

## Chapter 5

# Trust, Loyalty, and E-Commerce

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### ABSTRACT

*E-commerce has experienced a meteoric rise from technological curiosity to substantive institution in little more than a decade of meaningful existence. The annual value of its global transactions is measured in the trillions of dollars. However, the unique nature of e-commerce has created a host of challenges for those seeking to ensure its continued vitality. The most significant of these challenges is the maintenance of user trust. To this point, e-commerce has tended to look to traditional methods of regulation to govern its participants and their transactions. However, the unique character of e-commerce and the concerns it generates warrant consideration of non-traditional approaches to regulation as well. This chapter suggests that fiduciary law, with its focus on maintaining the integrity of certain important relationships in contemporary society, could be a useful tool in e-commerce regulation by facilitating the trust and loyalty that is foundational to its success.*

### INTRODUCTION

Since its origins in the early 1990s, e-commerce has become a mainstream component of contemporary business reality around the globe. E-commerce transactions have grown to the point that their annual value is now measured in the trillions of dollars. According to the United States Census Bureau E-Stats (2008), in 2006, \$1.158 trillion in manufacturing

shipments were attributed to e-commerce in the United States alone. Yet, despite its current success, the issue of public trust continues to plague e-commerce, particularly in the relatively small, but highly visible retail sales sector where it could potentially experience its greatest success.

Trust is an essential component of various forms of human interaction, from personal relationships to business transactions. Trust is essential to e-commerce because of the manner in which e-commerce is conducted and the potential for opportunistic

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behaviour that it creates. The relative anonymity of e-commerce provides a basis for opportunism that does not exist in more traditional forms of business interaction. This, in turn, creates a general sense of wariness among potential e-commerce participants.

To engender trust, e-commerce has tended to look to traditional methods of regulation, such as legislation, international agreements, and voluntary self-regulation (including web site privacy policies and third-party web seals or trustmarks) to govern its transactions. While these methods have had success, they do not entirely address unique circumstances or pay sufficient attention to the highly interactive nature of e-commerce transactions, particularly in the retail sector. These existing methods of regulation do not focus sufficiently on the fact that what makes e-commerce successful is the willingness of users to participate in it in light of the risks to their security and economic well-being. Perhaps that should not be surprising, insofar as positive law generally attempts to promote certainty by articulating broad principles applicable to all forms of interaction. However, to be truly effective, these broad principles need to be augmented, where appropriate, by the use of discretion and their situationally-appropriate application to unique circumstances, such as e-commerce, and the peculiar issues that arise under it. The failure of existing regulation to address this central component of e-commerce significantly affects user confidence in the system and is ultimately detrimental to its effectiveness.

The effectiveness and efficiency of law are premised upon competing notions. The first is that the law must provide a readily ascertainable basis for its acceptable standards of behaviour; the second is that the law must retain sufficient flexibility to respond to new and unique circumstances. Too much certainty leaves insufficient space for the discretion needed for the situationally-appropriate application of law. Law must, therefore, balance its desire for certainty with an appropriate measure of flexibility and discretion. This is evidenced by

the co-existence within numerous legal systems of both positive laws of general application and equitable principles designed to mollify the former and fill in their gaps. Law maintains its appropriateness in a wide variety of circumstances by virtue of the co-existence of these complementary, yet distinct, legal methodologies.

Equitable principles, like the fiduciary concept, extrapolate beyond proscriptive law by providing the context to judicial decision-making that is often lacking in common or civil law regimes. This facilitates the law's ability to respond to disparate fact situations. As the most doctrinally pure expression of Equity, fiduciary law supplements traditional bases of civil obligation, such as contract and tort, but only where the interaction in question is one of sufficient social or economic importance or necessity resulting in an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary (Rotman, 2005). Unlike traditional bases of civil obligation, which are designed to impose liability upon wrongdoers and to award relief to aggrieved persons, fiduciary law seeks to facilitate the construction and preservation of social and economic interdependency. The protection of trust and how the reposing of and caring for that trust affects human interaction is central to this conceptualization of fiduciary law.

The unique character of e-commerce and the concerns it generates warrant consideration of non-traditional approaches to regulation. This chapter suggests that fiduciary law, with its focus on maintaining the integrity of important social and economic relationships in contemporary society, could prove useful in e-commerce regulation by looking to its often-neglected human interaction component.

Certainly, the rise of e-commerce from its humble foundations in the early 1990s indicates that it has been immensely successful. However, when one examines some of the characteristics of e-commerce since its transformation from curiosity to substantive institution, certain initiatives to foster and maintain trust are most prominent. These

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