain threshold or trigger an error message when a price entered is too low. In short, the merchants are far from being passive players in the online sales process. And in any case, as the saying goes, carelessness is no defense.

It should also be noted that repetition of an error by the same merchant is considered an aggravating factor in their inexcusability.⁹⁰

It not only seems that a price display error should always be considered an inexcusable mistake, but we should pursue the logic further. Should not the obligations of the vendor, who is a professional, be more onerous than those of the individual consumer, as in the case of latent defects, for example? In such situations, even if the vendor is unaware of the defect, the CCQ establishes a presumption of knowledge for the professional vendor⁹¹ who must repair the damage suffered by the buyer.⁹²

When a price display error occurs on the Web, is this not similar to a latent defect? After all, the ad is the tool that the vendor makes available to consumers to enable them to deal with him. If the tool proves to be inaccurate or unclear, it seems unfair that consumers should have to bear the consequences.

old maxim *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor* — let the seller beware. [p. 102]

⁸⁸ Miriam Cohen, « L'affaire Dell: qu'en est-il de l'erreur sur le prix? » *Lex Electronica*, vol. 12, n° 2, fall 2007, p. 12.

⁸⁹ There are several advanced solutions available today allowing merchants to automate pricing. See for example: <https://www.omniaretail.com/dynamic-pricing>.

⁹⁰ *Comtois v. Sunwing Vacations inc.*, March 10, 2015, the Court of Québec EYB 2015-251054.

⁹¹ *Civil Code of Québec*, ch. CCQ-1991 Article 1729. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>.

⁹² *Civil Code of Québec*, ch. CCQ-1991 Article 1728. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>.

That said, we are not claiming that Québec law should prohibit merchants from making mistakes or that it should forbid them to correct them. On the contrary, it is intended to prevent consumers paying for the mistakes of merchants and encourage merchants to correct them quickly. This is somewhat similar to the accurate pricing policy⁹³ used in supermarkets, which is why customers who purchase before the error is corrected are entitled to the list price. Those who purchase after the error is corrected are not entitled to anything.

b. Consumer bad faith

Despite what we have just seen, one might still wonder about the justification for consumers benefitting from the mistakes of merchants. Is not taking advantage of someone else's error contrary to the principle of good faith? Should the good or bad faith of the consumer be a criterion? Given the huge space this factor occupies in the judges' reasoning, in both pricing error doctrine and in public opinion⁹⁴ we would be ill-advised to evade the issue.

Good faith is always presumed⁹⁵ and the parties shall conduct themselves in good faith.⁹⁶ It is an obligation of public order. Bad faith is sanctioned in several places in the CCQ. Since good faith must govern the conduct of the parties at all times, it can make an error excusable that otherwise would have been inexcusable.⁹⁷

[TRANSLATION] any person is acting in good faith who acts without malicious intent. [...] The second traditional sense of good faith is ignorance or false perception of reality; a person is in bad faith when he acts knowing that the act is illegal or illegitimate. [...] The Civil Code adds a third sense, [which it] calls objective, [and] has a much broader meaning, that of an acceptable standard of behaviour. Depending on the context, such standards may have a moral, social dimension, or they may simply refer to what is "sensible" or "reasonable." Good faith has thus become the requisite ethical behaviour with regard to contracts [...]. It assumes fair, honest behaviour.⁹⁸ (Citations omitted)

⁹³ Order respecting the price accuracy policy for merchants who use optical scanner technology, ch. P-40.1, r. 2, made under the *Consumer Protection Act* (Chapter P-40.1, s. 315.1). Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cr/P-40.1>

⁹⁴ The discussions held at our focus groups have shown that consumers may be lenient in some situations, especially when the pricing error is obvious and the merchant's reaction is fast.

⁹⁵ *Civil Code of Québec*, ch. CCQ-1991 Article 2805. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>.

⁹⁶ *Civil Code of Québec*, ch. CCQ-1991 Article 1375. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>.

⁹⁷ Jean-Louis Beaudouin, Pierre-Gabriel Jobin, *Les obligations*, 5th Edition, Carswell, 1998. 205-206, para. 210.

⁹⁸ Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th Edition (2013), Éditions Yvon Blais, EYB2013OBL29 para.132.

Good faith entails obligations such as the obligation to inform the other party and the obligation to inform oneself. A breach of these obligations may, in certain circumstances, be considered to be an absence of good faith. However, in consumer contracts, electronic or not, it is the vendor who has the obligation to inform and the consumer who has the duty to inform himself. The consumer cannot be required to inform the merchant. Indeed, the burden of information occurs when three criteria are met, including the inability of the other party to inform themselves.⁹⁹ However, in the case of pricing errors displayed online, not only can the merchant inform himself, he is in fact the only one possessing the correct information.

Good faith also entails a duty to advise. This generally rests more with the merchant than with the consumer. However, even if the consumer has something of a duty to advise the merchant, professors Lluelles and Moore remind us of the limits of this duty:

[TRANSLATION] While it is important to adhere to the letter of a contract, one should not require from the debtor [duty to advise] a degree of altruism that is counter to his own interests.¹⁰⁰ (Citations omitted)

Public opinion sometimes seems to require consumers to show themselves to be whiter than snow to “deserve” the protection provided by the law.¹⁰¹ People quickly draw conclusions about the bad faith of a consumer seeking a bargain, or one who wants to procure several goods at very low prices. Everyone is looking for the best possible price and there is nothing wrong in obtaining a good or service at a price that seems advantageous. [TRANSLATION] “The buyer, like everyone else, without this having any negative connotations, wants to take advantage of good opportunities. It does not necessarily mean that the buyer is acting in bad faith if he places an order for the purchase of an inexpensive object.”¹⁰² Nor is it illegal to obtain a quantity of similar goods at a very low price.¹⁰³ Moreover, as we have already mentioned, in the vast majority of price display errors, it is not clear to the consumer that he is dealing with an error of this kind.

⁹⁹ *Bank of Montréal v. Bail Ltd.*, [1992] 2 SCR 554, cited by Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nd edition, 2012, Carswell para. 2006.

¹⁰⁰ Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nd Edition, Carswell, 2012 para. 2013.

¹⁰¹ This is indeed what we found, particularly in discussions on social media as a result of a pricing error.

¹⁰² Miriam Cohen, “L’affaire Dell: Qu’en est-il de l’erreur sur le prix?” *Lex Electronica*, vol. 12, No. 2, Fall 2007, p. 12.

¹⁰³ If it can be proven that several products are purchased in order to be resold, this may tend to show that the buyer was not acting like a consumer. However, the burden of proof is on the merchant who wants to refuse to honour an order or cancel an existing order. In fact, for a consumer contract to be concluded, s. 1, CPA teaches us that a merchant who obtains a good or service for the purposes of his own business is not protected by the CPA. Also, Art. 1384 CCQ indicates that goods acquired by the consumer must be used for personal, family or household purposes.

Is a consumer who knows or should know that the merchant has made a mistake and does not mention that the price is “too low” guilty of fraud by omission? We believe not. Fraud is the action of deceiving or defrauding in order to cause the other contracting party to make a mistake under conditions that are unfavourable to him. But in the case of price display error, the error has already been committed when the consumer contracts.

Despite this, is a consumer who knows or should know that the merchant made an error with the price and intends to take advantage of it, automatically acting in bad faith?

Doctrine and jurisprudence teach us that lack of good faith and bad faith are two different things. It also teaches that whoever calls into question the good faith of the other party must prove that it is actually a case of bad faith in order to rebut the presumption.¹⁰⁴

[TRANSLATION] Bad faith is more difficult to prove when it takes the form of omission, failure to act, willful blindness, recklessness, or irresponsible behaviour. This is the situation that sometimes gives rise to a distinction between evidence of lack of good faith and proof of bad faith. While lack of good faith is often censured, the Court may however be less severe or more lenient in punishing it than it is toward the person whose bad faith is evident. The party who wants to demonstrate the absence of good faith must prove that the other party has not complied with the requirements of good faith, while for evidence of bad faith, the party must prove the constitutive elements. The distinction between lack of good faith and bad faith is not always obvious. Lack of good faith is likely closer to willful blindness, carelessness or unjustified recklessness or error due to negligence. Bad faith is far from being a standard of behaviour, but it can be defined as conduct indicating an intent to harm or as gross recklessness with regard to the possible consequences of the act on third parties. It is akin to the unreasonable exercise of selfishness. The fact remains that bad faith must be allied to the realization that it is against the law. Moreover, the Court of Appeal has already decided that: “Bad faith is more than simple fault or negligence. In principle, it implies a clear understanding of the true situation.”¹⁰⁵ (Citations omitted) (Emphasis added)

The Québec Court of Appeal has already ruled specifically that knowledge of a probable merchant pricing error does not result in a finding of bad faith:

[TRANSLATION][...] the appellant cannot reproach the judge for not having drawn the conclusion from her statement that the respondent “must have known that there was probably some error” that it was in bad faith. We must not forget that we are in the domain of automobile sales; the respondent was looking for the best price and the appellant was looking for customers. The appellant was in control of the vehicle and it

¹⁰⁴ Vincent Karim, *Preuve et présomption de bonne foi*, 1996, 26. R.D.U.S., p. 435. Online: https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_26/26-2-karim.pdf

¹⁰⁵ Vincent Karim, *Preuve et présomption de bonne foi*, 1996, 26. R.D.U.S., p. 435. Online: https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_26/26-2-karim.pdf

was she who proposed the selling price. The respondent cannot therefore seriously be taxed with acting in bad faith.¹⁰⁶

This example from the Court of Québec adopts the same reasoning:

[TRANSLATION] It is up to Longue Pointe to demonstrate convincingly that the error was committed or induced by fraud or the silence of the applicant. It would therefore have to prove not only that Mr. Chrétien knew that a mistake had been made but that he caused it by remaining silent. [...] Not only is Longue Pointe a professional vendor, but its representatives complete the contract, calculate taxes, ensure the document is signed and sign it themselves. All these steps mean that the vendor had the opportunity of realizing its mistake and was able to see it without claiming that it was the silence of the buyer that prevented consent from taking place.¹⁰⁷ (Emphasis added)

Let us add that, apart from a few very obvious cases, it is often rather difficult, on the Internet, for consumers to distinguish authentic bargains from price display errors. Not only do prices there vary, but the choices are almost endless. Can we really expect consumers to know the market value of all the goods sold on the Web and be able to detect errors? Should we ask consumers to shoulder the burden of shopping at several sites to make sure they know the fair market value of the goods or services they would like? If so, where do we draw the line? How many sites will be considered enough to fulfil this shopping obligation? There are no such obligations for consumers shopping in traditional stores. What would justify making such a distinction? On the Web, prices for the same products vary from one extreme to the other. Some stores specialize in larger-than-life discounts and others boast that they guarantee the lowest prices. A merchant can have a thousand and one reasons for displaying a very low price or having a fire sale. It may be part of a one-time promotion or liquidation, for example. In a world where you can buy a Montréal-Paris plane ticket for a price ranging from \$470 to \$1,936¹⁰⁸ (the highest price is a little more than 4 times the lowest price) and where you can find Monopoly games at a selling price ranging from \$14 to \$400¹⁰⁹ (the highest price is a little more than 28 times the lowest price), it seems unthinkable to ask consumers to shoulder the burden of determining whether the price that appears on the screen “must be a mistake” and even more unthinkable to accuse consumers of bad faith when they attempt to procure a product or service at a great price.

If a so-called “obvious” error managed to get past the measures set in place by the merchant, then it is, in our opinion, inexcusable, in addition to being a false or misleading representation. It cannot therefore vitiate the merchant’s consent. The consumer is entitled to expect that merchants will take all necessary measures to ensure that the prices on their websites are the right ones.

¹⁰⁶ *Ile Perrot Nissan v. Howard Holcomb* 2003 CanLII 39504 (QC CA).

¹⁰⁷ *Chrétien v. Longue Pointe Chrysler Plymouth* (1987) Ltd., REJB 2000-19318 For 32 (CQ).

¹⁰⁸ Prices found on Expedia.ca webpage, April 26, 2018

¹⁰⁹ Prices found on the amazon.ca webpage, page April 26, 2018

There is no denying that the bad faith of one of the contracting parties, in this case, the consumer, can open the door to the cancellation of the contract. However, by themselves, willful blindness and mere knowledge of the error or a potential error are not characteristics of bad faith. For there to be bad faith, it needs to be demonstrated that there was intent to harm or exploit the other party. There is a very heavy burden of proof on the shoulders of the merchant who wants to show that the consumer is acting in bad faith.

3.3.6 Jurisprudence

To complete our legal analysis, we carried out a review of Québec case law on pricing errors displayed online.

This is divided into two categories. One the hand, Class Action suits and on the other, cases brought before Small Claims Court.

1. Class actions

Currently¹¹⁰ at least four class actions involving pricing errors displayed online are pending before the Superior Court of Québec. None has yet been decided on the merits. We must be patient to see what the courts say.

Note that class action suits frequently end in settlements. This has the disadvantage of leaving many issues undecided. As the adage goes, the worst of settlements is better than the best of trials; however, we hope that a court other than the Small Claims Court will shortly have an opportunity to address the issue of price display error in electronic commerce.

a) *Leon Berros v. Sears Canada Inc.*¹¹¹

This class action was instituted to compensate all Canadian consumers who bought a product at a wrong price on the website of Sears Canada Inc. and whose transactions were cancelled as of October 13, 2012. These are some of the products:

- A Simmons mattress advertised at \$150 in January 2015 and \$135 in October 2015; its estimated value was \$1,599.99;
- A Little Tikes outdoor game advertised in February 2015 at \$12.99 instead of \$129.99;
- A Broil King barbecue advertised at \$69.99 in April 2015; its “real” price is not mentioned in the application;

¹¹⁰ We verified this information in March 2018.

¹¹¹ Online: <https://lpclex.com/sears/>

- A Kitchen Aid refrigerator advertised at \$99.99 in January 2016; its “real” price is not mentioned in the application;
- A toy SUV vehicle in the colours of the Disney film Frozen; the list price and the “real” price are not mentioned in the application.

Mr. Berros requested that Sears Canada Inc. be ordered to pay consumers compensatory damages for “lost value,” i.e. the difference between the replacement cost¹¹² and the cost advertised by Sears as well as punitive damages of \$300 per violation.

This class action is particularly interesting because it seeks a declaration by the court that the actions of Sears, although not explicitly prohibited by the laws of other Canadian provinces, constitute unfair practices, which are prohibited. It also seeks a declaration by the court that Sears' conduct violates the provisions of the *Competition Act*.

Unfortunately, the recent bankruptcy of Sears Canada ensures that this case will never be resolved.

b) *Sebastien Crete v. Lenovo (Canada) inc.*¹¹³

The aim of this class action suit is to compensate consumers who, on May 22 and 23, 2014 purchased laptops on the Lenovo Canada website for which Lenovo had accidentally allowed “doorbuster” coupons¹¹⁴ to be applied to products whose price had already been reduced. In this case, Lenovo continued to accept orders at the wrong price even after publicly admitting that it had committed an error. The claimant asked the court to grant the members of the class action damages equal to the difference between the list price and the advertised price for each computer ordered. He also asked the court to order Lenovo to pay \$100 in punitive damages to each member.

c) *Mosché Chetrit v. Touram Limited Partnership (Air Canada Vacations)*¹¹⁵

This joint action is aimed at compensating consumers who, on 19 and 20 April 2016, purchased a vacation from Air Canada Vacations, which Air Canada Vacations refused to deliver due to a pricing error, despite the consumers having received a confirmation email. It asks the court to grant members compensation, in an amount to be determined, in addition to punitive damages.

¹¹² This is the term used in the order to describe the cost of an identical item.

¹¹³ Online:

https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeDetail.aspx?DemRecID=858

¹¹⁴ This special type of coupon is used to offer sizeable discounts on special occasions.

¹¹⁵ Online: <https://lpclex.com/air-canada-vacations/>

d) *Hurst v. Air Canada*¹¹⁶

This class action is aimed at compensating Canadian consumers who on or about August 25, 2015, purchased a card valid for 10 business class flights throughout the west coast of the U.S. and Canada. This card was sold for \$800 instead of \$8000. Hurst claims damages of \$7200 + tax, the difference between the advertised price and the corrected price, as well as punitive damages of \$500 per member.

This class action was authorized by Judge Capriolo of the Superior Court of Québec on January 30, 2017.

2. Québec Court, Small Claims Division

Our research has allowed us to identify 13 decisions involving online price display errors reached since 2011 by the Court of Québec Small Claims Division. As we know, this is a court of first instance and the judgments they render are not subject to appeal. Thus, these judgments do not actually create a “precedent” in the strict legal sense.¹¹⁷ This does not mean that these judgments are completely worthless, however.

Reading through the judgments, we see a real split between decisions that rule in favour of consumers (eight) and those that rule in favour of merchants (five).

Following is a quick overview of the arguments that have been used in cases where the judges ruled in favour of merchants and, respectfully, of the reasons why we believe them to be unfounded.

- For there to be misrepresentation, the court must be satisfied that the merchant intended to deceive. The merchant acted in good faith. No advantage resulted for the merchant.¹¹⁸

¹¹⁶ Online:

https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeDetail.aspx?DemRecID=1022

¹¹⁷ André Émond, *Introduction au droit canadien*, Montréal, Wilson & Lafleur, 2016, page 272 :

[TRANSLATION] “There are three conditions for recognizing a legal precedent: the decision establishing the precedent must originate from a higher court in the same hierarchy; the facts of the precedent-setting case must be significantly similar to the case at hand; and the applicable rules of law, in the event that the court interpreted rules of legislative law, must be the same in both trials.”

¹¹⁸ *Guy Lelièvre and Stephanie Gagnon v. Magasin la Clé de Sol Inc.*, 2011 QCCQ 5774, *Francine Neron v. Sunwing*, 2014 QCCQ 1615, *Yannick Faucher v. Costco Wholesale Canada Ltd.*, 2015 QCCQ 3366, and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

With respect to this argument, we need to readjust our aim. The Court of Appeal¹¹⁹ and the doctrine on consumer protection¹²⁰ are categorical; intent to deceive is not something that the court should consider in determining whether a false or misleading representation has been made. Whether the merchant acts in good or bad faith is immaterial.

- No consent was given by the merchant. The merchant included a disclaimer in its terms of use that it will not be bound in the event the advertisement is accepted.¹²¹

This argument runs counter to the wording of Section 54.1 CPA that establishes an irrebuttable presumption of offer as soon as the website contains all elements of the contract, whether or not there is an indication of its willingness to be bound if accepted, even in the presence of indication to the contrary. The corollary of this wording is that the consumer placing an order on a website is always in a position to accept the offer and, therefore, when the merchant receives this acceptance, the contract is concluded.¹²²

- The agreement included a clause by the merchant allowing the latter to avoid liability in the event of error.¹²³

Clauses allowing the merchant to free himself from his own act or that of its representative are prohibited under Section 10 CPA.

- "Pull media" vs "push media" effect theory

According to this theory, the merchant's website does not constitute an offer to contract and no contract was concluded between the merchant and the consumer when the consumer made his order. This theory is based mainly on the wording of Section 20 of the CPA¹²⁴ which was no longer in force. The Section defined the distance contract as follows: "A remote-parties contract is a contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer, which is addressed to one or more consumers, nor at the time of acceptance, provided that the offer has not been solicited by a particular consumer." (Emphasis added)

¹¹⁹ 9070-2945 *Québec inc. v. Patenaude*, EYB 2007-117231 (C.A.).

¹²⁰ Nicole and Marc L'Heureux Lacoursière, *Droit de la consommation*, 6th edition, 2011 Éditions Yvon Blais, para. 485, p. 490, and Pierre-Claude Lafond, *Droit de la protection du consommateur : Théorie et pratique*, 2015, Éditions Yvon Blais, para. 676, p. 268.

¹²¹ *Guy Lelièvre and Stephanie Gagnon v. Magasin la Clé de Sol Inc.*, 2011 QCCQ 5774.

¹²² *Civil Code of Québec c. CCQ-1991* section 1387.

¹²³ *Yannick Faucher v. Costco Wholesale Canada Ltd.*, 2015 QCCQ 3366, and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

¹²⁴ This Section had been repealed when the judgment was published.

Thus, under this Section, the consumer directing himself toward a website was considered to have “pulled” the information toward him and, therefore, solicited the offer. Consequently, for a distance contract to actually be concluded, the merchant needed to ask the consumer directly by inviting the latter to visit its website. Indeed, in this case, the merchant “pushes” information toward the consumer and the website then constitutes the offer to contract.

Both¹²⁵ judgments that invoke this theory¹²⁶ totally ignore the reasons why Section 20 CPA was repealed and replaced by the new Section 54.1. As mentioned previously, in 2007 the legislator purposely removed that portion of the Section as he wanted to ensure that all websites are deemed to be offers.

- Section 224 c) CPA does not oblige the merchant to sell, but it prevents him from selling at a price higher than advertised.¹²⁷

According to this argument, refusing to sell or deliver an order does not constitute a violation of Section 224 c) CPA, which prohibits merchants from charging a price higher than the advertised price.

This would be a restrictive interpretation of the CPA, which instead requires a wide, liberal interpretation. In fact, the consumer who still wishes to purchase the good or service ordered despite the cancellation of his order would be forced to pay a higher price, since it is precisely in order to sell at a higher price that the merchant refuses to honour orders placed while the price was low.

- The merchant's consent was vitiated by an excusable error.¹²⁸

We have discussed at length in a previous section what constitutes an excusable price display error and what does not. Since the vendors are professionals and consumers do not bring about these errors by their silence, we believe that this argument cannot be accepted.

¹²⁵ A third judgment mentions this theory, but the magistrate ruled in favour of the consumer for other reasons: *Josée Therrien v. Sears Canada Inc.*, 2015 QCCQ 13168.

¹²⁶ *Yannick Faucher v. Costco Wholesale Canada Ltd.*, 2015 QCCQ 3366 and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

¹²⁷ *Francine Neron v. Sunwing Vacations, Comtois v. Sunwing*, 2015 QCCQ 2684.

¹²⁸ *Guy Lelièvre and Stephanie Gagnon v. Magasin le Clé de Sol Inc.*, 2011 QCCQ 5774, *Francine Neron v. Sunwing Vacations, Comtois v. Sunwing*, 2015 QCCQ 2684, 2014 QCCQ 1615, *Yannick Faucher v. Costco Wholesale Canada Ltd.*, 2015 QCCQ 3366, and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

- The applicant obviously knew that the price was wrong.¹²⁹

In the *Costco* case in particular, the price display error was very evident, as the consumer bought 10 computers at a price of \$2 each for a total of \$20 rather than \$9,379.99, on the day before the commencement of the offer.

These types of circumstantial facts could possibly be used in an attempt to demonstrate the buyer's bad faith, which was not done in this case. That said, it is rare for the error to be so obvious.

In contrast, in the *Sears* case, the circumstances were different and, as explained above, we consider it is unfair to put onto the consumer's shoulders the burden of deciding that a displayed price is not "too low." Let us add that if an "obvious" error goes unnoticed by the merchant, it should qualify as an inexcusable error on his part.

Finally, consumers being able to place orders before the beginning of the promotional period constitutes a second equally inexcusable error on the part of the merchant.

¹²⁹ *Yannick Faucher v. Costco Wholesale Canada Ltd.*, 2015 QCCQ 3366, and *Jessica Dumont and Marie-Eve Bourré v. Sears Canada Inc.*, 2015 QCCQ 13883.

3.4 Canadian jurisdictions - Ontario

Ontario's *Consumer Protection Act, 2002* (CPA 2002) is a law of public order. In fact, like the Québec law, it states that no one may waive the substantive and procedural rights provided for therein, even by agreement.¹³⁰

Also, CPA 2002 prohibits false, misleading or deceptive statements.¹³¹ Contravening the article is deemed to be an unfair practice.¹³² Could a price display error also be considered a false, misleading or deceptive practice? This is not clear. The criteria to be applied in answering this question are not set forth within the law, and we found no decision that would help us determine these.

In common law, the concepts of contract, offer and acceptance are much the same as in civil law. On the other hand, in the absence of legislative, regulatory or contractual provisions to the contrary, displaying products with the intention of selling them and advertising these products do not constitute an offer; they are more a way of initiating negotiations.¹³³ So, it is not clear on the face of it that displaying prices on a website always constitutes an offer to contract in common law.

CPA 2002 specifies what constitutes a consumer contract¹³⁴ and what constitutes an Internet agreement.¹³⁵ But none of these provisions change the concepts of offer or acceptance as the common law understands them. However, when we look at the way the rules governing Internet agreements¹³⁶ are written, we can only conclude that an online order placed by a consumer really does constitute the conclusion of a contract. For example, if we look at the right of cancellation provided for in Section 40:

(1) A consumer may cancel an Internet agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if,

¹³⁰ 2002 *Consumer Protection Act, SO 2002* Chapter 30, Schedule A, s. 7 (1). Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³¹ 2002 *Consumer Protection Act, SO 2002*, Chapter 30, Schedule A, s. 14. Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³² 2002 *Consumer Protection Act, SO 2002*, Chapter 30, Schedule A, s. 17. Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³³ Laurence M. Olivo and John Fitzgerald, *Introduction to the Law of Contracts*, 3rd Edition, Toronto, Edmond Montgomery Publications, 2013, p. 5.

¹³⁴ 2002 *Consumer Protection Act, SO 2002*, Chapter 30, Schedule A, s. 1. Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³⁵ 2002 *Consumer Protection Act, SO 2002*, Chapter 30, Schedule A, s. 20. Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³⁶ 2002 *Consumer Protection Act, SO 2002*, Chapter 30, Schedule A, ss. 37 to 40. Online: <https://www.ontario.ca/laws/statute/02c30>.

- (a) the supplier did not disclose to the consumer the information required under subsection 38 (1); or
 - (b) the supplier did not provide to the consumer an express opportunity to accept or decline the agreement or to correct errors immediately before entering into it. (1);
 - b) the supplier has not given him an express opportunity to accept or reject or correct errors immediately before entering into it.
- (2) A consumer may cancel an Internet agreement within 30 days of the date when he concluded if the supplier does not comply with a requirement under section 39.
(Emphasis added)

The procedure described in this section and in preceding sections is the one that takes place when the consumer places an order online. The copy of the agreement that the consumer must receive is what is commonly called the order confirmation email. As for the consumer's ability to revise the electronic agreement and correct errors, this is covered in the step when the consumer reviews his shopping cart before confirming the order. Finally, paragraph (2) provides that the consumer may terminate the agreement within 30 days if the merchant fails to send a written copy of the Internet agreement. Once more, this will take the form of a confirmation email.

The implication throughout this section of CPA 2002 is that the placing of an electronic order by a consumer is indeed the conclusion of a contract, even though this is not expressly stated.

Take for example the agreement on the Website tomleemusic.ca, which states: "Your properly completed and delivered order form constitutes your offer to purchase the goods or services referenced in your order. Your order shall be deemed to be accepted only if and when tomleemusic.ca sends an order acceptance and shipping notice email to your email address."¹³⁷

In this scenario, the merchant specifies in its agreement that the contract is not concluded before an email is sent to the consumer confirming that the order has shipped. Therefore, since the order has not been shipped, the contract is not concluded. This would have the absurd result that the merchant would have to give the consumer the specific ability to accept or decline the agreement and to correct errors immediately before sending the confirmation email and while the ordered shipment is already under way.¹³⁸ The merchant would also have to send a written copy of the agreement after the shipment.¹³⁹

¹³⁷ <http://tomleemusic.ca/website-agreement/> Last visit May 17, 2018.

¹³⁸ 2002 Consumer Protection Act, SO 2002, Chapter 30, Schedule A, s. 38 (2). Online: <https://www.ontario.ca/laws/statute/02c30>.

¹³⁹ 2002 Consumer Protection Act, SO 2002, Chapter 30, Schedule A, s. 39 (1). Online: <https://www.ontario.ca/laws/statute/02c30>.

This approach would clearly render ineffective the provisions of CPA 2002, aimed at enabling consumers to confirm their intention and to be informed before the contracting parties perform their respective obligations. For tomleemusic.ca, the two contracting parties had already fulfilled their obligations (payment by the consumer, shipping by the merchant) before the contract was formed.

Since it is impossible for Ontario consumers to abandon the protections of CPA 2002, we do not see how a judge could interpret as valid clauses that have the effect of delaying the conclusion of the contract to a time determined by the merchant, thereby rendering the provisions on electronic agreements ineffective.

3.4.1 Recourse

CPA 2002 does provide some recourse for the consumer who is a victim of unfair practices, including the right to terminate the contract¹⁴⁰ or “recover the amount by which the consumer’s payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement [...] is not possible.”¹⁴¹

Thus, there is no opportunity for making a claim for damages when resolution is possible. Nor is there any recourse for enforcement.

CPA 2002 is therefore of no help to the consumer who has a contract with the wrong price and wants that contract to be honoured, even if it has been determined that the price display error is actually false, misleading or deceptive.

3.4.2 Jurisprudence

We could not find any judgment on the specific issue of pricing errors displayed online in Ontario case law.

This is partly explained by the fact that, in Ontario and in the other provinces studied, Small Claims Courts allow the parties to be represented by counsel. In addition, common law judges tend to consider the consumer on an equal footing with the merchant, whereas in Québec, the consumer is considered the more vulnerable party. Consequently, in other Canadian provinces, the way that small claims function has

¹⁴⁰2002 Consumer Protection Act, SO 2002, Chapter 30, Schedule A, s. 18 (1). Online: <https://www.ontario.ca/laws/statute/02c30>.

¹⁴¹2002 Consumer Protection Act, SO 2002, Chapter 30, Schedule A, s. 18 (2). Online: <https://www.ontario.ca/laws/statute/02c30>. Termination of the contract may not be possible for two reasons: either the return or restitution of the goods or services can no longer take place, or the resolution would deprive a third party of their right to the object of the agreement that they acquired in good faith and “against value received.”

resulted in very few consumer disputes being addressed, particularly because of the small value of the amounts involved. To our knowledge, there is no jurisprudence with respect to pricing errors displayed online.

3.5 Canadian jurisdictions - Alberta

On December 15, 2017 the new Alberta legislation on consumer protection¹⁴² came into force, thereby replacing the *Alberta Fair Trading Act* (AFTA).¹⁴³ As is the case with the laws of Québec and Ontario, it provides that it is impossible to waive the rights and protections offered within it.¹⁴⁴ It is a law of public order.

Interestingly, the preamble to the new Act, which is new law, establishes in principle the right of consumers to be protected from unfair commercial practices, to be adequately informed about products and transactions, and to have reasonable access to means of rectification when they suffer damage.

The Act provides in Section 4 that the Ministry may adopt regulations related to the marketing of goods and services in the electronic media, including the Internet. At present, this regulation has not been adopted and does not seem to be the object of a bill under consideration.¹⁴⁵ We nonetheless invite the Alberta legislature to consider the recommendations of this report when it formulates those regulations.

It is too early for this law to have been interpreted by the courts, but this interpretation is not expected to be very different from what has already been seen with regard to AFTA in the past.

Alberta does, however, have a regulation governing Internet sales, the *Internet Sales Contract Regulation*.¹⁴⁶ This regulation defines an “internet sales contract” as a transaction of more than \$50 “formed by text-based Internet communications.”¹⁴⁷ The content of the regulation is almost identical to that of the section on distance contracts in Québec’s CPA discussed earlier, except as concerns the notion of offer.

It will be recalled that the Québec CPA provides that “A merchant is deemed to have made an offer to enter into a distance contract if the merchant’s proposal comprises all the essential elements of the intended contract, regardless of whether there is an

¹⁴² *Consumer Protection Act*, RSA 2000, c C-26.3. Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁴³ *Alberta Fair Trading Act*, RSA 2000, c F-2.

¹⁴⁴ *Consumer Protection Act*, RSA 2000, c C-26.3, s. 2. Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁴⁵ Last verified: March 28, 2018

¹⁴⁶ *Alberta Regulation 81/2001*. Online: http://www.qp.alberta.ca/documents/Regs/2001_081.pdf

¹⁴⁷ *Alberta Regulation 81/2001*, s. 1 (d). Online: http://www.qp.alberta.ca/documents/Regs/2001_081.pdf

indication of the merchant's willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary."¹⁴⁸ The Alberta regulations, on the other hand, will be applicable to all contracts for which the offer or acceptance is made or sent from Alberta.¹⁴⁹ By allowing the merchant to decide when the contract is concluded, the latter is free to claim that a consumer who ordered a product or service and who received email confirmation, has not yet concluded a contract and, therefore, he can still legitimately cancel the order.

With regard to the Alberta law, we will make the same observation that we made about the Ontario legislation on electronic agreements. Since the entire regulation is written based on the premise that ordering online constitutes the conclusion of a contract, leaving the merchant to choose the time of conclusion of the contract would render the regulation ineffective in the vast majority of online transactions, which cannot be what the legislator intended.

We therefore believe that the Alberta law recognizes to some extent that online contracts are concluded when the consumers submit their orders online.

That said, the regulation defines the pre-contractual disclosures that merchants must make, the recourse for the consumer who has not received all the information or who may have received the wrong information, as well as the recourse for the consumer who does not receive an order, for example by granting a right of withdrawal. However, like the Québec CPA, the Alberta Act is silent with regard to the situation that concerns us at present: the rights and remedies available to the consumer when the roles are reversed and the merchant rescinds the contract while the consumer would like to keep it.

Alberta prohibits representations that could mislead consumers.¹⁵⁰ We must therefore determine whether a price display error qualifies as a statement likely to mislead. In this regard, the Alberta Court appears to have consistently determined that it is not necessary for the merchant to intend to mislead consumers for an offense to be committed.¹⁵¹ Thus, a simple mistake could constitute a misleading representation if it has the potential to deceive.

¹⁴⁸ *Consumer Protection Act, RSQ*, ch. P-40.1, section 54.1. Online:

<http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

¹⁴⁹ *Alberta Regulation 81/2001*, s. 2 (b). Online: http://www.qp.alberta.ca/documents/Regs/2001_081.pdf

¹⁵⁰ *Consumer Protection Act, RSA 2000*, ch. C-26.3, s. (6) (4) (a). Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁵¹ *Alberta (Director of Trade Practices) v. Edanver Consulting Ltd.* 1993 CanLII 7092 (AB QB), para. 22, *Basaraba v. St. Albert Dodge Chrysler Ltd.* [2000] AJ No. 833 at para. 29, *Paananen v. Nicholson Chevrolet (1977) Ltd.*, 2006 ABPC 339, para. 10 and *Keizer v. Autoworld Superstore Alberta Ltd.* 2003 ABPC 23, para. 26.

The new provisions that may affect online pricing errors are similar to the former provisions of AFTA. Indeed, we find only a few minor differences. The interpretation that the courts will make under the new provisions should therefore not involve any substantial changes to current lines of jurisprudence.

3.5.1 Recourse

The *Consumer Protection Act* (CPA) provides several remedies for consumers who fall victim to misleading representations. However, these remedies are primarily designed to help consumers who want to opt out of their obligations rather than oblige merchants to respect theirs. For example, it is expected that a consumer can cancel a contract without penalty in response to a written or oral statement that is likely to mislead. The consumer also has the right to a refund of the amount of the payment exceeding the value of the good or service purchased following a misleading representation, but only if cancellation is impossible.¹⁵²

Also, the consumer who has contracted and has suffered damage as a result of a contravention of the law may apply to the Court of Queen's Bench to obtain compensation for such damage. The Court may also grant the injured consumer punitive or exemplary damages. It may also order the execution of the transaction, the refunding of amounts paid or cancellation of the contract, or grant an injunction to prevent the merchant from breaking the law.¹⁵³ To determine the nature and quantum of the remedies to be applied, the court must take into account the efforts that the consumer has made to minimize the damage and to resolve the dispute.¹⁵⁴

The Director, i.e. whoever is responsible for enforcing the law, may also apply administrative sanctions to a merchant who violates it. The maximum fine is \$100,000 per day of violation.¹⁵⁵ Finally, the Director may initiate proceedings against a merchant who contravenes the CPA. The merchant can then be sentenced to a fine of \$300,000 per offense, each day of contravention being an offense in itself.¹⁵⁶

¹⁵² *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 7.

Online: <http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁵³ *Consumer Protection Act*, RSA 2000, ch. C-26.3, ss. 142.1 (1) and (2).

Online: <http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁵⁴ *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 142.1 (3). Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁵⁵ *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 158.1 (3). Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

¹⁵⁶ *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 164. Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

3.5.2 Jurisprudence

Unfortunately, we did not find any judgment on the specific issue of pricing errors displayed online in the Alberta courts, either or under the old AFTA or under the CPA.

However, even though we found no decisions related to pricing errors displayed online, we consider it relevant to quote this excerpt from a judgment of the Supreme Court of Canada, made in 2002 with regard to an appeal at the Alberta Court of Appeal:

As stated, high hurdles are placed in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.¹⁵⁷

3.6 Canadian jurisdictions - British Columbia

The particular British Columbia law aimed at protecting the interests of consumers, the Business Practices and Consumer Protection Act (hereinafter BPCA) prohibits deceptive acts and practices.¹⁵⁸ These are defined as any oral, written or visual representation, or other misleading representations made by a supplier, or any act of a supplier that has the ability or tendency to mislead, or has the effect of misleading, consumers.¹⁵⁹

The BPCA expressly names some twenty deceptive practices, but does not limit itself to these.¹⁶⁰ None of the practices named specifically concerns price accuracy, except for the practice of charging a higher price than that quoted in an estimate, unless the consumer consents to the price increase before the goods and services are provided.¹⁶¹

Since we could not locate any case law in the BC courts regarding pricing errors displayed online, we do not know whether the courts would consider an incorrect price a deceptive practice, but we believe this would be possible, for two reasons.

¹⁵⁷Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd. REJB 2002-28038, para. 35 (Supreme Court on appeal from a decision of the Court of Appeal of Alberta), Judge Binnie. Quoted by Nicolas VERMEYS, *Le poids des virgules – Étude sur l'impact des erreurs matérielles en droit des contrats*, La Revue du Barreau du Québec, Automne 2006 – Tome 66, p. 291-332. Online: <https://www.barreau.qc.ca/pdf/publications/revue/2006-tome-66-2.pdf>

¹⁵⁸ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 5 (1). Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁵⁹ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 4 (1). Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁰ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 4 (3). Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶¹ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 4 (3) (c) (iii). Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

First, the commission of a deceptive practice in British Columbia law is not dependent on an intent to deceive on the part of the merchant. It is sufficient that the representation made has the potential to deceive.¹⁶²

Second, the BPCA provides that a person does not commit an offense under the Act if, at the time the information is issued, he or she did not know that this information was false or misleading and that even by exercising due diligence, they could not have known that the information was false or misleading.¹⁶³

Now, as we discussed above, we believe that, given the technology available at present, pricing errors displayed online always result from a reasonable lack of diligence on the part of the merchant, and are therefore likely to constitute an offense.

Assuming that a price display error was recognized as a deceptive practice, the BPCA provides an interesting reversal of the burden of proof, placing this on the merchant's shoulders — it would be up to the merchant to prove that no deceptive act was involved.¹⁶⁴

While the BC legislation does not specifically indicate when it considers that an electronic contract is concluded, the entirety of Division 4¹⁶⁵ of the Act is written based on the assumption that a contract is concluded when the order is placed online. Otherwise, if the merchant were allowed to decide by agreement the time when the contract was actually concluded, the Act would not be applicable to the vast majority of online transactions, which cannot be the what the legislator intended. We therefore believe that the BC law basically acknowledges that an online contract is concluded when a consumer places an order online.

That said, this section of the Act defines the pre-contractual disclosures that merchants must make and the recourse available for the consumer who has not received all the information or who has received the wrong information. It also defines the remedies for consumer who have received their order, including granting them a right of rescission. However, as with the other provinces, the Act says nothing that applies to the situation that concerns us here, that is to say, the rights and remedies of the consumer when the roles are reversed and the merchant terminates the contract when the consumer would like to maintain it.

¹⁶² Principle reiterated by the Supreme Court of British Columbia in *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894, para. 28, and applied uniformly from at least 1976: *Findlay v. Couldwell*, [1976] 5 WWR 340 BCSC.

¹⁶³ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 189 (6).
Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁴ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 5 (2). Online:
http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁵ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss. 46 to 52. Online:
http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

3.6.1 Recourse

In the event of deceptive practices, the remedies offered by the BPCA are as follows: Consumers who have suffered damage or loss as a result of a breach of BPCA can request the Provincial Court to recover such damages.¹⁶⁶

In addition, the Director¹⁶⁷ may take action against merchants who contravene the BPCA. A merchant convicted of an offense such as misrepresentation may be fined up to \$100,000.¹⁶⁸ This penalty may be added an amount equivalent to a maximum of three times the profit the merchant made through his offense. To this can also be added a maximum contribution of \$1000 to the Consumer Advancement Fund¹⁶⁹ as well as damages to the consumer equivalent to the damage suffered up to a maximum of \$25,000.¹⁷⁰

3.6.2 Jurisprudence

Unfortunately, we found no judgments in BC courts on the specific issue of pricing errors displayed online.

¹⁶⁶ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 171.

Online:http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁷ A person appointed by the Ministry and who has certain powers under BPCA, including the right to take action against non-abiding merchants of the law. *Business Practices and Consumer Protection Act*, SBC 2004, c 2, arts. 171, 172, 175-179 and 192

Online:http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁸ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 190.

Online:http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁶⁹ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 191 (1). Online:

http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

¹⁷⁰ *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 191 (1). Online:

http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00 and *Court Rules Act, Small Claims Act, Small Claims Rules*, BC Reg. 261/93, s. 4.

Online:http://www.bclaws.ca/civix/document/id/loo80/loo80/261_93_01

3.7 Foreign jurisprudence - United States

3.7.1 Federal

In 1914 in the US, the Federal Trade Commission (hereinafter FTC) was created to protect consumers by combatting anti-competitive behaviour and deceptive trade practices. It is mandated to inform the public to enable it to make better choices and better understand the mechanisms of competition - without unduly affecting business activities.¹⁷¹ The FTC is responsible for implementing the *Federal Trade Commission Act*,¹⁷² which prohibits unfair or deceptive trade practices.¹⁷³

A. Unfair or misleading representations

In the U.S., can pricing errors displayed online be seen as false or misleading representations? Nothing could be less certain.

In 2000, the FTC issued a guide to advertising and online marketing for merchants.¹⁷⁴ While the guide does not specifically address the issue of pricing, it sets forth the criteria for determining whether a representation, omission or practice can be considered misleading or unfair.¹⁷⁵

A representation, omission or practice is deceptive if it is likely to mislead consumers and has an impact on their behaviour or decisions about the product or service. A practice or act will be considered unfair if it causes or is likely to cause substantial damage to the consumer and this damage is not offset by other benefits and it is not reasonably avoidable.

It should be noted that, to assess whether the damage was preventable, the courts have to apply the criterion of the reasonable consumer rather than that of the credulous, naïve consumer found in Québec.

¹⁷¹ Website of the Federal Trade Commission: <https://www.ftc.gov/about-ftc>

¹⁷² 15 USC ch. 2 subchapter i: Federal Trade Commission. Online: <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter2-subchapter1&edition=prelim>

¹⁷³ 15 USC §45. Online: <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter2-subchapter1&edition=prelim>

¹⁷⁴ Federal Trade Commission Bureau of Consumer Protection, *Advertising and Marketing on the Internet Rules of the Road*, September 2000, 12 pp. Online: <https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-Internet-rules-road2018.pdf>

¹⁷⁵ Federal Trade Commission Bureau of Consumer Protection, *Advertising and Marketing on the Internet Rules of the Road*, September 2000, p.2. Online: <https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-Internet-rules-road2018.pdf>

These are the criteria established by the FTC in 1980; they are still in force today¹⁷⁶ and are applied consistently by U.S. courts.¹⁷⁷

It is therefore likely, according to these criteria, that price display error is not recognized as misleading representation. Indeed, proving substantial harm to the consumer would be hard to do, since the cancellation of the sale by the merchant leaves the consumer in the exact financial state he was before the transaction. However, the criteria applied by the FTC indicate that the damage must not only be substantial but in most cases will be financial. It could also be applied to questions of safety, but psychological, emotional or subjective damages are generally not likely to make a practice unjust.¹⁷⁸

Finally, the FTC has adopted rules on deceptive pricing¹⁷⁹ and bait-and-switch advertising,¹⁸⁰ but these are not applicable to online price display errors. In fact, the rule about deceptive pricing is intended to spell out the conditions that enable merchants to advertise discounts and make statements such as “previously sold at such and such a price.” Also, the rule about bait-and-switch advertising focuses on the product sold, not on how much it costs.

B. Offer, acceptance and conclusion of contract

Can American consumers who are victims of pricing errors displayed online claim that placing an order online constitutes the conclusion of a contract and that the merchant is obliged to comply with its terms?

The answer to this question is yes, if a contract is actually concluded. But it is not clear that simply placing an order online would be considered acceptance of an offer equivalent to the conclusion of a contract, even if some judges have already so decreed.¹⁸¹ Indeed, not only is it possible for merchants to decide unilaterally by

¹⁷⁶ *FTC Policy Statement on Unfairness*, December 17, 1980. Online: <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

¹⁷⁷ J. Thomas Rosch, Commissioner, Federal Trade Commission, “Deceptive and Unfair Practices Principles: Evolution and Convergence”, speech given May 18, 2007 in front of the California State Bar, Los Angeles, California. Online: https://www.ftc.gov/sites/default/files/documents/public_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence_0.pdf

¹⁷⁸ *FTC Policy Statement on Unfairness*, December 17, 1980. Online: <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

¹⁷⁹ *Electronic Code of Federal Regulations*, Title 16, Chapter I, Subchapter B, Part 233, “Guides Against Deceptive Pricing.” Online: <https://www.ecfr.gov/cgi-bin/text-idx?SID=ef259e6b3e7a956171e13631c29bc336&mc=true&node=pt16.1.233&rgn=div5>

¹⁸⁰ *Electronic Code of Federal Regulations*, Title 16, Chapter I, Subchapter B, Part 238 “Guides Against Bait Advertising.” Online: <https://www.ecfr.gov/cgi-bin/text-idx?SID=ef259e6b3e7a956171e13631c29bc336&mc=true&node=pt16.1.238&rgn=div5>

¹⁸¹ Court of Appeal, Second District, Division 4, California, *I Lim Ho, Plaintiff and Appellant, v. The.TV International Corporation*, No. B151987, Decided: June 24, 2002. Online: <https://caselaw.findlaw.com/ca-court-of-appeal/1075955.html>

convention when a contract is concluded, but it is also possible for them to invoke the error as a defect of consent.

C. Error as defect of consent

The doctrine of unilateral mistake in common law is intended to restore the balance between two fundamental principles of law, independence of will, which allows contractors to consent in a free, informed manner, and stability of contracts, which has the effect of creating a future certainty, i.e. that the contracting parties will respect their word. Indeed, from a purely practical perspective, we need to be able to rely on the word of those people with whom we contract without being constantly led to wonder if they really know what they are doing. The functioning of society depends on those who make an offer or a promise keeping their word.¹⁸²

That is why making a mistake about the value of the item for sale will usually not constitute grounds for cancellation, since it is the vendor's responsibility to verify the value of his goods before putting them on sale.

This doctrine, however, makes it possible for a merchant who has committed a price display error to terminate the contract if the consumer knew that the price was due to an error or that the circumstances are such that he should have known.

The key is knowledge of the error by the other party - in this particular instance, the consumer. In fact, when he knows that the merchant is wrong, he also knows that he does not have his free and informed consent. The contract cannot be validly formed, even if the vendor made an error about an item that would normally not justify a defense of reasonable mistake. On the contrary, if the consumer ignores that the merchant has made a mistake, he legitimately believes that the merchant has agreed to the displayed price. In this case, the contract should be maintained.

The doctrine of unilateral mistake is therefore not intended to excuse the error of the merchant, but to sanction the knowledge, by the consumer, that the other party is unable to give his informed consent.

Despite this, if the error renders the contract manifestly unfair or unconscionable, it could still be overturned by the courts.

That said, the vast majority of U.S. online user agreements have clauses that give the right to cancel orders in cases of price display error. At least one court has already ruled that such clauses are valid,¹⁸³ which makes it easier for merchants, who no longer have to go to court or invoke the doctrine of unilateral mistake.

¹⁸²Andrew Kull, *Unilateral Mistake : The Baseball Card Case*, 70 Wash. U.L.Q. 57 (1992).

¹⁸³ *Perez v. Hung* 244 SW3D 444 (Tex. App. 2007). Online: <https://casetext.com/case/perez-v-hung>.

3.7.2 At the state level

A quick tour of U.S. state legislation¹⁸⁴ reveals that not all states have laws or regulations respecting the display and accuracy of prices. Generally speaking, the states that have adopted such laws target only the accuracy of the prices of products sold by weight, volume or unit, and have laid down detailed rules regarding unit pricing. However, they appear to provide few or no sanctions for those who do not respect these provisions.

Some states have similar rules to Québec's price accuracy policy, but these apply only to existing businesses "brick and mortar" rather than virtual stores. Some states have laws defining false or misleading representations, but the ones we were able to examine did not appear to be invoked any more successfully than the federal laws.

Let us take as an example, Texas. Its law¹⁸⁵ outlaws 31 practices considered to be false or misleading, and the list is not exhaustive. The majority of the offenses listed may or may not be committed intentionally.¹⁸⁶ For instance, with the exception of three offenses,¹⁸⁷ the merchant does not have to knowingly violate the law for an offense to be committed.

Among the three offenses listed as exceptions, we find: "advertising goods or services with intent not to sell them as advertised."¹⁸⁸ This was invoked in *Perez v. Hung*¹⁸⁹ when Perez had purchased from the MicroCache store 100 hard drives at a displayed price of \$1 each. The MicroCache store argued successfully that it did not intend to sell the hard drives at this price. Moreover, in this case, the court recognized the clause stating that the merchant was not bound by the pricing errors displayed as valid.

Our second example is California. The *California Unfair Competition Law*¹⁹⁰ requires proof that the merchant knew or should have known that its representation was false or

¹⁸⁴ National Institute of Standards and Technology, US Department of Commerce, *US Retail Pricing Laws and Regulations* 2009. Online: https://www.nist.gov/sites/default/files/documents/2017/04/28/US-Pricing-Laws-All-States_2.pdf

¹⁸⁵ *Texas Business and Commerce Code* - BUS & COM § 17.46. Online: <https://codes.findlaw.com/tx/business-and-commerce-code/bus-com-sect-17-46.html>

¹⁸⁶ See *Eagle Props. Ltd. v. Scharbauer*, 807 SW2d 714, 724 (Tex. 1990). Online: <https://casetext.com/case/eagle-properties-ltd-v-scharbauer#p724>

¹⁸⁷ *Texas Business and Commerce Code* - BUS & COM § 17.46 (9). Online: <https://codes.findlaw.com/tx/business-and-commerce-code/bus-com-sect-17-46.html>

¹⁸⁸ *Texas Business and Commerce Code* - BUS & COM § 17.46 (9) (10) (13). Online: <https://codes.findlaw.com/tx/business-and-commerce-code/bus-com-sect-17-46.html>

¹⁸⁹ *Perez V. Hung* 244 SW3D 444 (Tex. App. 2007). Online: <https://casetext.com/case/perez-v-hung>

¹⁹⁰ *California Unfair Competition Law* integrated within the *California Business & Professions Code*, Part 3, § 17500. Online: https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=BPC&division=7.&title=&part=3.&chapter=&article=

misleading.¹⁹¹ The *California Consumers Legal Remedies Act*,¹⁹² meanwhile, includes a list of deceptive practices that is similar to the list in the Texas law. In fact, it contains the same prohibition against advertising goods and services with the intent not to sell them as advertised.¹⁹³

Even though a breach of one of these laws can be committed independently of a breach of another law, the burden of proof is very heavy for any consumer alleging misrepresentation. On the one hand, he must prove that the merchant knew or should have known that its price was wrong and, on the other, he must prove that the merchant intended to deceive.

3.7.3 Conclusion

As we can see, U.S. law is fundamentally different from Canadian law with regard to pricing errors displayed online. Canada has chosen to protect the consumer, who is considered to be the “vulnerable” party. Moreover, the laws of the four provinces studied have to differing degrees enacted specific rules for consumer contracts, rules that are exceptions to the general rules of contract formation.

The U.S. laws seem more likely to consider consumers to be on an equal footing with merchants and, therefore, grant them less protection. Consequently, there is little in them to inspire Canadian consumers.

¹⁹¹ Cal Bus. & Teacher. Code (§ 17500).

¹⁹² *California Consumers Legal Remedies Act* integrated within the *California Civil Code* § 1750 to 1784.

Online:

https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CIV&division=3.&title=1.5.&part=4.&chapter=&article=

¹⁹³ *California Consumers Legal Remedies Act* integrated within the *California Civil Code* § 1750 (9). Online: https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CIV&division=3.&title=1.5.&part=4.&chapter=&article=

3.8 Foreign jurisdictions - France

There are two sources of law in France. First, there are the Directives of the European Union, which must be incorporated within the national law of each Member State. Then there is French law, which is not dictated by a directive.

3.8.1 The European Directives

The directives that are most relevant to the case of pricing errors displayed online are the directive concerning unfair business-to-consumer commercial practices in the internal market¹⁹⁴ (hereinafter the *Unfair Commercial Practices Directive* or UCPD) and the Unfair Terms in Consumer Contracts Directive (hereinafter UTCCD).¹⁹⁵

The primary purpose of the UCPD is to improve the efficiency of internal trade.¹⁹⁶ Consumer protection is always referred to as a secondary concern.¹⁹⁷

This is known as a full, or maximum harmonization directive, which means that each State of the European Union must incorporate the directive within its national law while taking care not to offer consumers greater protection and being more demanding toward merchants. Although criticized by consumer groups, the full harmonization guidelines are intended to ensure that merchants operating in the EU do so with a high level of certainty about the rules that apply to them.

Indeed, maximum harmonization is opposed to minimum harmonization, which was more the norm in the late twentieth century and established a minimum threshold of protection while allowing each state to adopt tougher rules. This type of harmonization led to uncertainty for companies that wanted to operate on European territory. It was very burdensome for them to familiarize themselves with the rules in force in each Member State and to know in which States they would be subjected to stricter rules.

¹⁹⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive). Online: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32005L0029>

¹⁹⁵ Directive 93/13/EEC of 5 April 1993 on unfair terms in contracts concluded with consumers, OJ L 95, 21.4.1993, p.29-34. Online: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31993L0013>

¹⁹⁶ Mateja Durović, *European Law on Unfair Commercial Practices and Contract Law*, Hart Publishing, Oxford and Portland, Oregon, 2016, p. 28.

¹⁹⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, First Article. Online: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32005L0029>

Any violation of the UCPD is to be adjudicated according to the benchmark of the average consumer, i.e. the reasonably well-informed consumer who is reasonably observant and circumspect, taking into account social, cultural and linguistic factors.¹⁹⁸

The UCPD provides a list of 31 business practices deemed to be deceptive in every circumstance.¹⁹⁹ Among these is issuing “an invitation to purchase products at a specified price and then: [...] refusing to take orders for it or deliver it within a reasonable time [...] with the aim of promoting a different product (bait and switch).”²⁰⁰ (Emphasis added).

The DCPD states that “bait and switch” type practices are always unfair. However, it includes the criterion of intent on the part of the merchant. Simply displaying an erroneous price does not fit this definition.

However, this list is not exhaustive, and other practices may be declared unfair that do not appear on the list of practices that are unfair in all circumstances. Indeed since 2009, the Court of Justice of the European Union has instituted a strict procedure to determine whether a commercial practice is unfair.²⁰¹ In cases when a practice is not included on the list of 31 practices deemed deceptive in all circumstances, the Court must perform a case-by-case assessment to see if it satisfies one of the definitions of Articles 5 to 9 of the Directive, regarding unfair commercial practices, misleading actions, misleading omissions, aggressive commercial practices or the use of harassment, coercion and undue influence.

In our opinion, online price display errors may belong in two of these categories, unfair actions and deceptive actions.

¹⁹⁸ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, preliminary para. 18.

Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0261&from=EN>

¹⁹⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Appendix 1. Online:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0261&from=EN>

²⁰⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Appendix 1, para. 6).

Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0261&from=EN>

²⁰¹ Joined cases C-261/07 and C-299/07, VTB-VAB NV v. Total Belgium NV and Galatea BVBA v. Sanoma Magazines Belgium NV, April 23, 2009. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0261&from=EN>

In fact, for a practice to be considered unfair, it must be contrary to the requirements of professional diligence and materially distort or be likely to affect the economic behaviour of the average consumer with regard to the product.²⁰² As pointed out earlier, we consider that, given the technological means at the disposal of merchants today, pricing errors displayed online are always the result of a lack of professional diligence.

Also, a commercial practice is regarded as a misleading action if it “contains false information [...] especially regarding the price or manner in which the price is calculated” and that this information causes, or is likely to cause, the consumer to make a decision that he would not otherwise have made.²⁰³

However, to our knowledge, this Directive has not been invoked in the pricing errors displayed online. We could not find any judgment confirming or refuting our interpretation.

The *Unfair Terms in Consumer Contracts Directive* (UTCCD) provides a non-exhaustive list of clauses that are presumed to be unfair. The Directive dates from 1993 and, since it has hardly been altered since that time, provisions most commonly found with respect to electronic commerce - including those granting merchants the right to correct errors at all times as well as disclaimers or clauses unilaterally determining when a contract is concluded - are nowhere to be found.

However, unlike the UCPD, the UTCCD is a minimum harmonization directive, which permits Member States the flexibility to decree that other terms are unfair if they meet the following criteria: a clause in an adhesion contract will be “regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”²⁰⁴

It therefore seems possible to invoke that certain clauses that are typically found in the conditions of use of electronics stores are abusive. We are thinking here of exclusion of

²⁰² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, Art. 5, para. 2. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

²⁰³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, Art. 6, para. 1 d). Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

²⁰⁴ Directive 93/13/EEC of 5 April 1993 on unfair terms in contracts concluded with consumers, OJ L 95, 21.4.1993, p.29-34, Art. 3. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0013>

liability clauses, clauses allowing merchants to unilaterally decide when a contract is concluded and the terms for changing essential elements (including price) in the contract at any time, including after an order has been made, confirmed by email, and sometimes even, billed.

To our knowledge, this Directive has not been invoked in such cases and it is unclear whether the European Court of Justice would adhere to our reasoning.

3.8.2 French domestic law

In France, the *Code de la consommation* (Consumer Code)²⁰⁵ governs relations between merchants, whom French law call professionals, and consumers. In particular, it regulates business practices.

This law contains provisions that may apply to pricing errors displayed online. It also incorporates the provisions of the UCPD within domestic law.²⁰⁶ This integration has had the effect of reducing the protection offered to consumers, including the repeal in March 2015, of the edict guaranteeing consumers that any product or service ordered during a period in which a price or price reduction was advertised shall be delivered or provided at the price indicated in this advertising.²⁰⁷

That said, the *Consumer Code* continues to impose on any product vendor or service provider “marking, labelling, bill-posting or by any other appropriate procedure” the responsibility of informing the consumer about prices.²⁰⁸ It also prohibits professionals from refusing to sell a product or service to a consumer without a legitimate reason.²⁰⁹

The law does not, however, define what constitutes a legitimate reason; this is up to the courts to determine. However, certain criteria have been developed to assist judges in this task. First, the professional may refuse to sell a product or deliver a service if the product or service is not available. Next, the abnormal character of the order could also prevent the sale from going through. The order will be considered abnormal when:

²⁰⁵ *Code de la consommation*. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²⁰⁶ Ordinance No. 2016-301 of March 14, 2016 on the legislative part of the *Code de la consommation*, JORF No 0064 of 16 March 16, 2016, text No. 29. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²⁰⁷ *Arrêté du 31 décembre 2008 relatif aux annonces de réduction de prix à l'égard du consommateur*, NOR: ECEC0831181A, Art. 3. Online: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020080467&dateTexte=20150324>

²⁰⁸ *Code de la consommation* Art. L. 112-1. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²⁰⁹ *Code de la consommation*, Art. L. 121-11. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

[TRANSLATION] “[...] it does not comply with the conditions of sale or delivery usually offered by professional services.”²¹⁰ Bad faith on the part of the purchaser and public order are also factors to be considered.

Although we were unable to identify case law as to whether an error may be a legitimate reason, in light of established criteria, it is conceivable that pricing errors may in some circumstances be considered as resulting from the unusual nature of the order or the bad faith of the buyer, especially if the price is patently ridiculous. However, considering that in the vast majority of cases of online pricing error, the professional does not refuse to conclude the contract, but to honour its commitments, this defense is unlikely to be argued in court.

3.8.3 Distance contracts

Note that the *Consumer Code* devotes an entire chapter²¹¹ to distance contracts, including e-commerce contracts, with certain exceptions.²¹² This section includes an obligation to provide pre-contractual information that requires the professional to disclose the price of each item sold. In the event of dispute, the burden of proof that disclosure occurred rests on the shoulders of the professional.²¹³

This chapter does not expressly state when the online contract is concluded, but it can be inferred from the wording of certain articles that it is concluded when the consumer completes his order: [TRANSLATION] “[...] The professional shall take care to ensure that the consumer, when he places his order, explicitly acknowledges his obligation to pay. To this end, the function used by the consumer to confirm the order shall include the clear, legible statement: *order with obligation to pay*, or some similar, unambiguous statement, indicating that placement of an order requires payment.” Usually, when a payment is due, there has been meeting of wills and the contract has indeed been concluded. This interpretation seems consistent with the requirements of the *Code civil*, which also provides the conditions for an offer to be made electronically²¹⁴ as well as

²¹⁰ Website of l’Institut de la consommation, *Refus de vente ou de prestations de services aux consommateurs*. Online: <https://www.inc-conso.fr/content/refus-de-vente-ou-de-prestation-de-services-aux-consommateurs>

²¹¹ *Code de la consommation* Book II, Title II, Chapter I. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²¹² The complete list of exceptions can be found in the *Code de la consommation*, Art. L. 221-2. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²¹³ *Code de la consommation*, Art. L. 221-7. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²¹⁴ *Code civil*, consolidated version to January 3, 2018, Art. 1127-1. Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

those for the offer to be considered accepted and the contract to be concluded.²¹⁵ All that is required is that the acceptance reaches the offeror, which is what happens when the consumer places an order online.

The professional has strict liability for the proper performance of all obligations resulting from the distance contract. He can be relieved of liability only by proving that the breach of contract is attributable to the consumer or an unpredictable fact or one that it is "due to the insurmountable act of a third party to the contract"²¹⁶ or to a "force majeure."²¹⁷ Price display errors do not fit into any of these categories.

The *Consumer Code* provides that the consumer has a right of withdrawal that can be exercised by different means, depending on the circumstances. However, it has nothing to say about the situations under consideration, in which it is the merchant who wants to withdraw, and the consumer who would like to maintain the contract.

3.8.4 The mistake defense

On the face of it, one might infer from the *Consumer Code* that pricing error is a misleading commercial practice since it is contrary to the requirements of professional diligence and distorts or is likely to substantially alter the consumer's economic behaviour.²¹⁸ Moreover, in case of doubt, a contract is interpreted in favour of the consumer,²¹⁹ which tends to argue for the application of the lowest price.

However, the *Code civil* provides that consent can be vitiated if it was given in error, is extorted by violent means or is vitiated by fraud "such that without this [vititating factor], one party would not have contracted or would have contracted substantially different conditions."²²⁰ (Emphasis added)

²¹⁵ *Code civil*, Consolidated Version to January 3, 2018, Arts. 1121 and 1127-2. Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

²¹⁶ These are the terms used in the law.

²¹⁷ *Code de la consommation*, Art. L. 221-15. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²¹⁸ *Code de la consommation*, Art. L. 121-1. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²¹⁹ *Code de la consommation*, Art. L. 133-2. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²²⁰ *Code civil*, Consolidated Version to January 3, 2018, Art. 1130 Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

Thus, the mistake defense is permitted to the professional, but only under certain conditions that are very similar to the conditions recognized in Québec. A vice of consent is sanctioned by the annulment of the contract.²²¹ However, an inexcusable error does not vitiate consent.²²²

It does not appear that the French courts have deliberated over the excusable nature of a price display error.

3.8.5 Paltry compensation

“An onerous contract is void if, at the time of its formation, the consideration agreed in favour of the contracting part is illusory or ridiculously low.”²²³

The key word in the text of this article of the *Code civil* is *dérisoire* (ridiculously low, trifling). If the displayed price is so low that the consumer knows or should know that it is an error, the courts will annul the contract.

We accessed little jurisprudence from the French courts. However, the articles we consulted are fairly unanimous in testifying to a strong tendency, established as early as 1990, in favour of annulling contracts (formed online or instore) involving a price display error, given the ridiculously low price displayed. In a judgment on the sale of paving slabs for a swimming pool displayed at a price of 16% of their value, the court found that the transaction should have been considered void, due both to the error vitiating the consent of the vendor and the paltry consideration.²²⁴

This approach was later transposed to sales made online. In one particular case in 2002, the Strasbourg District Court overturned a contract between a consumer and the company NetBusiness involving the purchase of an overhead projector because the projector was being sold at a higher price by other merchants. Since the error was ascribable to a computerized labelling error, the court held that the professional's consent was vitiated.²²⁵

As these examples show, and since the law provides no definition, it is up to the courts to determine whether the displayed price is patently ridiculous to the point where no reasonable consumer could claim to have believed it to represent the true market value.

²²¹ *Code civil*, Consolidated Version to January 3., 2018, Art. 1131. Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

²²² *Code civil*, consolidated version to January 3, 2018, Art. 1132. Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

²²³ *Code civil*, consolidated version to January 3. 2018, Art. 1162. Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

²²⁴ Angers Court of Appeal, January 8, 2001, RG No. 1999/01512.

²²⁵ District Court of Strasbourg, Judgment of July 24, 2002.

When this is the case, the professional will have little chance of being forced to honour the contract. This leads to the following paradoxical corollary: the greater the error, the less the merchant is likely to be punished.

3.8.6 Sanctions and recourse

A professional who fails in his pre-contractual duty to inform is liable to a fine of up to €15,000.^{226, 227}

A professional who is guilty of deceptive business practices may be sentenced to two years in prison accompanied by a fine of €300,000.²²⁸ This fine is not maximal; indeed, it can be increased by up to 10% of the average annual turnover of the business or 50% of the cost of the advertising or practice that constituted the offense.²²⁹

Finally, consumers aggrieved by an online price display error committed by a professional can ask the court to force the execution of the contract or file for damages (compensation for breach of contract).²³⁰ However, in light of the interpretation made so far by the courts, we believe that French consumers stand very little chance of success unless they can prove gross negligence, malicious intent, or bad faith on the part of the professional.

²²⁶ Approximately \$22,900.

²²⁷ *Code de la consommation*, Arts. L131-1 and L131-5. Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²²⁸ Approximately \$458,000.

²²⁹ *Code de la consommation*, Art. L. 132-1 Online: <https://www.legifrance.gouv.fr/Traductions/Catalogue-des-traductions/> Code de la consommation (partie législative, partie réglementaire)/en/Code.29.pdf

²³⁰ *Code civil*, Consolidated Version to January 3, 2018, Art. 1217 Online: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations/> Code_civil - 20130701_EN.pdf

4 Analysis of conditions of sale on business websites

4.1 Construction of the sample and preliminary discussion

Companies that engage in e-commerce include various aspects of their contractual offer within documents such as their conditions of service or pricing policies. We wanted to know if these documents address the errors in advertised prices. In doing this, we amassed a sample of 50 websites of online merchants visited by Canadians. The full list of these sites, together with explanations of how the sample was constructed, is presented in Appendix 5 of the French version of the report.

There are several platforms that bring together consumers and merchants, vendors or service providers, and which do so free of charge, such as eBay, Alibaba and Booking.com, who are all part of our sample. Although some platforms claim not to be merchants, we consider that they are indeed merchants, and that, accordingly, they must comply with provincial consumer protection laws. In this regard, we adopt the reasoning developed in the Option consommateurs report on the sharing economy,²³¹ which is that because these platforms engage in commercial activities and because of the tripartite contractual relationship (platform, service provider and consumer) that is established, it is difficult for consumers to know who they are actually dealing with. Since, with the exception of eBay, the platforms in our sample only offer consumers the services of other merchants, and since consumer protection laws should be interpreted broadly and liberally, this reasoning must *a fortiori* be applied to them. Let us add that there have been recent judgments ruling that free internet service contracts should be considered consumer contracts.²³² Indeed, the courts have held that they cannot be considered gratuitous contracts, since both parties derive benefit from them.²³³ So there is no doubt in our minds that these platforms should be considered as merchants, subject to consumer protection legislation.

Accordingly, we analyzed the conditions and policies on the websites of these 50 merchants in the provinces of Québec, Ontario, Alberta and British Columbia to determine the legal provisions that are respected and those that are not. Most of these merchants operated in all the provinces studied.²³⁴

²³¹ Annik Bélanger-Krams, Option consommateurs, *Sharing Economy – The Canadian Perspective*, p. 22 ff. Online: <https://option-consommateurs.org/wp-content/uploads/2018/03/oc-809308-economie-du-partage-rapport-sans-annexesenglish-final.pdf>

²³² *Douez v. Facebook*, 2017 SCC 33.

²³³ *Demers v. Yahoo! Inc.*, 2017 QCCS 1454 (CanLII).

²³⁴ Of the 50 companies, two did not do business in Québec, 2 did not do business in Ontario, 5 did not do business in Alberta and 5 did not do business in British Columbia. To determine whether a merchant did business in a certain province, we checked whether it was possible to have goods or services delivered there. Note that some retailers allow consumers to contract online even if they do not deliver goods or provide services in their province.

It should be noted that many of the conditions of use of the analyzed websites are written in a heavy, convoluted legal style. Sometimes it is obvious that we are confronted with a poorly translated document. Often, especially in stores having a large volume of business and operating on the international scale, the contractual terms are spread out over several webpages, that may or may not have hyperlinks. And just when we think we have all the information in hand, we discover new hyperlinks to additional, sometimes contradictory conditions.

Also, on several of the websites visited, we found two separate agreements, one for the use of the website itself and one for the sales or rental contracts that can be concluded via the website. Sometimes, the hyperlinks to both agreements are on the same page, and sometimes they are in different places. The agreements are sometimes connected by hyperlink, sometimes not. It also happens that the clauses of both types of agreements may be included within in a single text. When this happens, it is very difficult, just by reading those clauses, to know whether what we are reading has to do with the rules governing the use of the website or those governing transactions that can be concluded on it. This obviously made analyzing the terms of use highly complex. Accordingly, the numbers and statistics should be interpreted with caution.

Although this is not the subject of this report, we believe that, due to their illegibility and their unintelligibility, a large number of the contractual clauses we read could be declared void by a Québec court.²³⁵ It will be recalled that the Canadian Code of Practice for Consumer Protection in Electronic Commerce requires that "All information that the vendor is required to provide pursuant to this Code must be: a) clearly presented in plain language [...]."²³⁶ That said, a number of the clauses we read during this study could clearly be characterized as abusive and leave themselves open to sanctions under the CCQ or the CPA. The clauses could be declared null, or a judge could order a further reduction of the obligation.²³⁷ Mtre Vincent Gautrais, Director of the Centre de recherche en droit public, and a Professor in the Faculty of Law at Université de Montréal and LR Wilson Chair on the Information Technology and E-commerce Law makes the point that: [TRANSLATION] "electronic contracts are not as stable as equivalent paper contracts, and in practice, the parties now have the ability to change the contracts more easily."²³⁸ This is what we found when analyzing the conditions of use of 50 sites operating in Canada. In fact, 24 of 48 merchants offering goods or services in

²³⁵ *Civil Code of Québec*, ch. CCQ-1991 Art. 1436. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>

²³⁶ *Canadian Code of Practice for Consumer Protection in Electronic Commerce*, para. 1.1. Online: [http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/\\$FILE/EcommPrinciples2003_e.pdf](http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_e.pdf/$FILE/EcommPrinciples2003_e.pdf)

²³⁷ *Civil Code of Québec*, ch. CCQ-1991 Art. 1437. Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991> and *Consumer Protection Act*, RSQ, ch. P-40.1, s. 8. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

²³⁸ Gautrais, Vincent, *Les contrats de cyberconsommation sont presque tous illégaux !* Revue du Notariat, 2005, p. 617-650.

Québec (50%) state specifically that they have the power to change the contract unilaterally. This practice seems to be in direct contradiction with the requirements of Article 1399 CCQ regarding free and informed consent. It is impossible to consent to something that is not reasonably foreseeable and is subject to change at any time.

Finally, the vast majority of the policies we analyzed dealt with the rights of cancellation, termination or refusal of transaction that merchants accord themselves in the event of errors. But they do not have a word to say about the corresponding rights of their customers in the same circumstances. However, we can certainly infer from our analysis that the vast majority of websites of merchants doing online business in Canada are not in compliance with provincial legislation, particularly with regard to false or misleading representations and the remedies available to consumers.

The sets of conditions that turned out to be most consistent with the various provincial statutes were the shortest ones. These were mostly to be found on the more amateur or old-fashioned sites. We hypothesize that it is mainly due to a lack of financial or legal resources that they mention nothing about most of the points we wanted to check.

4.1.1 Regarding false or misleading representations

The laws of every jurisdiction we studied prohibit making false, misleading or deceptive representations,²³⁹ and require that merchants are bound by their statements and those of their representatives.²⁴⁰

However, 82% (41/50) of the policies we analyzed contain at least one clause emphasizing the merchant's unwillingness to be bound by representations made on its website, and, most of the time, to do so without having to provide justification. Two other policies contain such a clause, accompanied by a statement such as "unless prohibited by law." Now, it cannot be taken for granted that every consumer knows what the law in his jurisdiction allows and what it does not. In total, 88% of the merchants whose policies we analyzed mentioned the possibility of not respecting representations made on their website, including those made in relation to the advertised prices.

²³⁹ *Consumer Protection Act*, ch. P-40.1, s. 219. Online:

<http://legisquebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, s. 14. Online:

<https://www.ontario.ca/laws/statute/02c30>

Alberta: *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 6 (4) (o). Online:

<http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 5 (1). Online:

http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

²⁴⁰ *Consumer Protection Act*, RSQ, ch. P-40.1, ss. 41 and 42. Online:

<http://legisquebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

Note that 54% (27/50) of the policies analyzed have a clause allowing merchants to demand a price higher than the advertised price, in particular by giving them the right to correct prices at any time, including after the orders have been sent by the consumer, or received or even confirmed by the merchant. Twenty-five of these merchants do business in Québec and may be in contravention of the requirements of Section 224 c) CPA. Four other policies have ambiguous, seemingly contradictory clauses on the topic; some suggest that no higher price can be demanded and others specify that the price can be changed at any time.

4.1.2 Regarding the remedies available

The vast majority of policies and conditions analyzed attempt in one way or another to limit the remedies available to consumers who fall victim to price display errors and are deprived of the compensation to which they may be entitled. Note that these clauses are not all designed to be applied to price display errors. Rather, they are written in more general terms, in order to encompass the widest range of possible circumstances, including such errors.

4.1.3 Making the contract subject to laws of jurisdictions other than those of Canada or the province where the contract is concluded

Of the 48 merchants doing business in Québec, 21, almost 44%, attempted to make their contract subject to other jurisdictions in contravention of Sections 19 and 22.1 CPA²⁴¹ and Article 3149 CCQ.²⁴² For instance, 14 subject the contract to the laws of another province and 7 to the laws of a foreign jurisdiction: the Netherlands, Hong Kong, California and Oregon. In Ontario, 58% of the conditions of use we analyzed include a clause stating that the contract is subject to the laws and jurisdiction of another province or another State; 8 chose Québec, 7 chose Alberta, 5 chose British Columbia, and 8 chose a foreign country.

Note that these contractual provisions may contravene Section 7 (1) of the CPA 2002, which states that consumers cannot waive the substantive and procedural rights provided therein.²⁴³ Unlike the Québec provisions, this section does not specifically

²⁴¹ 19. Any stipulation in a contract that such contract is wholly or partly governed by a law other than an Act of the Parliament of Canada or of the Parliament of Québec is prohibited,”

“22.1. An election of domicile with a view to the execution of a juridical act or the exercise of the rights arising therefrom may not be set up against the consumer, except if it is made by notarial act.”

²⁴² “3149. Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

²⁴³ “7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.”

prohibit a contract being subject to a foreign jurisdiction. On the other hand, if such foreign courts were less likely to be generous toward consumers than courts in Ontario, making the contract subject to them would contravene provincial legislation.

Fortunately for Ontario consumers, the laws of the other provinces we studied offer relatively similar guarantees to consumers, with the exception of Québec law, which is more generous.

That said, we believe that this type of contractual clause, although it may be void, is a serious potential impediment to the exercise of consumer rights. Indeed, particularly as regards price display errors, the disputed amounts are often small. The consumer who mistakenly or wrongly believes he has to travel to another province, or worse, to another country, to assert his rights may simply give up trying.

In Alberta 60% (27/45) of the conditions we analyzed subjected the agreement to the laws or jurisdiction of another province or a foreign state, contrary to Sections 13 (1)²⁴⁴ and 142.1²⁴⁵ of the Alberta CPA, which provide that the Court of Queen's Bench has jurisdiction to settle any dispute and apply the appropriate remedies.

²⁴⁴ "13(1) When a consumer(a) has entered into a consumer transaction, and (b) in respect of that consumer transaction, has suffered damage or loss due to an unfair practice, that consumer may commence an action in the Court of Queen's Bench for relief from that damage or loss against any supplier or any principal, director, manager, employee or agent of a supplier who engaged in or acquiesced in the unfair practice that caused that damage or loss. (2) In an action under this section, the Court of Queen's Bench may (a) declare that the practice is an unfair practice; (b) award damages for damage or loss suffered; (c) award punitive or exemplary damages; (d) make an order for (i) specific performance of the consumer transaction, (ii) restitution of property or funds, or (iii) rescission of the consumer transaction; (e) grant an order in the nature of an injunction restraining the supplier from engaging in the unfair practice; (f) make any directions and grant any other relief the Court considers proper. (3) In determining whether to grant any relief under this section and the nature and extent of the relief, the Court of Queen's Bench must consider whether the consumer made a reasonable effort to minimize any damage resulting from the unfair practice and to resolve the dispute with the supplier before commencing the action in the Court. (4) The Court of Queen's Bench may award costs in accordance with the Alberta Rules of Court."

²⁴⁵ "142.1(1) When a consumer (a) has entered into a consumer transaction, and (b) in respect of that consumer transaction, has suffered damage or loss due to a contravention of, or failure to comply with, this Act or the regulations, that consumer may commence an action in the Court of Queen's Bench for relief from that damage or loss against any supplier or any principal, director, manager, employee or agent of a supplier who engaged in or acquiesced in the contravention or failure to comply that caused that damage or loss. (2) In an action under this section, the Court of Queen's Bench may (a) award damages for damage or loss suffered, (b) award punitive or exemplary damages, (c) make an order for (i) specific performance of the consumer transaction, (ii) restitution of property or funds, or (iii) rescission of the consumer transaction, (d) grant an order in the nature of an injunction restraining the supplier from contravening or failing to comply with this Act or the regulations, or (e) make any directions and grant any other relief the Court considers proper. (3) In determining whether to grant any relief under this section by a regulation and the nature and extent of the relief, the Court of Queen's Bench must consider whether the consumer made a reasonable effort to minimize any damage resulting from the contravention or failure to comply and to resolve the dispute with the supplier before commencing the

Finally, of the companies doing business in British Columbia, 67% of the agreements we analyzed (30/45) intended to subject the contracts concluded by consumers to foreign laws or the jurisdiction of courts outside the province; 22 of these are other Canadian provinces. Like the Ontario Act, the BC Act does not expressly prohibit merchants subjecting contracts to a foreign jurisdiction. On the other hand, Section 3 prohibits waiving the rights set forth under the *Business Practices and Consumer Protection Act*.²⁴⁶ So if the foreign jurisdiction in question turns out to be less generous to consumers than British Columbia, subjecting the contract to it would contravene provincial law.

4.1.4 Limiting the types of recourse open to consumers

The three main types of limitations we found in the electronic agreements we analyzed are:

a) Binding arbitration

While Québec, Ontario and Alberta explicitly prohibit binding arbitration clauses, some merchants still include them in their contracts, again leaving consumers with the false impression that they have fewer rights than granted by law.

Of the 50 agreements analyzed, only 2 contain binding arbitration clauses: Fitness Depot and Alibaba. Three other agreements specify that, in case of dispute, arbitration is mandatory, except where prohibited by law.

b) Prohibition of class actions

Another way to limit consumers' redress is to forbid them from bringing a class action suit or from participating in one. Five of the agreements we analyzed contain such clauses. Such clauses, however, are explicitly prohibited by the law of Québec²⁴⁷ and invalid under the laws of Ontario.²⁴⁸ Alberta law gives consumers who have suffered damage after concluding a consumer contract the right to seize the Court of Queen's Bench.²⁴⁹ Remember that it is impossible to waive one's rights under that Act.²⁵⁰

action in the Court. (4) In an action under this section, the Court of Queen's Bench may award costs in accordance with the Alberta Rules of Court."

²⁴⁶ Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act..

²⁴⁷ *Consumer Protection Act*, RSQ, ch. P-40.1, s. 11.1. Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

²⁴⁸ *Consumer Protection Act*, 2002, SO 2002, c 30, s. 8 (1). Online: <https://www.ontario.ca/laws/statute/02c30>

²⁴⁹ *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 13. Online: <http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

²⁵⁰ *Consumer Protection Act*, RSA 2000, ch. C-26.3, s. 2 (1). Online: <http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

c) Prohibition of recourse

Rather than forcing consumers to use a particular remedy (arbitration) or prohibiting certain procedural vehicles (class actions), some merchants choose to deny consumers the right to any form of recourse whatsoever. Twenty-four percent (12/50) of the online agreements we analyzed state that the consumer has no recourse unless prohibited by law or they contain the following sentence: "Your only recourse is to stop using our website."²⁵¹

Damage limitation

Without completely prohibiting consumers from suing them, some merchants instead try to limit the amount of damages that can be claimed.

Almost all the agreements we read contain some form of limitation of liability clause. However, these clauses are illegal to varying degrees in all the jurisdictions we studied.²⁵²

Some agreements limit damages that can be claimed to a specific amount, while others simply prohibit claiming any damages whatsoever. In all, 54% of the analyzed agreements (27/50) prohibited consumers from claiming damages of any kind. Two agreements limit the amount of damages that can be awarded to the total amount of purchases made.

Some merchants added terms to their agreements indicating that some of the clauses they contain may not be applicable, which makes reading these agreements even more indigestible. This occurred in 20% of the agreements analyzed (10/50). For instance, even though the Penningtons Online Store states that the consumer's sole remedy is to stop using the website and that it will not be responsible for damages of any kind, it also states that if it should be responsible for damage, its liability would be limited to the smaller of the following amounts: \$100 or the amount of purchases made by the consumer.²⁵³

²⁵¹ Fournitures de Bureau Denis, Lancôme, Atmosphère, La Vie en Rose, Métro, Tristan, FrontierPC.com, Tigerdirect.ca, Nike, Alibaba, Fitness Depot and Ticketmaster.

²⁵² Québec: *Québec Civil Code*, ch. CCQ-1991 Art. 1474. Online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991> Act and *Consumer Protection Act*, RSQ, ch. P-40.1, s. 272. Online: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, s. 18. Online: <https://www.ontario.ca/laws/statute/02c30>

Alberta: *Consumer Protection Act*, RSA 2000, ch. C-26.3, ss. 7 (1) and 142. Online: <http://www.qp.alberta.ca/documents/Acts/c26p3.pdf>

British Columbia *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s.192 (1). Online: http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00

²⁵³ Website of Penningtons online store: <https://www.penningtons.com/en/termsfuse.html>

However, unless you are a lawyer, it is generally impossible for consumers to know whether a particular clause is applicable in their home province. The presence of such words leads them to believe that they have fewer rights than the law actually provides and, given the small amounts usually under dispute in the case of price display error, they may simply give up. Only 18% of the agreements analyzed (9/50) do not stipulate a limit on the damages consumers can claim.

Determining when the consumer contract is concluded

One final strategy aimed at limiting consumer redress is for the vendor to delay as long as possible the moment when he considers the sales contract to be concluded. The consequence of this is that a refusal to honour an order is not tantamount to a refusal to fulfill a contract. If there is no contract, the consumer cannot demand delivery of the good or claim that he suffered damage. As we explained earlier, this strategy is explicitly prohibited by the Québec CPA, since an irrebuttable presumption of offer is created when the offer on the website contains all the essential elements of the intended contract.²⁵⁴ Thus, from the moment the Québec consumer makes an order online, he is in the position of someone who accepts the offer. Once the order is received by the vendor, the contract is concluded, with all the obligations applicable thereto.

Yet, of the 48 agreements of companies doing business in Québec that we analyzed, 25% (12/48) attempted to otherwise define the time of conclusion of the contract. Of these, 58% (7/12) reserved the right to rescind, terminate or cancel the contract unilaterally, contrary to the provisions of the CCQ, which state that the contract is binding on the parties who have signed and cannot be rescinded, terminated, modified or revoked except on grounds recognized by law or by agreement of the parties.²⁵⁵ Twenty-seven percent (13/48) of the agreements analyzed expressly state that the information found on the merchant's website does not constitute an offer to contract. Worse yet, 75% (36/48) state that the merchant will not be bound by any order placed by the consumer.

²⁵⁴ *Consumer Protection Act*, RSQ, ch. P-40.1, s. 54.1.

Online: <http://legisQuebec.gouv.qc.ca/en/showdoc/cs/P-40.1>

²⁵⁵ *Civil Code of Québec*, ch. CCQ-1991 Arts. 1434 and 1439. Online:

<http://legisQuebec.gouv.qc.ca/en/ShowDoc/cs/CCQ-1991>

5 Conclusion and Recommendations

Our research has led us to make several observations. First, errors in prices posted on the Internet affects a considerable number of consumers. This is indeed what emerged from the press review and the survey we conducted. From 1997 to 2017, nearly a hundred separate cases of pricing error, including 11 in Canada, attracted the attention of the national and international media. Moreover, 39% of respondents to our survey reported having heard of pricing errors on the Web, while 24% had already bought a product that was advertised at the wrong price.

We should also recall especially that this phenomenon arose at the end of the 2000s, while the number of consumers turning to online trading was growing; it has continued to grow ever since. In Canada, online retail sales increased by 27% from 2016 to 2017. About ten cases of pricing error were recorded in 2017 alone. This brings us to our second conclusion: errors in online business continue unabated.

This situation raises a number of legal issues. These relate in particular to the concept of error - when is it possible to invoke the error defense for not meeting one's commitments? And is the time of contract conclusion based on when the consumer placed his order? On this point, we made a third observation based on our analysis of the legal framework: the legislative framework does not provide the necessary solutions to contract disputes provoked by pricing errors.

It will be noted that Québec is an exception here. Indeed, we believe that the sections of Québec's CPA and *Civil Code* that can be invoked are clear when the courts are confronted with a pricing error: a consumer who buys a product at an incorrect price is entitled to receive the product. The situation is far less clear in the other Canadian jurisdictions we studied. In fact, we were unable to find sections of any law that applies specifically to the question of price display errors.

Given the current situation, companies try to guard against the potential consequences of mispricing by providing restrictive conditions of sale. This is what emerges from our analysis of a sample of terms of service posted on the websites of merchants frequented by Canadians. For example, in 82% of the policies analyzed, there was at least one clause indicating the merchant's refusal to be bound by the representations made on its website, most of the time without any accompanying justification. Also, in 54% of policies we analyzed, there was a clause that allowed the merchant to demand a higher price than the advertised price. Finally, the vast majority of policies and conditions analyzed contained various attempts to limit the remedies available to consumers who fall victim to price display errors and are deprived of the compensation to which they may be entitled.

It appears therefore, that we need to modernize Canadian provincial laws and regulations so that cases of price display error can be treated with fairness and transparency. The problem, however, is difficult and involves the search for a better balance between the rights of consumers and the needs of electronic merchants.

Part of the justification for finding this balance was provided by the discussions we held with Canadian consumer focus groups. We should first mention that these consumers often said they felt entitled to receive the product they purchased so cheaply, even when the merchant says it is a mistake, and that it is the company's responsibility to make sure they limit the number of errors on the Internet.²⁵⁶ On the other hand, the consumers brought up several nuances. For example, they show themselves to be more conciliatory when merchants apologize, respond quickly and provide compensation. Similarly, they are more understanding towards smaller companies or when there is a significant, obvious difference between the wrong price and the market value of the product.

This brings us to a series of recommendations carefully considered and adapted to the digital environment. These changes seem necessary in order to make handling cases of price display error more fair and transparent, both for consumers and for businesses wishing to trade online in Canada.

Our recommendations

We first focus on the efforts that companies doing business online could employ in order to prevent pricing errors and respond better when they do occur. These efforts seem necessary given the numerous repeated cases of pricing error, the apparent lack of preparation of some merchants when an error occurs²⁵⁷ and their non-compliance with Canadian laws with regard to conditions of sale, as shown by our analysis.

The discussion during the focus groups also offer the lesson for merchants that consumers show themselves to be more lenient when the latter react quickly, apologize, and offer compensation, even if this involves only a symbolic amount.

We therefore recommend that merchants associations or companies:

- 1. Modernize their reference and best practices guides with regard to the display of prices and include a section on online pricing errors.**
- 2. Inform their members about existing laws regarding price display on the Internet.**

²⁵⁶ This view was shared by one of the participants in our survey. According to 65% of participants, in cases of pricing error, the merchant should honour the order.

²⁵⁷ Recall the example of the company Lenovo, which waited two weeks before it corrected the pricing errors on its website.

- 3. Make the IT investment necessary to prevent pricing errors on the Internet.**
- 4. Quickly contact affected customers, suggest a solution, and apologize whenever a price display error occurs.**
- 5. Provide consumers with compensation.**

A change in corporate practices would be welcome but would be insufficient. Changes to Canadian laws are also needed. First, we believe that the provinces should follow Québec's example and specify the time when a contract is concluded on the Internet and prohibit requiring a price that is higher than the advertised price.

We therefore recommend that Canadian provincial legislators:

- 6. Amend their respective legislation in order to specify that:**
 - **A contract is concluded when the consumer places an order on the Internet;**
 - **It is prohibited to sell at a higher price than the listed price.**

Should these legislative changes prove too restrictive, we suggest alternatively the adoption of a new price accuracy policy: ²⁵⁸ a price accuracy policy 2.0 that is adapted to the reality of the Internet. The new price policy 2.0 could be based on the current price policy by establishing a sufficient error threshold (expressed in monetary or percentage terms) that is considered adequate by the legislature, which would be advised by a committee composed partly of consumer associations. The adoption of such a policy would make the process seamless, and it seems to represent an appropriate solution for both consumers and businesses.

We therefore recommend to Parliament:

- 7. The creation of a committee to decide on the elements to prioritize in a 2.0 pricing policy.**
- 8. The adoption of a pricing policy 2.0 that includes a price threshold at which an order should be honoured or refused. This price accuracy policy 2.0 should be made mandatory in all Canadian jurisdictions.**

In conjunction with the adoption of price accuracy policy 2.0, we believe that the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*²⁵⁹ needs to

²⁵⁸ Order respecting the price accuracy policy for merchants who use optical scanner technology, ch. P-40.1, r. 2, made under the *Consumer Protection Act* (Chapter P-40.1, s. 315.1). Online: <http://legisQuebec.gouv.qc.ca/en/ShowDoc/cr/P-40.1>.

²⁵⁹ This code was endorsed by the federal, provincial and territorial ministers responsible for consumer affairs. Online: [http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_fr.pdf/\\$FILE/EcommPrinciples2003_en.pdf](http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/EcommPrinciples2003_fr.pdf/$FILE/EcommPrinciples2003_en.pdf)

be updated in order to incorporate, among others, ways of dealing with price display errors. The Code, which dates from 2004, no longer reflects the new realities in the world of e-commerce. In addition, updating it would be in line with the desire to harmonize trade rules inaugurated by the adoption in 2017 of the Canadian Free Trade Agreement.

We therefore recommend that Parliament and provincial legislators:

- 9. Update the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* in order to include the terms for dealing with pricing error situations.**