# No Such Thing as a Free Lunch:

# Consumer Contracts and "Free" Services


Written By: Kent Sebastian
Public Interest Advocacy Centre
1204 - ONE Nicholas St.
Ottawa, Ontario
K1N 7B7

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The Public Interest Advocacy Centre
(PIAC)
Suite 1204
ONE Nicholas Street
Ottawa, ON
K1N 7B7
Tel: (613) 562-4002 Fax: (613) 562-0007
E-mail: piac@piac.ca Website: www.piac.ca

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## Executive Summary

Consumers access a multitude of online services that are termed as “free” for the average user. These services range from fee calling (Skype) to data storage (flickr, YouTube, Dropbox) and retaining contact information (Facebook, LinkedIn). However in an era where the web companies providing such services are increasingly interested in monetizing their businesses, consumers can be the eventual losers in the deal; while consumer losses may not be financial, the use of their information poses both challenges to personal privacy and the use of metadata to drive advertisers to key audiences. While these services seem free – there is ultimately a cost.

Consumers’ interests in using these services are often subordinated by business considerations. This is reinforced through the terms of service associated with using these services – often these are restrictive in nature for the consumer, providing a lop-sided ability for companies to use and monetize data while giving users few recourses to action should a dispute arise. Further, because of limited definitions of a “consumer” found at law many of the provincial consumer protection laws, enacted to protect citizens against these types of contracts, are largely void for the users of free services.

This paper addresses the multitude of issues that arise for consumers using free services: legal, jurisdictional and definitional. Consumer attitudes, legal regimes and case law are surveyed in order to better understand the position of consumers when using free online services.

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## Introduction

In the traditional business model, a consumer must provide payment for the product or service that they use. The growth of the Internet has led to new business models based on reaching the broadest possible audience and harnessing the economies of scale. Advances in technology have drastically decreased the cost of infrastructure required by online businesses – processing power, storage and bandwidth. As such, online businesses can now afford to offer their services without initial payment by consumers. In many cases, consumers can continue to use a service without ever having to directly pay for them.

However, these "free" online services still require a significant initial monetary investment. While their infrastructure may be able to support a large number of non-paying users, at some point these businesses need a source of revenue. Since users have become accustomed to using the service without payment, they are unlikely to arbitrarily start paying for the same benefits they have been receiving free since they first began using the service. Businesses then must turn to other methods to monetize their user base.

And thus the "free" service business model is born: a free service that requires its users to provide it with some kind of non-monetary value, which is then monetized by the business. This monetization can take many forms, for example, as Chris Anderson described in his article "Free! Why $0.00 Is the Future of Business"[1]: "Freemium," where users of the free service are persuaded to upgrade to a paid version of the service with extra resources or other added value; "Advertising," where users' information they provide the service is used to target advertising at them while they use the service; or "Labour Exchange," where users provide non-paid labour that generates value for the service (or for another service run by the same business).

This business model may be of great benefit to consumers; however, these services pose new problems as well. The terms governing the use of the service are 'adhesion contracts' – you must accept the terms as-is, or you cannot use the service. Virtually all of these agreements contain some combination of anti-consumer clauses: forum selection, mandatory arbitration, bars on class action suits and the ability to make unilateral changes to the contract. Since online services are often based in one jurisdiction but accessible worldwide, if a business breaches their terms of service or commits some other civil wrong, consumers can be placed in an unfair position in a dispute or have no real opportunity for remedy.

Consumer protection laws were enacted specifically to address concerns about pricing and competition. It is unrealistic to say "don't use the service if you don't like the terms" when every business in the industry uses the same policy, or consumers were not aware these unfair clauses were in the terms of service. Thus, consumer protection laws often make these types of

[1] Chris Anderson, "Free! Why $0.00 Is the Future of Business" (25 February 2008), online: <http://www.wired.com/techbiz/it/magazine/16-03/ff_free?currentPage=all>.

clauses void, allowing consumers a fair chance at their day in court against a sophisticated business entity.

However, “free” services are generally not subject to most of these rules based on definitions in consumer protection laws – the protections only apply to transactions based on payment. A recent case decided in Quebec held that because it is free to join and use Facebook, the terms of service were not a “consumer contract” and the plaintiff could not benefit from the consumer protections in the Quebec Civil Code. The Ontario *Consumer Protection Act* has a similar definition of “consumer agreement” – the supplier agrees to supply goods or services *for payment*. With these definitions preventing the application of consumer protection laws to “free” services, it will be extremely difficult for a consumer to hold a “free” service accountable without changes to trust law.

This report explores the growing phenomenon of “free” services, the problems they pose to consumers and the shortcomings of current laws and legal frameworks in addressing the problems these services create. Consumers can certainly benefit from “free” services, and some users may never encounter the problems addressed in this report. However, a system should never be judged solely by when everything goes according to plan – in the event of a dispute, consumers need laws and regulations to put them on equal ground with the businesses profiting from consumer-created value.

In order to undertake the research for this report a number of methodologies were used. Research was conducted on the various websites mentioned to better understand the array of services available to consumers. Jurisdictional and legal considerations were assessed through analyzing current legislation and case law in the area. Consumer research was also completed through conducting three focus groups early in 2013. These focus groups asked participants to consider: which services were considered “free services;” how consumers feel in giving up personal (or other) information in order for free services; and what rights consumers feel they have when receiving free services.

## What are “Free” Services?

This report will use the following definition of a “free” service: *a free online service that monetizes user-provided value*. This definition focuses on the activities of the service and its overall business model as it relates to the users of the service. Each concept in the definition will be unpacked and explored.

The problems posed by “free” services, as discussed later in this report, are mainly due to the advances in technology that allow them to exist in the first place. Thus only *online* “free” services are examined. While it is still prohibitively expensive for a business to purchase enough servers to handle hundreds of thousands of users, large cloud-based providers[2] have made it affordable for even small companies to develop and deploy an online platform that can serve a global audience. As well, the operation of web technologies allows any such platform to gather information about users’ habits as they use the service, without the user even being aware of it. These are new concerns that are not present at the same scale in the offline context.

As the name implies, a “free” service is one where the user is not required to pay the service provider a monetary sum in order to access and use the service. That is not to say that the service must be entirely free or that a user can *never* pay for some aspect of the service, but the main features of the service must be available without cost. This allows the service provider to easily entice new users and quickly grow their user base. It also leads to the most important aspect of a free service: the users provide the value in the platform.

Typically, a “free” service will begin operating with a ‘bare-bones’ platform that allows users to submit some type of content. Users are usually drawn to the platform through the features the service provides on top of the content. As more people use the platform, the amount of submitted content grows, and the value in the platform grows. A service provider may contribute their own content, but as the user base grows larger, the amount of value that users provide to the platform dwarfs what the service provider could possibly generate. The value of the service itself then becomes the value that the users have provided, and continue to provide, over time. The service provider creates the infrastructure, the users create the value.

The service providers, as a business, must then find a way to monetize this value. Businesses exist to make money and if the users are not paying for use of the service directly, the business must use the value it has in its platform to generate revenue. Operating a web service at a large scale will still have significant ongoing costs, and, without the ability to monetize services, eventually a business’ financial reserves may dry up.

The best example of this process is Facebook’s rise to popularity. Facebook initially provided a structured way for people to display their pictures, find people with similar hobbies, and communicate with friends. The value of the platform was this ability to connect with others. As

[2] For example, Amazon Web Services (http://aws.amazon.com/), and CloudFlare’s content delivery network (https://www.cloudflare.com/).

more and more people shared their information and connected with other users on Facebook, this data became increasingly valuable to advertisers. Facebook is now a publicly traded company with a market capitalization of around $93 billion[3], with a substantial amount of their revenue generated through advertising[4]. The value users have provided to Facebook – namely, their personal information – has dwarfed the value Facebook initially provided to jump-start the platform.

Another example of a "free" service is review site Yelp. The Yelp platform collects information about businesses in certain municipalities and allows users of the site to leave a star rating and a message of their experience with the business. Like Facebook, Yelp provides the platform and some business listings but the real value in the service is the user-provided approvals or warnings of local businesses. Yelp is also now a publicly traded company, receiving the majority of its revenue through advertising[5] and had approximately 102 million unique visitors during the first quarter of 2013[6]. Without the user reviews, the platform is merely a directory – the value in the website is provided by the users, which the company then monetizes.

Indeed, nearly all of the most popular online services today are "free" services, for example: Youtube, Gmail, Twitter, Instagram, Reddit, Pinterest, LinkedIn, blogging platforms such as WordPress, Blogger and Tumblr, Skype, Spotify, Vine, Dropbox, flickr and Pandora to name a few.

While these types of services are free, as in without requiring payment, they are not entirely without cost. Users still are giving up something of value to these services, whether they are aware of it or not. Most often this is in the form of personal information provided willingly to the service: name, birthday, likes/dislikes and other demographic information that can be used to tailor advertising to a particular person. Or, it can be in the form of a user's habits being tracked without them being explicitly aware, through web tracking technologies[7]. Even the simple ability to reach a person with the possibility of accessing their friend network is something that would not otherwise be available to advertisers (or malicious users) and hence has value. An 'offline service' may have access to this type of information as well, however, since their business model does not *depend* on monetizing such information, and to collect such information at the same scale would be significantly more difficult, the potential for abuse is much lower.

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[3] Google Finance, "NASDAQ: FB" (Accessed 7 August 2013), online: <http://www.google.ca/finance?client=ob&q=NASDAQ:FB>.

[4] 84% of Facebook's over $5 billion revenue in 2012 was from advertising, see: Facebook Inc, "Form 10-K" (1 February 2013), online: <http://www.sec.gov/Archives/edgar/data/1326801/000132680113000003/fb-12312012x10k.htm> at 14.

[5] Yelp Inc, "SEC Filings 10-K" (27 February 2013), online: <http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTg3NTU1NjQmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d> at 2.

[6] Yelp, "About Us" (Accessed 3 July 2013), online: <http://www.yelp.ca/about>.

[7] For a detailed discussion of online tracking, see previous PIAC report: Janet Lo, "A 'Do Not Track List' for Canada?" (October 2009), online: <http://www.piac.ca/files/dntl_final_website.pdf>.

As the examples show, the most common way that businesses monetize the value in their platforms is through advertising. However this is by no means the only method. Chris Anderson in an article for WIRED Magazine[8], as well as a wiki page created by WIRED readers[9], describes several ways that "free" services could monetize their platforms. These methods include: a paid upgrade to the service (freemium), using user-provided effort to benefit another service (labour exchange), licensing of user-submitted content, user endorsements (e.g. Facebook sponsored stories), requesting user donations, or even directly selling user information to other parties (sales companies, data brokers). Depending on the type of platform and the type of value the users create, the possibilities for monetizing "free" services are endless.

These monetization opportunities are precisely why Chris Anderson predicts "$0.00" is going to be the "future of business". As long as a service is enticing enough and provides enough initial value to users, platforms can grow organically to enormous sizes with little additional investment. Once these platforms have gathered a critical mass of users, regardless of the nature of service, revenue can be generated through advertising. If the platform is suited to a particular type of information or content, it can be monetized further. The barrier to entry has been substantially lowered with advancements in technology such that it is easier and easier for successful services to be created in little time. Therefore, the popularity of this business model will likely grow, and it may only be a matter of time until all Canadian consumers use primarily free services in their day to day lives.

However, for all the benefits that "free" services provide to consumers and businesses alike, the "free" service business model poses new problems to consumers that may not be adequately addressed by current laws.

[8] Anderson, *supra* note 1.
[9] "Make Money Around Free Content – Wired How-to Wiki" (28 February 2011), online: <http://howto.wired.com/wiki/Make_Money_Around_Free_Content>.

## Problems with "Free" Services

"Free" services create a new set of concerns that are not necessarily present in the offline world, due to the use of new technologies and the necessities of monetizing user-provided value. This report highlights some of issues inherent in "free" services.

### Fundamental Conflict between Business Interests and User Interests

The purpose of a business is to generate profits. While "free" services are offered to users without payment, the business still incurs costs to create and maintain their platform which eventually must be recovered. Differentiation begins to occur between groups of customers as business models develop; those who access free services, or "users," and those that pay for services, or "consumers." If the interests of the business are not aligned with the interests of users, inevitably situations will arise where those interests conflict. In the conflict between the paying customer and the non-paying user, users are unlikely to prevail.

This is the main point from an opinion piece written by Dmitry Fadeyev for professional web design magazine Smashing Magazine[10]. As designers create and improve a service, decisions must be made that balance the many interests at play: the creator's vision, the user experience and especially, the paying customers' interests. While the creator's vision and user experience are initially paramount in order to gather a large user base, eventually the service must generate revenue. Gradually, the interests of the paying customer will displace those of the user as the service providers come under pressure to make money.

In a "free" service, the paying customer is not the average end user of the service. While some "free" monetization methods may allow for end users to pay the service (e.g. the Freemium model), the vast majority of "free" services are supported by advertising or some other third-party use of user-submitted information. Once a "free" service is required to monetize, the advertiser's interests become material and design decisions are nudged into providing the advertiser with greater benefits from the user base. In essence, "[i]f the users aren't going to pay for their product, the advertiser will pay for the users."[11]

The easy solution as noted by Fadeyev, is simply to charge for the service, thereby aligning user interests with customer interests. However, charging even a low price for a service that was built on access without cost will likely alienate a significant number of users. Alternatively, creating a web service based on payment is doomed to fail next to competitors that offer a similar service for no cost. As Chris Anderson noted, "...the truth is that zero is one market and any other price is another. In many cases, that's the difference between a great market and none at all."[12]

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[10] Dmitry Fadeyev, "Uncompromising Design – Avoiding The Pitfalls of Free" (11 October 2012), online: <http://www.smashingmagazine.com/2012/10/11/uncompromising-design-avoiding-pitfalls-free>.
[11] *Ibid*.
[12] Anderson, *supra* note 1.

Consumer attitudes confirm this hypothesis as well. A 2010 study by the University of Southern California's School for Communication and Journalism found that while 49% of Internet users said they have used micro-blogs such as Twitter, 0% said would be willing to pay for it[13]. Similarly, another 2010 poll found 77% of online adults wouldn't pay to read a daily newspaper's content online[14]. A focus group run by Environics for PIAC found that users under 40 years of age who have paid for online services only do so because they *needed* the extra functionality required by the paid service, but otherwise very few people pay for services that have a free component:

> "I paid for the LinkedIn premium or whatever it was called, I paid for it for when I needed the extra service, whether I was looking for a job or I was looking to hire somebody. Then when I was done with that, then stopped paying for it."
>
> (Focus Group Participant, Vancouver, January 15, 2013)

> "I pay for Skype when I'm abroad, just because you can telephone voice cheaper, so just when I'm travelling[15].
>
> (Focus Group Participant, Vancouver, January 15, 2013)

Focus group participants indicated that they use free services because the service offering is compelling, and assists them in some manner with their lives and can be extremely convenient[16]. Indeed, participants saw that there were disadvantages to these services however – disadvantages that involved a trade-off such as a loss of privacy[17].

The result of being unable to immediately convert free users into paying users is an increase in decisions that sacrifice user interests for business interests. For example, social game company Zynga offers its games as free to play, with the ability to purchase in-game currency to advance through tedious tasks more quickly. In order to publicize the game and gather the largest

[13] Justin Pierce, "2010 USC Annenberg Digital Future Study Finds Strong Negative Reaction to Paying for Online Services" (26 July 2010), online: <http://annenberg.usc.edu/News%20and%20Events/News/100726_CDFStudy.aspx>.
[14] Lance Whitney, "Poll: Most won't pay to read newspapers online" (13 January 2010), online: <http://news.cnet.com/8301-1023_3-10433893-93.html>.
[15] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 12-17, and Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 24-25.
[16] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 6-7, 10-12, Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 12, Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 11-13, and Free Services Focus Group Transcript, Participants 40 Years of Age or More, February 12, 2013, p. 20-22.
[17] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 13, 17-18, Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 8, 61, and Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 13.

possible user base, Zynga made some arguably manipulative design decisions, such as the prompt in the following figure. The game asks whether the user should share the reward with their Facebook friends (i.e. posting a message to friends) but the prompts “Accept” and “Cancel” could make the user think they refer to accepting the reward itself or not[18].


**Figure 1. Manipulative In-Game Prompt from Zynga’s Farmville**

Similarly, in a critical blog post, developer Dalton Caldwell described his experience with Facebook executives upon learning the application he had created was in competition with a recently-developed Facebook product[19]. As Facebook’s application would be part of their advertising platform, the executives essentially gave Caldwell an ultimatum: take our offer to buy your application or you will be shut down. Despite the value provided to Facebook with his application, recognized by Facebook staff, Caldwell was forced to abandon his product and move on. His opinion of the problem is summed up in the quote: “I don’t think you or your employees are bad people. I just think you constructed a business that has financial motivations that are not in-line with users & developers.”[20]

Online markets are fundamentally different from traditional markets because of the method of communication – not merely one-to-one between consumer and service provider, but many to many, where both consumers and service providers communicate in the same network. This new role has been called the “prosumer”, where the consumer is as involved in producing content in the community as the service provider[21]. This new role for consumers is highly

[18] Fadeyev, *supra* note 10.
[19] Dalton Caldwell, “Dear Mark Zuckerberg” (1 August 2012), online: <http://daltoncaldwell.com/dear-mark-zuckerberg>.
[20] *Ibid*.
[21] Alexander E. Reppel & Isabelle Szmigin, “Consumer-managed profiling: a contemporary interpretation of privacy in buyer–seller interactions” (2005) 26:3-4 Journal of Marketing Management 321 at 323.

valuable to businesses; Facebook Chief Operating Officer Sheryl Sandberg has been quoted as saying:

> "Marketers have always known that the best recommendation comes from a friend. ... This, in many ways, is the Holy Grail of marketing. ... This is the illusive [sic] goal we've been searching for, for a long time; [m]aking your customers your marketers."[22]

Not only have users become the product, business interests have coerced users into becoming 'employees'.

**Privacy Concerns and Use of Personal Information**

A key difference between the online and offline context is the ease by which digital information can be collected, stored, manipulated and shared. Many companies now exist solely to provide tracking and analytics of users' usage habits on web services[23]. This data is combined with the information users provide to "free" services, then it is analyzed in a process called 'data mining'. The result can be anything from generalized demographic trends to a detailed model of an individual's preferences (a so-called 'tastespace')[24]. This resultant data can be used for any number of purposes: to improve the data collection processes of the service, to target advertisements, or to generate extra revenue by selling the data to third parties (who can mine the data further, or apply it to problems in other industries such as credit ratings).

It may not seem worrisome that this information is collected and mined, if it is merely used for targeted advertising. Indeed, focus group participants felt that as long as they were not being targeted as individuals, instead only by general demographics, they did not mind targeted advertising[25]. This sentiment was encapsulated by the following comment:

> "It depends on your definition of what your information means because they're not saying my name, but they will say my habits. They're selling my habits so that's a different thing than just saying they're selling my information[26]."
>
> (Focus Group Participant, Vancouver, January 15, 2013)

However, consumers' awareness of the extent and true purpose of such information collection is a major issue. For example, Facebook has previously partnered with data brokers, businesses and advertisers to provide "retargeted" advertisements – advertisements for

[22] *Angel Fraley et al v Facebook Inc*, 830 F Supp (2d) 785 at 808 (2001).
[23] Lo, *supra* note 7 at 18.
[24] *Ibid*.
[25] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 33-34, 57, Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 58, 60 and Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 57.
[26] Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 58.

products that users have recently viewed on a retailer's website, but did not purchase[27]. One shoe retailer using this practice earned a return on investment of seven times[28]. With such positive results for retailers, this practice is likely to become more widely used. Nevertheless, it is arguably beyond the average consumer's understanding of data collection practices that the contents of their shopping cart from an online retailer would be collected, stored and subsequently used in an individualized advertisement on Facebook.

The exchange of information with online services has been called the "privacy bargain" – consumers exchange their privacy (i.e. personal information) for use of a service[29]. Unfortunately, consumers are rarely fully informed of the nature of this bargain.

The main method by which consumers are informed about how their information will be used is a service's privacy policy. These documents are often lengthy, written in confusing pseudo-legal language, deliberately vague or incomplete, or possibly misleading. As well, since many "free" services are based in the United States, they use the American concept of "personally identifiable information", a much weaker concept than Canada's "personal information" found in privacy legislation[30]. Since a "free" service is based on collecting and monetizing the information of its users, it is specifically in their interest to make these documents as vague as possible in order to justify any use to which they put the information they collect. In any event, terms of service and privacy policies often have clauses which specify they can be changed at any time, possibly without notice to users, so that the 'agreed-to' use of users' information can change dramatically[31]. Such changes may further come into conflict with legal obligations in Canada such as PIPEDA requires.

A 2008 study found that if American Internet users read every privacy policy of all websites they use in a year, it would take approximately 201 hours per year[32]. By comparison, in 2000 the estimated time per year to complete US federal income tax was 26.4 hours[33]. 201 hours per year corresponds to roughly 33 minutes per day, nearly half of the estimated 72 minutes the average user spends on the Internet per day[34]. The estimate also does not take into account any changes that occur to privacy policies in a year, or the time that it would take to understand

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[27] Geoffrey A. Fowler, "Facebook Sells More Access to Members" (1 October 2012), online: <http://online.wsj.com/article/SB10000872396390443862604578029450918199258.html>.
[28] *Ibid*.
[29] Cory Doctorow, "The Curious Case of Internet Privacy" (6 June 2012), online: <http://www.technologyreview.com/news/428045/the-curious-case-of-internet-privacy>.
[30] Compare Google's definition of personal information: "This is information which you provide to us which personally identifies you, such as your name, email address or billing information, or other data which can be reasonably linked to such information by Google." (Google, "Key Terms", online: http://www.google.ca/policies/privacy/key-terms/#toc-terms-personal-info), to the definition in the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 2 (PIPEDA): "'personal information' means information about an identifiable individual ...".
[31] See e.g. Kurt Opshal, "Facebook's Eroding Privacy Policy: A Timeline" (28 April 2010), online: <https://www.eff.org/deeplinks/2010/04/facebook-timeline>.
[32] Aleecia M. McDonald & Lorrie Faith Cranor, "The Cost of Reading Privacy Policies" (2008) 4 ISJLP 543 at 562.
[33] *Ibid* at 560-561.
[34] *Ibid* at 560.

and compare two competing policies and make an informed decision between them. In short, consumers simply do not have the time to read, and otherwise do not sufficiently understand the content of the privacy policies of the "free" services they use. As such, consumers are rarely aware of the nature and extent to which their information is used.

Furthermore, the methods by which this information is collected are invisible to the user. If the only information a "free" service used was that which the user willingly submitted, there would be a reasonable argument that the user consented to its subsequent use. However, technologies such as tracking cookies, web bugs, and behavioural targeting technologies collect information about a user as they use a service, without any explicit sharing action by the user[35]. Given a user's lack of knowledge of what and when information about them is collected or how it will be used and the lack of an explicit action to share such information, there is a strong argument that "free" services with these practices violate several principles in Canadian privacy legislation, such as principle 2 (identifying purposes) and 3 (consent)[36].

Since "free" services monetize the information of their users, it is in the best business interests of the service to collect as much information about its users as possible and retain it as long as possible, even indefinitely[37]. The motivation to retain information is partly due to the fact the results of data mining techniques become more valuable as more information is available to be mined. Information held by a "free" service is often supplemented with information provided by data brokers[38] and often it will be shared or sold back to the broker as well. Thus, if any information is ever collected about a user, it will likely be sold, aggregated and become perpetually available through a network of data brokers. It is then effectively impossible for a consumer to manage the information they choose to make available to any particular service. As well, consumers are unable to know if any information stored about them is inaccurate and, if so, have no opportunity to correct it.

Such mass collection, sharing and retention of data also creates new security risks. The annual Symantec Internet Security Threat Report found that in 2012, attackers increasingly targeted social media, mobile services and other "free" services[39]. These services now hold a significant amount of information about users and therefore are becoming prime targets for identity theft, which can then lead to other types of scams or attacks. As well, the trend of more attacks towards services that collect a significant amount of data on its users is growing. Symantec has

[35] See generally Lo, *supra* note 7 at 20-47 for a discussion of tracking technologies in various contexts.
[36] PIPEDA, *supra* note 30 at Schedule I 4.2, 4.3.
[37] Indefinite retention of data is not uncommon, see e.g. PIAC's complaint to the Privacy Commissioner regarding Nexopia's retention of non-user and user data indefinitely being well-founded: Office of the Privacy Commissioner of Canada, "PIPEDA Report of Findings #2012-001: Social networking site for youth, Nexopia, breached Canadian privacy law" (29 February 2012), online: <http://www.priv.gc.ca/cf-dc/2012/2012_001_0229_e.asp#section5>.
[38] Kurt Opshal & Rainey Reitman, "The Disconcerting Details: How Facebook Teams Up With Data Brokers to Show You Targeted Ads" (22 April 2013), online: <https://www.eff.org/deeplinks/2013/04/disconcerting-details-how-facebook-teams-data-brokers-show-you-targeted-ads>.
[39] Symantec, "2013 Internet Security Threat Report, Volume 18" (April 2013), online: <http://www.symantec.com/security_response/publications/threatreport.jsp> at 31-39.

a simple explanation for this growth: “The bank robber Willie Sutton famously explained why he robbed banks: 'Because that’s where the money is.' Online criminals target social media because that’s where the victims are.”[40] With users having little control over the amount and type of information being aggregated and stored by “free” services, identity theft and fraud are becoming increasingly serious concerns for consumers.

That being said, focus group participants canvassed for this investigation noted they have not encountered a conflict with an online service provider that caused them to seek out available dispute resolution methods. Moreover, while feedback received from provincial consumer affairs ministries reveals they would register consumer complaints regarding free online services, according to Service NL and Consumer Protection BC, no complaints have been received.[41] When asked of any legal dispute resolution recourse avenues that are available to consumers in the event of a dispute, Service NL provided the following response:

> “Again, how a complaint is ‘resolved’ depends on the nature of the matter, but we are quite aware of several legal dispute resolution avenues, especially Small Claims Court in this Province where claims can be heard without hiring a lawyer as long as the amount at risk does not exceed $25,000.”[42]

If a complaint received by a consumer protection ministry was believed to be outside of the scope of their mandate, the ministries providing feedback offered a number of recourse alternatives. For instance, Consumer Protection BC noted that it would refer complaints to the appropriate association or the Small Claims Court of British Columbia.[43] Service NL suggested that, depending on the nature of the concern, complaints regarding social media might initially be referred back to the company involved. If that failed, the CRTC, the CCTS, Measurements Canada, the Advertising Council of Canada, the BBB or the RCMP were suggested as appropriate venues.[44] As a result, it can be suggested that consumer protection ministries are aware of the potential for consumer concern regarding the use of online free services.

Although focus group participants have not encountered conflicts and consumer protection ministries have fielded no complaints, it would be irresponsible to conclude there is little to fear from consumers continuing use of online free services. A large scale analysis of the collection and use of consumers’ internet data is beyond the scope of this investigation. However, other Canadian commentators, such as Dr. Ronald Deibert, have provided startling insight into the tracking and use of internet data on a global scale.[45]

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[40] *Ibid*.
[41] Consumer Protection BC, *Response to PIAC Questionnaire*, and Service NL, *Response to PIAC Questionnaire*
[42] Service NL, *Response to PIAC Questionnaire*
[43] Consumer Protection BC, *Response to PIAC Questionnaire*
[44] Service NL, *Response to PIAC Questionnaire*
[45] Deibert, Ronald J., *Black Code: Surveillance, Privacy, and the Dark side of the Internet*. Toronto: McClelland and Stewart, 2013. P. 55-58.

Professor Deibert is the Director of the Canada Centre for Global Security Studies and the Citizen Lab at the University of Toronto. The Citizen Lab is self described as "an interdisciplinary research and development hothouse working at the intersection of the Internet, global security, and human rights."[46] The Citizen Lab aims to document and expose the exercise of power hidden from the average internet user by combining technical intelligence and field investigations with open-source information gathering.[47] During the course of "watching the watchers" since 2001, Dr. Diebert and his team has developed detailed opinions about the use and purpose of free online services. For example, he refers to social networks in the following manner:

> "Social networks may seem like secure, even cozy, playgrounds, but they are more like vacuum cleaners that hoover up every click and shared link, every status change, every tag and piece of personal history…Not a single bit or byte is ignored: the companies involved reap what we sow. Freedom in cyberspace is just another word for nothing left unused."[48]

As a result of the extensive research undertaken to produce a book entitled, *Black Code: Surveillance, Privacy, and the Dark side of the Internet*, Diebert concludes:

> "ISPs, web-hosting companies, cloud and mobile providers, massive telecommunications and financial companies, and a host of new digital market organisms digest and process unimaginably large volumes of information about each and every one of us, each and every day, and it is then sold back to us as 'value-added' products, service and advertisements for yet more products and services!"[49]

**Discrimination**

The majority of "free" services use advertising as their main source of revenue. Due to the information available to the services and the perceived benefits of focused marketing, these advertisements are mainly, if not wholly, targeted using the information of users available to the service. Targeted advertising in general makes rational economic sense; for example, an advertisement for a product that only females can use would be wasted if shown to a male. If information is available to distinguish users based on target demographics, both advertisers and consumers would likely agree it is to the benefit of both parties that such information is used.

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[46] Ronald Deibert, *Biography*, Director, Canada Centre for Global Security Studies and the Citizen Lab, Munk School of Global Affairs, University of Toronto. Last accessed February 14, 2014, at http://deibert.citizenlab.org/bio/

[47] Deibert, Ronald J., *Black Code: Surveillance, Privacy, and the Dark side of the Internet*. Toronto: McClelland and Stewart, 2013. P. 5.

[48] Deibert, Ronald J., *Black Code: Surveillance, Privacy, and the Dark side of the Internet*. Toronto: McClelland and Stewart, 2013. P. 56.

[49] Deibert, Ronald J., *Black Code: Surveillance, Privacy, and the Dark side of the Internet*. Toronto: McClelland and Stewart, 2013. P. 56.

However there is a larger social cost when other characteristics such as race or sexual orientation are used, or as an individual becomes personally profiled due to the wealth of information available about them – targeted advertising becomes a form of discrimination. By definition, profiling people using particular characteristics separates them into categories where some are deemed to be more valuable than others. Any one particular targeted advertising campaign may not inflict actual social harm, but allowing the practice without constraint is one step towards creating a systemic issue that could be much more difficult to dismantle when it does cause widespread social harm.

As Teresa Scassa, Canada Research Chair in Information Law, said to the Standing Committee on Access to Information, Privacy and Ethics in 2012:

> "We are told that profiling is good because it means we don't have to be inundated with marketing material for products or services that are of little interest. Yet there is also a flip side to profiling. It can be used to characterize individuals as unworthy of special discounts or promotional prices; unsuitable for credit or insurance; uninteresting as a market for particular kinds of products and services. Profiling can and will exclude some and privilege others."[50]

Consumers with particular characteristics may not mind if they miss out on a deal for laundry detergent. However, the situation is very different if a promotion for a mortgage, insurance, health service or educational opportunity is not offered to, for example, people of low socio-economic status or of a particular race merely because an algorithm determined they are not part of the target audience.

Renowned scholar Oscar Gandy suggests that this 'statistical discrimination' already contributes to the cumulative disadvantage that minority groups face in society. Discrimination through the analytics that produce targeted advertising is simply yet another way that minorities are disadvantaged in society, and the practice is only accepted because of how widely it is used[51]. The use of these statistical techniques results in a process that "...weighs down, isolates, excludes, and ultimately widens the gaps between those at the top, and nearly everyone else."[52]

The problem, as Gandy sees it, is the entire process from information gathering to the statistical result is rife with error[53]. Errors include: sampling errors in collecting the information, errors introduced in converting the data to and using a digital representation, incorrect or incomplete predictive models, or a bias in the end goal of the process. As well, since these analytical

[50] Teresa Scassa, "Statement to the Standing Committee on Access to Information, Privacy and Ethics" (5 June 2012), online: <http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=103:statement-to-the-standing-committee-on-access-to-information-privacy-and-ethics&Itemid=80>.
[51] See Oscar H. Gandy Jr, "Consumer Protection in Cyberspace" (2011), online: <http://www.triple-c.at/index.php/tripleC/article/download/267/241>.
[52] *Ibid* at 2.
[53] *Ibid* at 2-3.

processes can be fully automated, from the information gathering process to the end recommendation, there is potentially little accountability for the decisions that result.

Gandy makes the comparison to genetic discrimination: the use of genetic information in determining access to health insurance or employment[54]. The problem was seen as a social harm – an external cost – to the operation of these businesses, and so it required a regulatory answer. The push in the United States to outlaw such discrimination culminated in the passing of the Genetic Information Nondiscrimination Act of 2008, which prohibits these industries from using genetic information in their decision process[55].

Note that genetic discrimination makes 'rational economic sense': an insurance company benefits from using all relevant information to determine the rates of a health insurance plan. However, the cumulative social harm outweighs the economic benefits to these businesses. The problems created by statistical discrimination through data mining are very similar, and therefore the solution should follow a similar path of regulation.

**Children and "Free" Services**

"Free" services raise unique issues for children, due to the information gathering and sharing a "free" service is required to do in order to maintain a source of revenue. A previous report by PIAC focused on the privacy concerns faced by children when using websites designed for children[56], and so this report will only highlight some of the issues specific to the "free" services context.

At the outset, note that the only reason children can access "free" services online is because the service is offered without cost. In the offline world, the cost of a product or service serves as a 'natural' barrier to its use by children, as children (rarely) have the economic independence to purchase any product or service at will. In the average case, a parent must pre-approve the use of a product or service by their child, and so there is a natural supervision element present. In the online world, this supervision element is still present with for-pay services – the vast majority of online retailers require payment by credit card or Interac, both of which cannot be legally used by children.

This is not the case with "free" services online. While many parents may choose to monitor their child's usage of the Internet, there is no inherent barrier preventing children from signing up to "free" services and participating as if they were adults. Websites may require the user to submit their birth date to determine if they can access the service, however there is currently no

[54] *Ibid* at 10.
[55] Brandon Kiem, "Genetic Discrimination by Insurers, Employers Becomes a Crime" (21 May 2008), online: <http://www.wired.com/wiredscience/2008/05/the-genetic-inf>. Note that to date, Canada has not passed a law outlawing genetic discrimination, although it has been attempted.
[56] John Lawford, "All In The Data Family: Children's Privacy Online" (September 2008), online: <http://www.piac.ca/files/children_final_small_fixed.pdf>.

reasonable way, or incentive, for a service provider to verify it is accurate[57]. On the contrary, "free" services have a great incentive to attract children to use their platform: a 2002 study found Canadian children aged 9-14 spend $1.9 billion of 'their own' money and influence $20 billion in family purchases per year[58], a number that has likely since grown. Society has determined there are valid reasons why children cannot participate in the regular economy (e.g. minors cannot form a contract), but the structure of "free" services allows them to reap the benefits of children's access to their service without much regard for the risks.

The larger issue with children and "free" services is the interference with children's identity development. While it has been widely thought that children do not care about privacy, studies have shown opposite, especially with respect to parents and teachers[59]. Children simply have a different concept of privacy than adults; they do not think of privacy in an abstract sense. Rather privacy in a child's mind is a social concept that only becomes 'real' when their privacy is invaded, or if it is an active concern in an actual social experience[60]. As such, children are much less aware of threats to their privacy from external sources as compared to, for example, friends and family[61].

The result is, children consider online spaces to be 'safe spaces' similar to school or a friend's house, where they can experiment with ideas and different identities, and where they are generally much more open to sharing personal information[62]. It becomes a natural fit for "free" services which depend on collecting as much information on an individual as possible. Children do not read privacy policies, or otherwise do not understand them, and so they are generally unaware that the information they are providing can be shared with other parties and used in targeted advertising directed at them[63]. Given that children are very concerned about their privacy in concrete situations, it stands to reason they would be concerned with such hypothetical or implied uses if their concept of privacy was more developed.

Otherwise, the motivations of a "free" service to collect and use personal information drive decisions that affect children's identity development process. For example, decisions such as Facebook changing users' privacy settings to the least restrictive possible and leaving it as a

[57] Nicole Perlroth, "Verifying Ages Online Is a Daunting Task, Even for Experts" (17 June 2012), online: <http://www.nytimes.com/2012/06/18/technology/verifying-ages-online-is-a-daunting-task-even-for-experts.html?pagewanted=all&_r=0>.
[58] Valerie Steeves, "It's Not Child's Play: The Online Invasion of Children's Privacy" (2006) 3:1 UOLTJ 169 at 174.
[59] Bruce Schneier, "Young People, Privacy, and the Internet" (20 April 2010), online: <http://www.schneier.com/blog/archives/2010/04/young_people_pr.html>.
[60] Steeves, *supra* note 58 at 185.
[61] Steeves, *supra* note 58 at 183.
[62] Lawford, *supra* note 56 at 14. See also Lawford, *supra* note 56 at 38, a comment by a respondent in a focus group in the 14-17 year old group: "On Facebook it's pretty safe because people can't go on your profile unless you accept them as a friend so it's safe."
[63] *Ibid* at 19-20.

default, or Instagram's default inclusion of location data in user-submitted pictures[64] shapes how children use the service, and as a result shape children's habits and identities. This information is not only available to advertisers, who influence children's tastes and opinions through targeted advertising, but also to the public, which potentially subjects children to harassment or child predators. As well, since information about children's habits are collected and mined over the course of many years, the profiles can become extremely detailed, and lead to unwanted results as children become adults. For example, based on data about a child and the people in their network, they could be targeted with advertising for alcohol or gambling as soon as they become of age. Children's lives can be affected in ways they could have never foreseen as a result of their mistakes and experiments with identity online, and over-sharing of personal information.

**Users Have Limited Options for Dissent From a "Free" Service's Practices**

Another issue with "free" services is that users have markedly less influence over a service's behaviour if the users disagree with a decision made by the service provider. In the traditional for-pay business model, if a user is dissatisfied with the product or services of a business, they can simply stop paying the business and search for an alternative. These businesses therefore have strong incentives to keep their customers satisfied: to maintain a stable cash flow.

The incentive to put customers concerns first is not nearly as strong for a "free" service. A "free" service monetizes the *value* provided by the users rather than obtaining payment directly from users. The monetization of a "free" service depends much more on the ongoing data collection of the platform's users than any individual customer's satisfaction. A for-pay service must continually value its users, since at any billing cycle they can choose to switch to an alternative service; the business must maintain their standard of service to maintain their source of revenue.

In contrast, a "free" service can only extract a finite amount of useful information from a single user, and so after a period of time an individual user becomes less valuable to the service. While a user who is satisfied with a "free" service may be more willing to share information, online tracking techniques allow valuable information to be collected regardless of a user's willingness to share it. Both types of services build value on top of the information it has gathered from its users, however an existing user represents more potential value to a for-pay service than to a "free" service.

For example, when 100 users quit a for-pay service, this results in 100*X dollars lost to that business. But when 100 users quit a "free" service could be no impact at all – their data is still available to be monetized, or has already been analyzed via data mining techniques. Even if every user of a "free" service were to suddenly cease using it, the service provider would still be able to monetize the data it collected from its users over time (e.g. provide access to it, sell it). A

[64] Jam Kotenko, "Parents and privacy advocates say Instagram is unsafe for underage users" (16 May 2013), online: <http://www.digitaltrends.com/social-media/keep-our-underage-children-safe-instagram-concerned-parents>.

for-pay service would likely not have this option, as their business model would be structured around direct payment from users.

Advertising revenues may suffer as users leave a "free" service, however this relationship is still not as direct as the loss from a user who leaves a for-pay service. "Free" services are dominated by *targeted* advertisements – advertisements specialized to a group of individuals with particular characteristics. It does not necessarily follow that if a group of people decide to leave a "free" service based on unfavourable practices, that they are part of specialized groups considered highly valuable to advertisers. Alternatively, these users may not represent a significant proportion of a specialized group such that it no longer worthwhile for an advertiser to run targeted advertisements to that group. Overall, it is not clear that a random group of individuals leaving a service would have a significant impact on the service's advertisement revenue.

Furthermore, even if advertising revenues were based only on the overall number of users, the nature of many free services discourages users from spontaneously leaving the service. This is referred to in the business context as "vendor lock-in" – the particular way a service stores your submitted data means it can't easily be transferred to another service, and the particular features that service offers over its competitors makes it very difficult to simply switch. Focus group participants agreed, considering themselves in a passive role with "free" services, with one participant explaining: "[as a] user, you're reliant on them ... we let ourselves become so reliant on it [the service], it's a real hassle to change, some things more than others. It's a real hassle to change your email address, for example ..."[65] These concerns are compounded by the fact that arguably many popular "free" services do not have a competitor with the same level of functionality that would serve as a suitable alternative. In any event, an alternative service likely has the same unfavourable practices that would make a user consider switching to an alternative, as they are all in the same industry working within the same constraints for revenue.

"Free" services also often incorporate a social aspect to their platform, in order to encourage people to bring their friends to the service[66]. The other side of this practice is that it adds an extra element of 'lock-in', where users are discouraged from using alternative services because their social circle is not using it. It is very unlikely that a user's entire social circle would simultaneously switch to an alternative a service merely because a few people in their network are dissatisfied with the service's practices. Only an exceptional issue that unified users against the service could cause such a chain reaction. In the average case, some dissenters and parts of their social network leaving a service are unlikely to have a significant impact on the service provider's decisions.

[65] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 26.

[66] Even business directory and review site Yelp, for example, has message boards, the ability to add friends and communicate with them, and 'follow' reviewers, see generally: <http://www.yelp.ca>. See also Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 56.

It would likely take a critical mass of users which can impact advertising revenues to leave a service, before a service will reconsider their decisions. For a service with an enormous number of users, such as Facebook's 1.11 billion monthly active users[67], the critical mass required to shift policy decisions would be remarkably high[68]. Users dissatisfied with a service's practices can attempt to bring attention to the issue through the media (e.g. news media, blogosphere), or even within the social tools of the platform itself, in the hopes to reach a critical mass of angry users. However, negative publicity is generally ineffective at resolving issues based on their merits, and it is not a reliable method for users, as individuals, to settle a dispute.

The last resort for redress from a dispute is the legal system. While the legal issues surrounding "free" services will be discussed in greater detail later in this report, a few issues are worth mentioning briefly. Terms of service contracts that users agree to when signing up to a service often have clauses which make legal claims against the service much more difficult for an individual, or even impossible[69]. Participants in our focus groups indicated that they viewed the Terms of service, to which users are required to agree, as a contract with the free service provider.[70] This opinion existed for participants regardless of whether they read the terms of service or not.[71]

On the other side, consumers claiming the service breached their own idea of service have been met with significant challenges – courts do not consider personal information to have a 'cash value' and therefore there is rarely a 'harm' that courts are willing to remedy. Even if a user decides to take a "free" service to court, the business likely has many times more resources at its disposal than an individual, so the dispute becomes a David versus Goliath conflict at best.

In the end, often the best option available to a user is to simply stop using the service and hope that any request to delete their personal information from the service's database is honoured.

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[67] Facebook, "Facebook Reports First Quarter 2013 Results" (1 May 2013), online: <http://investor.fb.com/releasedetail.cfm?ReleaseID=761090>.

[68] Facebook has faced public backlash for many of its decisions and later retracted them, only to reinstate the same decision later. See e.g. the Facebook Sponsored Stories litigation, *supra* note 22, where users complained about the mere existence of the advertising program, and Facebook's settlement agreement had them amend their terms of service to explicitly state they could run the sponsored advertising, online: <http://www.dmlp.org/sites/citmedialaw.org/files/2012-10-05-Amended%20Proposed%20Settlement%20Agreement.pdf>.

[69] For example, a prohibition on class action lawsuits, or a forum selection clause. See the section "Legal Issues" below for more details.

[70] Free Services Focus Group Transcript, Participants 40 Years of Age or Less, Vancouver, January 14, 2013, p. 49-50, Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 52-53, Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 58-63, and Free Services Focus Group Transcript, Participants 40 Years of Age or More, February 12, 2013, p. 70-71.

[71] Free Services Focus Group Transcript, Participants 40 Years of Age or More, Vancouver, January 14, 2013, p. 39-40, and Free Services Focus Group Transcript, Participants 40 Years of Age or Less, February 12, 2013, p. 31-32, 40-41.

While this list of issues is not exhaustive of all the new concerns that "free" services pose, they are some of the more striking differences that can result from a service operating through the Internet. Some of these concerns may not arise if the service adopts ethical and consumer-focused practices, however, the problem is that the "free" service business model and the capabilities of online platforms incentivize this negative behaviour. Global Internet advertising spending hit $99 billion in 2012, and is expected to grow to over $113 billion in 2013[72]; with a market of this size, it is no wonder services are scrambling to collect as much data as they can on their users. The problems with "free" services will only increase as they become more widely used, and the market for Internet advertising grows.

[72] WPP, "Global internet ad spend hit $99bn in 2012, almost 20% of total investment" (27 March 2013), online: <http://www.wpp.com/wpp/press/2013/mar/27/global-internet-ad-spend-hit-99bn-in-2012>.

## Problems with "Free" Services Manifest: *St-Arnaud v Facebook Inc*

A catalyst for this report was a recent case from Quebec, *St-Arnaud v Facebook Inc*, where a judge held that consumer protection provisions in the Quebec Civil Code did not apply to the Facebook terms of service contract because users do not pay for the service[73]. The result is shocking – consumers have come to expect a certain level of protection from unfair businesses practices, and if need be, consumers expect to be able to take businesses to court to hold them accountable. If this reasoning is adopted more widely it could create a dangerous state of affairs for Canadian consumers: online services can essentially avoid accountability by structuring their business based on access without payment. A survey of litigation in the United States shows such a result is plausible.

### St-Arnaud v Facebook Inc

In 2010, Patrice St-Arnaud filed a class action suit in Quebec against Facebook for its decision to change all of their users' privacy settings to 'open to everyone'[74], regardless of the settings users had previously selected. Facebook also amended their privacy policy to allow this change. The complaint alleged that these changes were done without the informed consent of users. As well, since Facebook profits from the use of users' information, the complaint alleged Facebook intentionally or negligently designed their privacy policy to allow for broader information sharing than users agreed to upon signing up, which exposed people to "identity theft, fraud, date [sic] mining, harassment, embarrassment, intrusion …", in order to increase revenues[75].

The case never reached a finding based on the merits of St-Arnaud's claim. Facebook challenged the jurisdiction of the Quebec court, saying that the Terms of Service specified any dispute must be filed in a state or federal court in California, a standard 'forum selection' clause.

These types of clauses in a consumer contract are normally invalid under the consumer protections in the Quebec Civil Code. Article 3149 states:

> A Québec authority also has jurisdiction to hear an action involving 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[76]. [emphasis added]

A "consumer contract" is defined in the Quebec Civil Code in Article 1384:

> A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby

[73] *St-Arnaud v Facebook Inc*, [2011] QJ No 3161, 2011 QCCS 1506 [*St-Arnaud*].
[74] Including the broader Internet, i.e. Facebook profile data could be indexed and searchable by a search engine such as Google, and viewable by any person whether or not they had a Facebook profile.
[75] *St-Arnaud*, *supra* note 73 at para 6.
[76] Art 3149 CCQ.

> one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.[77] [emphasis added]

However, the judge decided that this consumer protection rule does not apply because:

> "Access to the Facebook website is completely free. Therefore, there exists no consumer contract when joining and accessing the website, because it's always free. A consumer contract is premised on payment and consideration."[78]

Since the Terms of Service is not a "consumer contract", but is still a valid contract otherwise, St-Arnaud was bound by the clause that stated he must file disputes in California and therefore the class action was dismissed. The decision was going to be appealed but Facebook settled before the appeal began, without admitting any wrongdoing or admitting that the Quebec court did have the jurisdiction to hear the dispute[79].

Implicit in the court's reasoning in *St-Arnaud* is that personal information is not sufficiently valuable to be considered 'payment'. This assertion seems absurd, given that Facebook's revenue is generated almost entirely from targeted advertising and the use of users' information. Yet, personal information does not have an equivalent cash value and so providing it to Facebook is not equivalent to paying Facebook under the law.

The court also implied that personal information is sufficiently valuable to be 'consideration', a legal requirement for valid formation of a contract[80]. The result is that the Terms of Service is a valid contract, giving Facebook the benefits of the clauses it authored, but not a valid 'consumer contract', which would have allowed St-Arnaud the benefits of consumer protection law.

It is surprising that in Quebec, a province with strong consumer protections, a judge could apply this type of reasoning to a dispute with a "free" service. Unfortunately, residents of Quebec may not be the only consumers vulnerable to the practices of "free" services.

**Litigation in the United States**

While the United States usually takes a different approach to legislation than Canada, Canadian courts often look to their American colleagues for assistance with new and emerging issues. As it happens, the Quebec judge from *St-Arnaud* was not alone in considering personal information

[77] Art 1384 CCQ.
[78] *St-Arnaud*, *supra* note 73 at paras 52-54.
[79] *St-Arnaud v Facebook Inc* Settlement Agreement, online: <https://www.merchantlaw.com/classactions/assets/pdf/Facebook_Settlement_Agreement_Exetuted.pdf> at para 2.3.
[80] Consideration and contract law will be discussed further in the Legal Issues section.

is not sufficiently valuable to have a monetary equivalent. A class action suit against Facebook in the United States was quickly dismissed based on similar reasoning.

In *In re Facebook Privacy Litigation*, the complainants alleged Facebook intentionally or negligently allowed users' personal information to be transmitted to third party advertisers as a result of improperly designed software[81]. The complainants asserted eight different claims, but most relevant is the claim under California's Consumer Legal Remedies Act (CLRA), which provides consumers with protections from unfair business practices.

Since 'consumer' in the CLRA is defined as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes", the court dismissed the claim[82]:

> "Here, Plaintiffs allege that Defendant "allows anyone ... to register for its services free of charge." As discussed previously, Plaintiffs' contention that their personal information constitutes a form of "payment" to Defendant is unsupported by law."

This 'previous discussion' describes the court's position very clearly:

> The court's opinion in [*Doe 1 v AOL LLC*, 719 F Supp 2d 1102 (ND Cal 2010)] does not stand for the broad proposition that personal information of any kind "equates to money or property." Rather, it indicates that a plaintiff who is a consumer of certain services (i.e., who "paid fees" for those services) may state a claim under certain California consumer protection statutes when a company, in violation of its own policies, discloses personal information about its consumers to the public.[83]

For similar reasons, the complainant's claim for breach of contract was dismissed[84]. As the court explains, California's law requires "appreciable and actual" damage to the complainant for a valid claim in breach of contract. The complainants allege that their personal information was transferred to third-party advertisers without their consent and as a result they 'suffered harm'. The mere transfer of personal information was not sufficient for a finding of damage and that the complainants "suffered harm" was not specific enough to be "appreciable and actual" damage[85].

In fact, the reasoning that personal information is not valuable such that it cannot be 'damage' is a well-defined trend in United States privacy litigation. Moreover, not even the time or money

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[81] *In re Facebook Privacy Litigation*, 791 F Supp (2d) 705 (2001).
[82] *Ibid* at 716-717.
[83] *Ibid* at 715.
[84] *Ibid* at 717.
[85] The court dismissed the breach of contract claim with the ability for the complainants to amend their complaint and try again. In *In re Facebook Privacy Litigation*, 2011 US Dist LEXIS 147345 (ND Cal 2011) the court dismissed the claim again, saying "Here, Plaintiffs allege that they suffered "actual and appreciable damages [in] the form of the value of their [personally identifiable information] that [Defendant] wrongfully shared with advertisers." However, *the Court has already rejected Plaintiffs' theory that their personally identifiable information has value.*" [emphasis added]

spent to mitigate the effects of a privacy breach (such as purchasing identity theft insurance) is sufficient 'harm' to support claims in negligence or breach of contract[86].

For example, a case where the plaintiff's personal information was obtained through the theft of computers containing unencrypted customer information was dismissed because the plaintiff could not prove "a loss of earning capacity or wages"[87]. Since there was no evidence that the plaintiff's information was actually accessed or misused, the claims failed. As well, the time, effort and money expended by the plaintiff to monitor their credit were also not considered sufficient harm to warrant recovery. Canada seems to be moving in a similar direction.

*St-Arnaud* and similar cases raise many troubling questions: Are "free" services with similar Terms of Service to Facebook effectively immune from lawsuits within Canada? Could this type of reasoning be applied to other legal frameworks? What other legal issues are raised by the "free" service business model?

[86] Andrew Serwin, "Hannaford Litigation Ruling Finds Plaintiffs Cannot Prove Damages" (21 September 2010), online: <http://web.archive.org/web/20121117002125/http://www.privacysecuritysource.com/2010/09/21/hannaford-litigation-ruling-finds-plaintiffs-cannot-prove-damages>. See also, Andrew Serwin, "Poised on the Precipice: A Critical Examination of Privacy Litigation" (2009) 25:4 Santa Clara Computer & High Tech LJ 883 at 927-931.

[87] Serwin, *supra* note 86 at 929-930.

## Consumer Focused Legal Issues

"Free" services use a number of legal tools to their advantage and sit at the intersection of a number of underdeveloped legal issues, which is arguably the reason they have been able to operate in the manner they do given the problems they pose to consumers. Consequently, solutions to these issues will likely require incremental changes to many legal frameworks, rather than a single quick fix to any particular law.

Much of the force of a "free" service comes from the Terms of Service and related documents, which are imposed on users and have proven very effective at preventing liability for the service provider. The law surrounding jurisdiction and the Internet have been in a constant state of flux since the 1990's and shows no sign of stabilizing. Consumer protection laws have traditionally kept consumers safe from unfair business practices; however the framework under which they operate was designed in a different era of technology and online business. Similarly, Canada's privacy laws were at one point the most forward-looking in the world, but they have not kept pace with developments in industry. Competition law has been used in other countries to attack these issues, but is unlikely to be effective in Canada.[88] Each area of law contributes to the issue, and each will be explored in turn.

### Contract Law and Terms of Service

While a complete description of contract law is outside the scope of this paper, a few essential concepts will be described briefly to provide context for the legal strategies often seen with online services.

Contract Essentials

For a contract to be enforceable in a court of law, several elements are required. The specific rights and obligations (the *terms*) of the agreement must be communicated from one party to the other. This act is called an *offer*. The person making the offer is called the *offeror*. The party to whom the offer is made is called the *offeree*.

The offeree can then: accept the offer, decline the offer, or modify the terms and make a new offer to the original offeror. This process of modifying and making new offers can repeat back and forth as needed until an offer is accepted. A common version of this process is 'haggling' at a yard sale.

When the offeree agrees to the specific terms of an offer, it is said there is *acceptance* of the offer, and that the offeree has *assented* to the terms. This signifies that both parties to the agreement understand their rights and obligations under the contract, and promise that they will fulfill them.

[88] For example in Europe, competition law examines market dominance from the perspective of "power over price" frequently, so that free services available online can be more readily attacked. For example see: European Commission, 7 October 2011, Case COMP/M.6281, Microsoft/Skype

The substance of a contract can be nearly anything, from an exchange of money for a product, or for both parties to perform some action. However for the contract to be valid, both parties must exchange something of value. This value is called *consideration*. Exactly what can serve as valid consideration has expanded over the course of many years, and includes: money, an object, property, a promise to perform some action, or a promise to not perform an action. In essence, because a contract is a *mutual* agreement, both parties must contribute to the exchange.

Many of the issues raised by "free" services in contract law relate to consideration and assent.

Terms of Service

Virtually all online services require a user to agree to a 'terms of service'[89] before they can use the platform's features. These documents outline the rights and obligations of the user while using the service and often describe particular practices of the service provider (for example, how a service deals with Copyright issues). Consumers may not realize that they are in fact forming a legally binding contract by clicking "I Agree" upon signing up[90]. As discussed below, the contract is validly formed whether or not the user reads the terms before agreeing to them.

The issue for consumers is that unlike the process described above where a user can modify terms presented to them and respond with an offer of their own, users must accept the terms of service as-is or they cannot use the service. This is called an *adhesion contract*[91]. Adhesion contract is a label applied to a contract when one party has essentially all of the bargaining power and uses it to write terms that are favourable to them, often at the expense of the other party. These contracts are then offered to the other party on a 'take it or leave it' basis. For example, wireless phone contracts are considered adhesion contracts, as the consumer must accept the price and features of the plan as offered, with no opportunity to bargain for alternative terms.

Given the popularity of many online services and how they are increasingly substituting for traditional services, it is quickly reaching the point where consumers must use some "free" services in order to fully participate in society. In these cases, consumers are often left in disadvantaged positions as a result of adhesion contracts (i.e. the terms of service) with few alternative options.

While adhesion contracts are not *inherently* problematic and are arguably necessary (it is unrealistic for Facebook to individually contract with 1.1 billion users), in practice, "free" services use their position of power to draft terms of service to the detriment of consumers. Moreover, research has demonstrated that the design and presentation of adhesion contracts "significantly

[89] Also sometimes called 'terms of use', 'end user license agreement', 'terms and conditions' or 'rights and responsibilities'.
[90] Unless the user does not have the legal capacity to contract, such as a minor or someone without legal capacity due to a mental illness.
[91] Also called 'standard form' contract, 'boilerplate' contract, or phrased as 'contract of adhesion'.

frustrate[s] an individual's ability to properly read and understand" them[92]. Consumer protection laws usually have rules addressing adhesion contracts in recognition of the fact that such contracts are often unfair for the consumer but, as discussed below, these rules rarely apply to "free" services.

Clickwrap & Browsewrap Agreements

An issue that is often raised in litigation involving online services is that the consumer never actually read the terms of service, and so they should not be bound by it. Framed in legal terms, this argument states that while there was technically *acceptance* of the contract, there was no *assent* to its contents. Therefore, an essential component of the contract is missing and as a result the court should not enforce the agreement.

The courts have rarely accepted this argument. It takes a very unusual set of circumstances for a court to not enforce a contract because one party did not read the terms[93]. In most cases, both parties review a paper copy of the contract before signing it, and so it would be disingenuous to argue there was no opportunity to read the terms. Otherwise, judges' aversion to this type of argument flows from the legal duty that both parties have to read and understand the terms of the contract to which they are agreeing; to ignore this duty is at one's own peril.

Online, the situation is different. Since the early days of lengthy license agreements accompanying the installation of every software program, a culture has developed where users 'click through' legal agreements without reading them. As well, online services have recognized that forcing users to read lengthy legal documents may prevent some users from signing up to their service, and so their platforms are often designed to make terms of service accessible but not necessary to read.

Courts in the United States faced with lawsuits against such services have categorized these agreements into "clickwrap" and "browsewrap" licenses[94]: "clickwrap", where the terms of service is merely one click away from the sign-up process, and "browsewrap", where the user has supposedly accepted the agreement simply by using the service, whether or not they have actually read the terms.

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[92] Woodrow Hartzog, "The New Price To Play: Are Passive Online Media Users Bound by Terms of Use?" (4 October 2010) 15:4 Comm L & Pol'y 405 at 408.

[93] For example see*: Rudder v Microsoft Corp*., [1999] O.J. No. 3778 (Sup. Ct. J.), at para 11-12. Here Justice Winkler states that technological impediments to viewing an entire contract (in this case scrolling) should not act as a reason not to enforce its terms.

[94] The terms "clickwrap" and "browsewrap" licenses come from "shrinkwrap" licenses, which were licenses printed inside boxed computer software that a user could only read after they had already purchased the software (i.e. broken the shrink-wrap packaging). Shrinkwrap licenses were challenged in US courts and upheld as valid and enforceable because "notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable" was seen as a valid method of doing business. Note the similarities and differences with "free" services and their terms of service (e.g. unable to be 'refunded'). See: Bradley J Freedman, "Electronic Contracts under Canadian Law – A Practical Guide" (2000) 28 Man LJ 1 at paras 57-61.

It is settled law in the United States and Canada that "clickwrap" agreements are valid and enforceable, even where a user 'clicked through' a displayed agreement or clicked 'I Agree' before reading a hyperlinked agreement[95]. Consumers arguably understand that they will still be bound by a contract despite not reading the terms, and thus it should be no surprise that this rule extends into the online contract realm.

However, "free" services can easily use the 'culture of click through' to their advantage. If it would take an average of 201 hours per year to read all the privacy policies a user is subject to[96], it would arguably take an equivalent or greater amount of time to read terms of service. Thus, the reality is consumers simply do not spend the time to read or understand these documents. Online services are aware of this trend, as well as the fact that courts will enforce clickwrap agreements against consumers. The result being that consumers are often placed in an unfair position as a result of clickwrap agreements.

The law on browsewrap agreements is less settled. Courts in the United States treat online agreements much in the same manner as paper agreements, with the only real difference being novel fact situations[97]. However, in an attempt to stretch new fact situations to fit old law, the enforceability of browsewrap agreements has often turned on whether the user was notified the agreement existed, rather than if they read and understood its contents[98]. Note that this interpretation is weakening a fundamental element of a contract: from *assent* (understanding the rights and obligations under an agreement) to *notice* (knowing an agreement exists).

American courts are more willing to enforce browsewrap agreements in litigation between businesses, however consumers are not immune[99]. Scholars have noted that in virtually all the cases where courts have refused to enforce a browsewrap agreement, it was refused in order to protect consumers[100]. Canada does not yet have much litigation involving browsewrap agreements, but so far Canadian courts seem to be following the same trend as American courts. A recent decision from a British Columbia court upheld a browsewrap agreement in litigation between two businesses, and the judge reasoned that a previous case between a consumer and a business could be analyzed as upholding a browsewrap agreement[101].

The issue for consumers is that as the trend of 'notice instead of assent' develops, bargaining power continues to shift from consumers to online services, placing consumers in an increasingly disadvantaged position. Consumers have been led down a dangerous path, presumably in the name of 'ease of use', where merely browsing a website forces upon them

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[95] See e.g. *Brodsky v Match.com LLC*, 2009 WL 3490277 (SD NY 2009), holding a checked check box reading "I agree to the Match.com terms of use" hyperlinked to the terms of the agreement is sufficient assent, and *Rudder v Microsoft Corp*., 1999 CanLII 14923 (ON SC).
[96] McDonald & Cranor, *supra* note 32.
[97] Hartzog, *supra* note 92 at 417.
[98] *Ibid* at 415.
[99] See e.g. *Dewayne Hubbert v Dell Corp*., 359 Ill App (3d) 976 (Ill App 2005).
[100] Hartzog, *supra* note 92 at 418.
[101] *Century 21 Canada Limited Partnership v Rogers Communications Inc*., 2011 BCSC 1196 at paras 92-108.

unfair obligations and restrictions that cannot be challenged. The more commonplace browsewrap agreements become and the more courts uphold them, the closer "free" services come to being able to force unilateral responsibilities on its users with little possibility of being held accountable for abuses.

Anti-Consumer Clauses

While every "free" service is different and therefore every terms of service agreement will have different goals, there are many common types of clauses found in online agreements. These types of clauses are inherently unfair to consumers, by placing the business in a significantly better position during a dispute.

The most commonly found clause is the *forum selection* clause. Jurisdiction will be discussed in greater detail below, but in essence these clauses state that in the case of any dispute with the business, the user must file the dispute in the location specified in the contract. For example, since many "free" services are based in California's Silicon Valley, these services specify that any lawsuit against them must be brought in a California court, and cannot be brought in a court where the plaintiff lives. Not only does this mean a Canadian consumer would have to find a lawyer in another country, and travel to and potentially stay in the country long-term while the dispute is ongoing, the consumer loses the benefits of the law of their home jurisdiction by submitting to the laws of another jurisdiction. A clause with a similar effect is a *choice of law* clause which specifies that the law from a particular country/province/state applies to any dispute with the business. It may come as no surprise that the jurisdiction chosen by the business likely has laws that favour businesses over consumers.

Another common anti-consumer clause found in terms of service agreements is *mandatory arbitration*[102]. These clauses make the consumer forfeit the right to file a lawsuit with a court, and instead any dispute must be resolved by a third party expert. Businesses often state this is to save costs, as even a trivial claim can result in significant costs due to court procedures. However, consumers can be placed at a significant disadvantage: arbitrations often require a large upfront payment which can easily be larger than the amount in dispute; the decisions are binding, non-public and generally can only be appealed in narrow circumstances, and the third party expert is often chosen by the business, raising issues of impartiality.

Another type of clause that raises significant fairness issues is a *bar on class action lawsuits*. A class action lawsuit is a method for a large group of individuals to sue a defendant in a way that is more efficient and effective than if each member of the group was to sue individually. The class action is often seen as a tool for consumers to hold large corporations accountable: the harm to any one individual may not be significant enough to warrant a lawsuit, but as a group, the combined damage is likely significant enough for a court to require the corporation to

[102] For an exploration of mandatory arbitration clauses, see previous PIAC and Option consommateurs report: "Mandatory Arbitration and Consumer Contracts" (November 2004), online: <http://www.piac.ca/files/manditory_arbitration.pdf>. See*ibid* at 24-37 for reasons why mandatory arbitration is bad for consumers.

compensate consumers and change their practices[103]. Note also that mandatory arbitration clauses may deny consumers from launching or being part of class action proceedings. A prohibition on class action lawsuits significantly reduces the power of consumers to influence the behaviour of large businesses, and seek remedy for a large-scale wrong.

Finally, an unfair clause that has been the subject of litigation in Canada in the clickwrap/browsewrap context[104] is a *unilateral amendment* clause. These clauses allow the business to change any term of the contract at any time, without needing approval from the user. Often these clauses will state that the business will provide some notice to the user of any changes, for example, by posting a notice on the business' corporate website. The notice requirement is likely included because unilaterally modifying a contract without communicating the change may be considered unreasonably unfair such that a court would refuse to enforce the changes. In reality, consumers rarely read terms of service the first time, let alone go looking on services' websites for updates on a regular basis. Therefore in practice, consumers are given an unreasonable responsibility which businesses know will not be fulfilled by the vast majority of consumers. Otherwise, this type of clause provides the business with complete control over users' rights.

The main concerns with terms of service stem from the fact that consumers do not read every lengthy document for every service they use. While it could be argued consumers do so at their own risk, the reality is "free" services and other online businesses alike have used the 'culture of click through' and the nature of adhesion contracts to their advantage by including anti-consumer clauses. Even if consumers were to read these documents, they would arguably not understand, for example, the combined effect of a forum selection clause and mandatory arbitration clause on their rights.

It cannot be understated that consumers need to be aware of what they agree to when signing up to a "free" service. However, as courts in the Canada and United States have already enforced browsewrap agreements against consumers and courts are trending to accept adequate notice over assent, it may not always be clear when these restrictions arise until it is too late. It is more likely than ever before that consumers can find themselves unfairly disadvantaged in a dispute with "free" services. Despite many consumer lawsuits and many negative media reports, market forces have not caused a shift in the policies of "free" services – regulation targeting these practices is likely required to protect consumers.

[103] See e.g. the comments of Hall JA in *Knight v Imperial Tobacco Canada Ltd.*, 2006 BCCA 235 at para 20: "…class proceedings legislation ought to be construed generously. Class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice and serve to modify wrongful behaviour."

[104] See *Kanitz v Rogers Cable Inc.*, [2002] 58 OR (3d) 299, 2002 CanLII 49415 (ONSC), which upheld the enforceability of unilateral changes to Rogers' terms of service after they posted a notice of the change on their website.

**Jurisdiction**

While a full treatment of jurisdiction is outside the scope of this paper, online services have created novel issues involving courts, contracts and jurisdiction that merit a brief discussion.

In essence, the legal concept refers to whether or not a court has the authority to hear and decide a dispute.[105] If a lawsuit is brought to a court and it does not have such authority, for example if someone brought a claim of medical malpractice to the Tax Court of Canada, the court would dismiss the proceeding for 'lack of jurisdiction'. Jurisdiction refers the range of topics under authority of a court as well the geographic regions where the court has that authority. It is this second concept that becomes an issue with the Internet.

In the offline context, businesses have a physical presence within the borders of a defined geographic region. If a dispute arises with that business, the complainant is likely in the same geographic region as the business, and any legal action would be brought before a court in that area.

With the Internet, a company can be legally headquartered in one country, have servers in another country and have their service accessed by a person in a third country. Depending on the nature of the dispute, it may not be obvious where legal action should be initiated. Since there is no 'cyber court', the dispute must be filed in a court in one of these regions.

In this situation, a consumer would want to file their dispute with a court in their home region, in order to have access to local legal representation and the benefits of the laws they have come to expect. If so, the business headquartered in another country would likely challenge the jurisdiction of that court, and suggest the case should have been filed where the business resides. The court would then look at the facts of the dispute, and make a reasoned decision based on the whole context of the case and the law of jurisdiction[106]. This decision could be appealed to higher courts who would review the context and the reasoning of the court below. Based on the facts of the dispute and some discretion of the court, consumers would have a fair chance of having their dispute heard in their home country.

On the other hand, businesses prefer predictability in their costs rather than the context-sensitive approach of a court. Due to the operation of the Internet an online business could potentially be brought to court in any country in the world where their service can be accessed, which would create significant uncertainty in legal costs. Therefore, businesses often sidestep this issue by including a forum selection clause in their contracts, which specify a particular location that legal action must be brought. With such a contract, courts need only decide if the

[105] For example see: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.
[106] In Canada, the proper assertion of jurisdiction is based on the 'real and substantial connection' test adopted in *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077. The framework for analyzing whether a real and substantial connection exists was recently modified in *Club Resorts Ltd. v Van Breda*, 2012 SCC 17.

contract was validly formed to determine if they can assert jurisdiction, rather than consider the context of the claim and issues of fairness.

While there are legitimate interests on both sides of this issue, the problem is that this is yet another area where consumers lose out to business interests. A consumer lawsuit against a large corporation is already fought on uneven grounds, as a corporation would have significantly more resources at its disposal than an individual. With the imposition of a forum selection clause, consumers are forced to file their dispute on a corporation's 'legal home ground', creating significant advantages for the corporation and significant inconvenience for the consumer. This inconvenience can easily rise to such a level that it deters consumers from bringing an action at all.

Recall that terms of service are adhesion contracts – thus users must give away this right as a condition of using the service. It is possible that without a forum selection clause a corporation would have to respond to claims without merit in other countries, incurring unnecessary legal costs. However, it is simply unfair that the entity which is far more able to bear the costs of a lawsuit forces individuals to give up their right to a fair hearing in the individual's home country. The context of the Internet combined with the law of jurisdiction and adhesion contract practices point to a need for regulation to void forum selection clauses, to give consumers at least a chance to have their claim be heard in a court in their own country.

**Consumer Protection Law**

Consumer protection law regulates transactions between individuals and businesses to ensure a fair marketplace where the rights of both parties are protected. Typically, this need arises from the fact that businesses have the ability and incentive to unfairly influence consumers. For example, businesses use adhesion contracts to insulate themselves from financial liability at the expense of consumers' rights, and consumers have little option but to acquiesce to the terms as-is. As described earlier, the Quebec Civil Code recognizes the imbalance of bargaining power when consumers sign adhesion contracts, and so it provides for protections from certain unfair clauses. In the pursuit of profits, some businesses will inevitably cross the line of what society considers is reasonable practice. As a result, consumer protection laws have come to play an important role in society.

However unlike the world of legislation, the business world is driven by innovation and fast-paced change. Eventually, changing markets and technological improvements lead to new business models. As with any new business practice, there may be new harms to consumers that prior consumer protection legislation would not have foreseen. This is exactly the concern of "free" services and current consumer protection law. The speed of innovation has far outpaced the speed of legislative action, and in the mean time the balance in the marketplace has shifted significantly in favour of businesses.

As *St-Arnaud* showed, the definitions in Quebec's consumer protection laws are inadequate to deal with the business model of "free" services. Despite the obvious spirit of the law, that consumers should not be forced to surrender an important right, the structure of the law and

Facebook's business model prevented the judge from applying it to Facebook's terms of service.

The result of *St-Arnaud* raised the question of whether consumer protection laws in other Canadian provinces would be vulnerable to the same type of reasoning. Unfortunately, consumer protection laws in other provinces suffer the same problem (or worse) – they are all premised on the definition of a 'consumer contract' or 'consumer transaction' that requires payment. For example, Ontario's *Consumer Protection Act* uses the following definition of "consumer agreement":

> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services **for payment**[107] [emphasis added]

Alberta's *Fair Trading Act* has a broader definition:

> "consumer transaction" means, subject to the regulations under subsection (2),
>
> (i) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement, or
>
> (ii) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement[108]

However, in the regulations for Internet-based contracts, 'Internet sales contract' is defined as:

> "Internet sales contract" means a consumer transaction that is a contract in which
>
> (i) the consideration for the goods or services **exceeds $50**, and
>
> (ii) the contract is formed by text-based Internet communications.[109] [emphasis added]

As a result, if the value of an Internet contract does not exceed the $50 threshold, consumers cannot benefit from the protections in the legislation.

Other provinces and territories have similar definitions[110]. British Columbia's *Business Practices and Consumer Protection Act* appears to apply to any type of contract, payment or not[111].

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[107] *Consumer Protection Act*, SO 2002, c 30 at s 1.
[108] *Fair Trading Act*, RSA 2000, c F-2 at s 1(1)(c).
[109] Alta Reg 81/2001, s 1(d).
[110] *The Consumer Protection Act*, CCSM, c C200 at s 1(1); *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1 at s 1(1); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 at s 2(b); *Consumer Protection Act*, RSNS 1989, c 92 at s 21V(b); *The Consumer Protection Act*, SS 1996, c C-30.1 at s 75.5(e). Consumer protection acts in the Northwest Territories, Nunavut and Yukon do not mention consumer contracts or Internet agreements at all.

However, the protections are largely based on full disclosure of the goods or services in the transaction and the ability to obtain a refund where a supplier does not provide the required disclosure[112].

The general aim of current consumer protections is clear – only transactions between a business and a consumer where a reasonable amount of money is involved are worth protection. Most industries require businesses to charge for their products or services, unlike "free" services which have the option for alternate revenue streams (i.e. advertising, data mining). It nearly amounts to a loophole that businesses who directly deal with consumers can structure their revenue model such that they are not subject to consumer protection law. It is unreasonable that if Facebook were to charge $50 for access to their service, consumers would have a stronger position in a dispute than if they brought an identical dispute under Facebook's current business model.

Certainly, consumers should be protected from unfair practices where they stand to lose a significant amount of money and therefore the current framework provides consumers with important rights and remedies. However, as the "free" online business industry has grown, a significant monetary exchange is no longer the only exchange that is deserving of consumer protection.

Unfortunately, there is unlikely to be a simple quick fix to address the issues of "free" services. Even if the definitions of consumer contracts were changed to include personal information as a type of payment, the rights created by many consumer protection laws are related to fair information disclosure of the goods or services provided to the consumer – an analogy to the type of information one would expect when purchasing a product offline.

As the problems section above outlines, many concerns with "free" services are not related to the operation of the service itself, rather they are the data collection, mining and sharing processes that occur while consumers use the service. In most cases, these practices are completely invisible to the consumer, and consumers may never be aware of them until something goes awry, such as a data breach or if a consumer is shown a jarring personalized advertisement. These are secondary business processes that might normally be considered confidential to the business, but due to the personal nature of the information involved, consumers deserve to know exactly how the processes use and manipulate their information. To mandate the disclosure of such processes would require a different legal framework which balances very different interests than current consumer protection law offers.

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[111] *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 17: "'distance sales contract' means a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person…"

[112] *Ibid*, s 46-52. However note that the Act provides a cause of action under s 172 to remedy a supplier's breach of the Act. The Supreme Court of Canada held in *Seidel v TELUS Communications Inc.*, 2011 SCC 15 that mandatory private arbitration clauses in consumer contracts cannot prevent a consumer from bringing an action under this section, effectively voiding such clauses in British Columbia.

Furthermore, the issues with "free" services outlined in this report sit at the intersection of consumer protection law, business and privacy law. Any change to laws in each area alone would likely be unenforceable in practice, or ineffective.

For example, courts currently do not consider personal information to have an equivalent cash value, and therefore a lawsuit based on an unauthorized disclosure of such information would still likely be dismissed for lack of 'harm'. Currently, a contract with a mandatory arbitration clause would prevent such a case being brought at all. A change to the definition of 'consumer agreement' in Ontario to include contracts made based on an exchange of personal information would allow such a lawsuit to be brought[113], but the issue remains that the claim would likely fail.

As well, the concerns outlined above regarding "free" services discrimination or "free" services and children would not be addressed at all through a simple redefinition. A more holistic approach would be required in order to effectively address the complex concerns raised by "free" services and level the balance of power in the marketplace.

**Privacy Law**

Since the vast majority of "free" services monetize users' personal information, privacy law has provided the most relevant legal framework for analyzing free services' obligations towards their users. Specifically, privacy law examines the collection, use and disclosure of users' personal information and in so doing provides rules and sets standards for the transparency, responsibility and relevancy of these data processing activities. PIPEDA[114] is the federal legislative framework that governs the collection, use and disclosure of personal information in the private sector. It applies in all provinces which do not have substantially similar legislation[115]. The strengths and weaknesses of PIPEDA have been extensively analyzed before[116], and so this section will only highlight some of the concerns specific to "free" services.

PIPEDA has a very broad definition of personal information: "'personal information' means information about an identifiable individual…"[117] which has been interpreted to include a wide variety of subject matter, including a user's IP address in the appropriate context[118]. This broad

[113] Ontario's *Consumer Protection Act*, *supra* note 107, s 7(2) voids any arbitration clause in a consumer agreement that would prevent a consumer from bringing an action before a court in Ontario.
[114] *Supra* note 30.
[115] Three provinces have enacted legislation that overrides PIPEDA (non-health related): Alberta (*Personal Information Protection Act*, SA 2003, c P-6.5), British Columbia (*Personal Information Protection Act*, SBC 2003, c 63) and Quebec (*An Act respecting the Protection of personal information in the private sector*, RSQ, c P-39.1).
[116] See e.g. John Lawford, "Consumer Privacy Under PIPEDA: How Are We Doing?" (November 2004), online: <http://www.piac.ca/files/pipedareviewfinal.pdf>; Lisa Austin, "Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices" (2006) 44 CBLJ 21; Eloise Gratton, "Personalization, Analytics, and Sponsored Services: The Challenges of Applying PIPEDA to Online Tracking and Profiling Activities" (2010) 8 CJLT 299.
[117] PIPEDA, *supra* note 30 at s 2(1).
[118] Office of the Privacy Commissioner of Canada, "Personal Information – Interpretations under PIPEDA" (2011), online: <http://www.priv.gc.ca/leg_c/interpretations_02_e.asp>.

definition benefits Canadians by ensuring the legislation applies to essentially all data that a business could collect which would impact a person's privacy.

However, "free" services based in other countries without such a broad definition will essentially ignore Canada's framework in favour of their own. As many popular "free" services available to Canadians are based in the United States, they use the standard of "personally identifying information", a significantly more narrow definition[119]. Similarly, standards of consent or informed consent are often different between countries. Since "free" services monetize user information, they have little incentive to use the most restrictive legal framework for protecting users' privacy. Taken together, Canadian consumers may mistakenly believe "free" services have the same standards for protection of personal information that they have come to expect through interactions with 'offline' Canadian businesses.

Another shortcoming of PIPEDA is the general lack of effective enforcement capabilities. If a Canadian consumer wanted to dispute a privacy-related practice of a "free" service, under PIPEDA they could register a complaint with the Office of the Privacy Commissioner of Canada (OPCC). The complaint process is often lengthy and is unlikely to result in compensation for the individual. Furthermore, under PIPEDA the OPCC has very few options for effective enforcement:

> The Commissioner may seek resolution through negotiation, persuasion and mediation. While the Commissioner may encourage compliance by naming respondent organizations when it is deemed in the public interest, she herself has no direct enforcement powers. The Commissioner can only, in certain circumstances, apply to the Federal Court to have the Court hear certain matters raised in complaints to her Office; order the respondent to take action to correct its practices; or award damages to the complainant.[120]

The ability to publicly name an organization in order to 'shame them into compliance' is not an effective enforcement model, especially when organizations can defend their actions by stating they comply with privacy legislation in their country of origin. The disputes that fall into the grey area between the different standards are unlikely to get the attention they deserve and in the end, the consumer is left without a remedy.

[119] See *supra* note 30 and accompanying text. Note also Canadian companies have used the American definition of personal information rather than PIPEDA's, such as Nexopia, a youth-oriented social networking service: see *supra* note 37.
[120] Office of the Privacy Commissioner of Canada, "The Case for Reforming the Personal Information Protection and Electronic Documents Act" (May 2013), online: <http://www.priv.gc.ca/parl/2013/pipeda_r_201305_e.pdf> at 5.

Consumers cannot sue a company in their own capacity for a violation of PIPEDA. However, four provinces have a statutory tort that allows an individual to sue for an invasion of privacy[121]. Unfortunately, as noted in a recent case of the Ontario Court of Appeal[122], each of these statues only allow recovery in a narrow set of circumstances, including that the plaintiff's request for recovery is "reasonable in the circumstances". Furthermore, none of these acts properly define what is considered an 'invasion of privacy'. The severity, or even the existence, of an invasion of privacy will depend on the circumstances.

Even if such an action could be considered an invasion of privacy, if a plaintiff cannot prove actual monetary losses, courts have typically awarded modest damage amounts[123]. For example, in *Heckert v 5470 Investments Ltd.*,[124] the plaintiff was awarded $3,500 for the unease she felt when a covert surveillance camera was installed in her apartment building, pointing directly at her apartment door, without her consent. An unauthorized use of information has a less tangible quality than unauthorized surveillance, and since personal information does not have an inherent cash value, and there is no easy way to value these types of breaches.

As well, any legal fees involved with bringing a suit against a corporation would be substantially higher than this range of damages, making such a lawsuit extremely risky for an individual[125]. In any event, as discussed earlier, bringing an action against a corporation would be hindered from the beginning due to mandatory arbitration and forum selection clauses in the contracts with the service.

Like consumer protection law, privacy law has its shortcomings in dealing with "free" services, and simple fixes to PIPEDA or provincial privacy acts will not likely solve all outstanding issues. The OPCC's recommendations for amendments to PIPEDA[126] will certainly be a step in the right direction for ensuring the continued relevance of privacy legislation, but consumers may still be left without sufficient tools to hold "free" services accountable.

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[121] British Columbia, *Privacy Act*, RSBC 1996, c 373; Manitoba, *Privacy Act*, RSM 1987 c P125; Saskatchewan, *Privacy Act*, RSS 1978, c P-24; and *Newfoundland*, Privacy Act, RSN 1990, c P-22

[122] *Jones v. Tsige*, 2012 ONCA 32 at para 52-54.

[123] *Ibid* at 83.

[124] 2008 BCSC 1298.

[125] For example, the plaintiff in *Jones v Tsige*, *supra* note 122, was awarded $10,000 for an invasion of privacy that the Ontario judge based on the Privacy Acts in other provinces, but had incurred $130,000 in legal fees which she refused to pay. The lawyer representing the plaintiff collected the $10,000 damage award and sued her for the remaining sum: Yamri Taddese, "Plaintiff in landmark privacy case sued for not paying legal bills" (11 March 2013), online: <http://www.lawtimesnews.com/201303112152/headline-news/plaintiff-in-landmark-privacy-case-sued-for-not-paying-legal-bills>.

[126] See *supra* note 120.

***The European Union Approach***

The European Commission has attempted to address some of the issues raised here for residents of the European Union by introducing new proposals in January 2012 entitled the General Data Protection Regulation (GDPR). The GDPR aims to regulate the processing of personal data in general in the public and private sectors. Existing protections did not consider the advent and proliferation of cloud computing and social networking. Thus, the proposal aims at regulating the processing of internet user's personal data in relation to new digital and social media.[127]

The proposed new EU data protection regime extends the scope of the EU data protection law to all foreign companies processing data of EU residents. The European Commissioner for Justice, Fundamental Rights and Citizenship, Ms. Viviane Reding, noted the proposal will give EU companies a competitive advantage globally, as the Regulation would provide for

- a harmonized pan-EU regulation, replacing the existing patchwork of 27 national regulations;
- an improvement of the current system of binding corporate rules for a safe transfer of data outside the EU;
- a regime allowing better control over individual's data.[128]

In addition to all companies located in the EU and EU residents, the proposed EU data protection regulation will apply to all non-EU companies that process data of EU residents. Thus, unlike the conditions presented under PIPEDA, it appears providers of free services will have to adapt to the GDPR standards once they are implemented.

The issue of consent is also addressed in the proposed regulation by the following statement, "the data subject's consent means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed."[129] Article 8 of the proposal explains that consent for children under the age of 13 must be provided by a parent or custodian.[130] In the case of a personal data breach, an entity shall without undue delay

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[127] "Statement on the European Commission's proposals for new EU Data Protection rules". Danish Minister of Justice and President of the Justice and Home Affairs Council, Mr. Morten Bødskov, January 25, 2012. Last accessed January 22, 2014, at http://eu2012.dk/en/NewsList/Januar/week-4/data-protection.

[128] M Law Group, "New draft European data protection regime", blog post, February 2, 2012. Last accessed January 22, 2014, at http://www.mlawgroup.de/news/publications/detail.php?we_objectID=227.

[129] European Commission, "General Data Protection Regulation", Article 4, Section 8, p. 41. Last accessed January 22, 2014, at http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM%282012%290011_EN.pdf

[130] European Commission, "General Data Protection Regulation", Article 8, Sections 1-4, p. 45. Last accessed January 22, 2014, at http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM%282012%290011_EN.pdf

and, where feasible, not later than 24 hours after having become aware of it, notify the personal data breach to the supervisory authority. The notification to the supervisory authority shall be accompanied by a reasoned justification in cases where it is not made within 24 hours.[131] The GDPR proposes the following sanctions for violations:

- a warning in writing in cases of first and non-intentional non-compliance
- regular periodic data protection audits
- a fine up to 100 000 000 EUR or up to 5% of the annual worldwide turnover in case of an enterprise, whichever is greater[132]

Another interesting element of the EU proposal is the right to be forgotten. If an individual no longer wants his or her personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system.[133]

The GDPR proposal is currently before the European Parliament, after being studied by the Committee on Civil Liberties, Justice and Home Affairs. It is expected to be adopted in 2015 and take effect in EU member states after a two-year transition period.

**Competition Law**

As mentioned above, competition law has been used to investigate free services in European and American jurisdictions. Use of competition law is not uncontroversial – much attention had been paid to the perceived misguided investigations by authorities in investigating corporations.[134] While in Canada it is historically more rare for the Competition Bureau to investigate the applicability of competition law to internet-based free service providers, recent reported investigations may signify the beginning of change for these online businesses operating in the Canadian market.[135]

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[131] European Commission, "General Data Protection Regulation", Article 31, Section 1, p. 60. Last accessed January 22, 2014, at http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM%282012%290011_EN.pdf

[132] European Union, "LIBE Committee vote backs new EU data protection rules," Memorandum, October 22, 2013, p. 6. Last accessed January 22, 2014, at europa.eu/rapid/press-release_MEMO-13-923_en.doc, and European Commission, "General Data Protection Regulation", Article 79, Sections 3-6, p. 60. Last accessed January 22, 2014, at http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM%282012%290011_EN.pdf

[133] European Union, "LIBE Committee vote backs new EU data protection rules," Memorandum, October 22, 2013, p. 7. Last accessed January 22, 2014, at europa.eu/rapid/press-release_MEMO-13-923_en.doc

[134] For example see: A. Douglas Melamed and Daniel L. Rubinfeld, " Chapter 10: U.S. v. Microsoft: Lessons Learned and Issues Raised,"*Antitrust Stories*, edx. Eleanor M. Fox and Daniel A. Crane, (New York: Foundation Press, 2007), p. 287-310.

[135] Matt Hartley, "Canada's Competition Bureau plans investigation into Google Canada," online: The Financial Post, 17 May 2013, < http://business.financialpost.com/2013/05/17/google-canada-investigation-competition-bureau/?__lsa=a22c-bdaa >.

Both European[136] and United States antitrust law has struggled to assess market power in assessing whether the behavior of organizations is actually anti-competitive. The United States Department of Justice (US DOJ), despite statements from detractors to enforcement action in the tech sector (see below), has clearly stated its intention to pursue anti-trust charges against technology industry companies where anti-competitive acts are done. In remarks to the New York Bar Administration's Annual Antitrust Forum in 2012, Fiona Scott-Morton, Deputy Assistant Attorney General in the Antitrust Division of the US DOJ, laid out the US DOJ's view of anti-trust enforcement for high-tech industries.[137] In her speech, Scott-Morton cited the financial importance of technology companies to U.S. industry as being a significant motivator to enhanced investigative and enforcement activities by the Department of Justice.

Scott-Morton makes clear that the US DOJ is aware of the era of "platform competition" - where the owner or sponsor of a technology platform owns only one piece of a larger system of complementary services.[138] Although these platforms offer benefits to consumers because they draw on separate parties to create and provide services for the platform (such as applications), there is a natural "lock in" effect where platform providers attempt to limit consumer choice by disallowing movement between platform providers. Free services can similarly tie consumers to one company – particularly where a website provides a platform for communication or contact between users (i.e., is the primary, or only, forum through which users communicate).

However, assessing innovations as dynamic efficiencies (and not a static efficiency) is important as a leap in technological ability, if not assessed as a dynamic shift, may be mistaken for an anti-competitive practice.[139] This is particularly the case where a dynamic shift leads to the creation of a new platform to which there are few or no competitors. Misunderstanding the nature of dynamic efficiencies has caused the US DOJ to struggle in assessing changes to the technology market. Similarly, academics have questioned whether the current market definitions for goods and services can accurately assess markets where free and for-fee services are offered.[140]

In an era of enormous change online, it remains unclear as to whether current legal definitions laid out in competition law provide wide enough breadth for competition authorities to accurately assess the effects of these providers on competition and consumers.

[136] See Microsoft, supra note 78, above.
[137] Fiona Scott Morton, *Antitrust Enforcement in High-Technology Industries: Protecting Innovation and Competition*, 2012, Speech to the NYSBA Annual Antitrust Forum. [DOJ Speech]
[138] *Ibid*, p. 2.
[139] *Ibid*, p. 3-4.
[140] David S. Evans, "The Antitrust Economy of Free," 19 May 2011, publication forthcoming, currently available from the University of Chicago Law School < http://www.law.uchicago.edu/files/file/555-de-free.pdf >.

## Conclusion and Recommendations

In creating this report on free services for consumers, PIAC aimed to explore what these service offerings provide to consumers and how consumer interests are protected. This report has provided ample evidence that consumers have few avenues of protection should they encounter a problem or become involved in a dispute with online free service providers. This report also points to the growing problem of the disparity of interests between many of the companies offering free services and consumers; when companies seek methods to monetize their "free" businesses, ultimately consumers stand to lose. Whether those loses happen through use of consumer metadata in order to push advertising to a consumer, or through a loss of privacy, even companies offering so-called free services are looking to monetize their assets – including the audience for their services. Yet, such services are provided through a means that ties consumers to services by becoming the primary conduit to connect to groups of friends or family (such as Facebook and LinkedIn), or as a primary means of communication (e.g., Skype) or as a storage solution to share information (e.g., Dropbox, flickr, Tumblr). These ties to online services, and the perceived difficulty of dropping these services from one's life, mean that consumers find it difficult to leave a service, or change providers, even as terms of service change so that consumer interests are less and less protected. As free services continue to grow online, so does the potential for conflict between consumer and corporate interests.

The breadth of consumer issues the free services market raise is vast, as free services are both diverse in their offerings and in their business models. However, we note a number of particularly significant issues of concern for consumers in using free services in this paper. Perhaps most important to highlight are the ways in which the Terms of Service to which consumers must agree in order to use free services, bind consumers in a restrictive contractual relationship. The limits imposed by the Terms of Service agreement constrains consumer rights and interests to dispute a situation through litigation, chose a jurisdiction for litigation or generally dispute a term that may run contrary to the consumer's interests. Such is part of the "costs" of free services to consumers.

Terms of Service agreements become even more haphazard as legislation and regulation built to protect consumer interests against these types of restrictions do not often apply to users, as they are not exchanging goods or services for payment when acquiring free services. This legal technicality, as discussed in *St-Arnaud v Facebook Inc,* is found throughout much consumer legislation created by the provinces. Hence, consumers using free online services who encounter a problem are essentially left to their own devices to resolve these issues as the legislative and regulatory regimes fail to provide sufficient support.

A difficulty alluded to in this study of the free services regime, which is related to service offering ties for consumers, is the difficulty for many consumers in completely disengaging with all of these services in our current society. While it may be understandable not to have a Facebook account, consumers need at least an email account in order to communicate. It may be that a consumer doesn't use Skype to make free calls, but if he wants to share a video online with friends, the number of services from which he may choose is limited. Email systems have

limited file sizes, so that an individual wishing to share extensive documentation may inevitably have to use an online storage provider. Inevitably, all consumers use free services of some form, and each time they do so a gamble with their rights and interests is involved. Yet, consumers have few options to protect themselves against the restrictive terms that may be imposed by an online free service provider should a problem arise. Because of this consumers largely use these increasingly necessary services at their own risk.

Based on this analysis the following are recommended:

**Recommendation: Update Consumer Protection Laws to Void Anti-Consumer Clauses**

A simple update to current provincial laws, which now preclude those that do not pay for services from accessing consumer protections, would provide greater protection for those accessing free services online. Clearly provincial law would need to be limited so that all free services would not be included in a new provision, so that defining the nature of free services as we've defined them (*a free online service that monetizes user-provided value*) would be included. As many current provincial laws are written this may only require a change to the definition of consumer for the purposes of certain provisions.

**Recommendation: A Statutory Tort Based On Breach of Confidence**

In order to address some of the loss of privacy for individuals accessing free services a statutory breach of confidence tort would allow a user to seek claim against web companies that unnecessarily used private information contained on their website. A model for this tort may be found in *Lac Minerals Ltd. v. International Corona Resources Ltd*.[141] In that case, although there was no contracted duty of confidence, a general duty of confidence was found to exist between the parties. Such legal underpinnings could form the basis of legislative action against similar breaches of confidence. In the free services context the current non-statutory tort fails to consider the manner in which information is provided to websites: because it may be difficult to show that personal information is 'confidential', or that it was necessarily communicated in 'confidence' to a service under the second part, it's unlikely that this tort is sufficient to hold services accountable for a misuse of personal information. However it is possible to model a statutory tort based on breach of confidence, such as 'breach of expectation.' This may be particularly relevant in the class action context; where a deemed statutory value to personal information, and/or deemed damage amount that is likely too small to pursue on its own, but in a class action would be a sufficient deterrent to free services.

**Recommendation: Greater Enforcement Powers for the Office of the Privacy Commissioner**

Changes to PIPEDA would allow the Office of the Privacy Commissioner the ability to not only investigate but also enforce elements of Canada's privacy regime. While the class action tort noted above involve some costs to consumers, involvement of the Privacy Commissioner in

[141] [1989] 2 SCR 574.

enforcement shifts the burden from users to an authoritative body. Enforcement powers would provide the government with the ability to levy fines or other punitive measures against those that violated terms in PIPEDA.

**Recommendation: Competition Law Investigations and Enforcement Activity must Become more Nuanced in Assessing Market Power**

A lesson learned from the European and American experience is not that enforcing competition law is "hard" in the technology sector, but that the analysis of anti-competitive behavior must be more nuanced. While many of the current statutory provisions deal with competition issues for the technology industry, some of the tests, developed judicially or through internal assessment and enforcement activities, fail to adequately consider how market power is defined, and what anti-competitive acts look like in the technology sector. Considering static versus dynamic technological improvements, as the US Department of Justice has indicated it does, is a move in the right direction, but greater understanding of how technological systems work (considering large-scale systemic effects), appropriate market definitions (free versus for-fee) and the long-term effects on consumers of service "lock-in" features.

**Appendix A – Environics Focus Group Report**

# Focus Group Report on Free Online Services

*Prepared for*

Public Interest Advocacy Centre

February 2013

Environics Research Group
33 Bloor Street East, Suite 900
Toronto, ON M4W 3H1

## METHODOLOGY

Environics Research Group is pleased to present this focus group report to the Public Interest Advocacy Centre. This report provides an overview of the attitudes towards services that companies provide online for “free.” This research project was designed with the following objectives in mind:

- To examine consumer views of the advantages and disadvantages of free online services.
- To explore what consumers feel they are giving up in exchange for free services and how they think companies offering free services make money.
- To determine whether consumers feel they have a contract with companies or service providers offering free services, and what rights and obligations they have vis-à-vis these service providers.

Three focus groups were held in Vancouver on January 14 and in Ottawa on February 12, 2013. One group in each city was comprised of online services users under the age of 40, and one group in each city was comprised of online services users over the age of 40. We recruited both men and women from a range of education and income levels. One of the Ottawa sessions was conducted in French.

The discussion guide used for the groups can be found in the Appendix at the end of this report.

# DETAILED REPORT

## GENERAL ATTITUDES TOWARD ONLINE SERVICES

### Services used

Participants use a wide range of services, and most use at least three or four services every week. Some of the more popular services are social networking, communication and email services, including Facebook, YouTube, LinkedIn, Gmail, Hotmail, Twitter, Instagram and Skype. Some participants also use storage services such as Dropbox, and all participants said they use Google's search engine and some other Google services regularly. Participants use a number of others such as Songza, Flickr, Shazam, eBay, Craigslist, Kijiji and Wikipedia. The vast majority of services mentioned were ones that are generally "free" and available to the general public.

### Advantages and disadvantages of online services

Participants were quick to identify a number of benefits associated with using free online services. They had a harder time thinking of any disadvantages. This tendency indicates that consumers may think they are "getting" more than they are "giving" or giving up when they use free services.

*Advantages*

In general, participants use these services because they improve their lives in some discernible manner. Whether this increased connection be through a greater degree of contact with friends, family and acquaintances (via social networking sites), or the ability to communicate directly for no cost with people who live far away (via Skype), it is clear that participants *appreciate* being able to share information online. One participant even saw the information that he was able to access through online services as a surrogate for in-person travel. He noted that he "would have never met people from all over the world. Sometimes you're in a circle so big, you might meet somebody who you would never meet somewhere you couldn't afford to go like Antarctica."

Participants also focused on the convenience of many online services, with many suggesting that being able to do work, or access and share information in "real time [is] easy, quick, and efficient. Basically, anything you want to find out information-wise, it's there." They see the information-sharing capacity of these services as a significant advantage to their personal lives, and their careers or businesses. As one participant

noted, to “start with some pros, we put time-saving and productivity, just your access to an array of services super conveniently. Access to information, we put communication and networking, again – just your whole network is there.” With information-sharing and social networking services topping the list of services used most frequently, it is not surprising that participants concluded that these capacities provide them with significant personal benefits.

Some also mentioned how these services save them money. They use services such as Dropbox, Skype and Facebook to share files, and communicate with friends and family for free. A few participants also suggested that music services like Songza save them money because they do not have to purchase music anymore.

*Disadvantages*

When discussing the disadvantages associated with using these online services, participants identified two types of issues: those that are personal in nature, and issues that have a negative impact on wider cultural relationships and institutions. The most significant and widespread personal disadvantage is a loss of privacy, with participants generally agreeing that most people make some sacrifices to their privacy in order to use free online services. They see this as a worthwhile trade-off: they share information in order to gain access to something, but most indicated that they only ever publish information that they would ultimately be comfortable sharing publicly. Some have developed personal strategies to deal with this issue, with some using alternative email addresses, pseudonyms and cookie-cleaning services, while others share the least amount of information necessary. As one participant noted, the trade-off is acceptable “as long as you’re intelligent with it, know where you’re sending the information [….] a lot of places will ask you for an address, I’ll just give them some random street.” A couple of participants were also concerned about copyright issues with these free services and whether they were potentially losing rights to materials they have created that they might upload. This was a particular concern to people who had written music or other materials.

In addition to their concerns over lost privacy, participants also noted that online services, while convenient, can also have a negative effect on productivity and can encourage sedentary behaviour. Most agreed that it is far too easy to “waste time” using these services.

Some of the broader disadvantages include a perceived loss of in-person or intimate connection with people in local communities. Participants who focused on this perceived declining connectedness noted that the Internet “helps you stay connected, but by the

same token we are probably the least connected we have ever been as a human race because of the Internet. People are sitting behind those screens, as opposed to communicating with each other."

## Free online service limitations

In general, participants struggled with the idea that these online services could have limitations, mainly because they think of the services as complete, rather than limited by a specific factor (such as bandwidth, storage space or time). Participants could think of few services with limitations, even after prompting. LinkedIn is one of the few services that clearly has specific "levels" of service, although some participants also noted that Skype and Dropbox have some modest limitations that users can overcome by paying a premium.

## Are these online services "free"?

At the outset, nearly every participant agreed that most of the online services being discussed (that they use) are "free." They see the transaction in economic terms: because they do not pay money for the services, they are getting them for free. They assume that the companies and organizations who provide these services are making money, but most have a fairly rudimentary understanding of how, exactly, those companies make money. This is despite a general understanding that companies like Google and Facebook "make a lot of money."

When prompted to explain what they mean by "free," and to consider if there is anything else involved in the transaction, participants noted that these companies make money through advertising. Only after considerable prompting did they acknowledge that by providing a "free service," these companies can make a lot of money by selling their user base to advertisers. At the end of the groups, participants understood this reversal (they started to see *users* as the commodity, rather than the service), and were much more receptive to the idea that no service is ever free. Nonetheless there was a general consensus that, as long as you the user are not actually paying money to use a service, it is essentially a free service.

## Paying for online services

Few participants currently pay, or recently paid, to use any online services that have free components. Most agree that there is almost always a free version of the pay-to-use service somewhere, so they will always use the free version before the paid version. Those who have paid to use some services (such as Skype, Dropbox or

LinkedIn) chose to do so because they *needed* the level of service available through the paid version, either to communicate with people, or to share large amounts of data. Some have also paid premiums when they have been selling products online in order to get better placement of their own notices.

## NATURE OF RELATIONSHIP WITH FREE SERVICE PROVIDERS

Participants were uncertain about how to characterize their relationship with free online service providers – most thought about this in terms of a positive relationship (using words like "accommodating" and "mutually beneficial"); while others noted that they are "detached" and "cautious." When prompted to characterize themselves as a user, consumer or client, almost all participants agreed that they see themselves as "users," which is a more passive (and less demanding) role than "consumer" or "client." As one participant noted, he sees the relationship as a passive one because "the world wouldn't end if I didn't have it [access to the service]." A few noted that they would prefer to be seen as a client or consumer "because [as a] user, you're reliant on them, but client, you're more of the boss [….] they need your business and you can move elsewhere." This participant went on to note that these services do not *need* users because "we let ourselves become so reliant on it [the service], it's a real hassle to change, some things more than others. It's a real hassle to change your email address, for example, definitely feel like a user there versus a client. Whereas something like Skype, year, there's a bunch of other services that […] I feel like more of a client."

Others actually preferred to see themselves as "users" because it allows them to stay more detached and refrain from developing a sense of customer loyalty. One participant noted that, "I don't mind being a user in the fact that I have absolutely no allegiance, so if any one of those services annoys me, I'm gone, I don't have anything invested." Another participant agreed, and suggested that "client" means the service is something people pay for, which she was not interested in doing.

## CUSTOMER SERVICE AND DISPUTE RESOLUTION

### Customer support issues

In general, few participants have ever had an issue with a service that prompted them to contact customer support, so they were largely unaware of the processes that customers have to go through to get their issues resolved. This lack of awareness notwithstanding, most agreed that free services should be obliged to provide a certain

quality of service. They noted, however, that most services would likely provide good customer service in the interest of keeping customers happy. Since the free online services market is so competitive and over-saturated, it is unlikely that a company with consistently poor customer service would maintain a loyal customer base for very long (unlike some industries where a few players corner the market with little room for customers to move from one company to another). For example, the few participants who reported that they received poor customer service quickly noted that they stopped using the service.

## Dispute resolution

None of the participants have experienced a dispute or conflict with an online service provider, so they were generally unaware of the dispute resolution mechanisms that may or may not be available them. In fact, most participants had a hard time even imagining why they would ever have a dispute with a provider of free online services. For the most part, the only situation anyone could really imagine where they might have a dispute with the provider of a free service would be if they were the victim of identity theft as a result of some sort of data breach that the service provider had caused through negligence.

When they were informed that there are no formal mechanisms available to users of online services, they generally thought that this was unfair, could not articulate *why* this would be unfair, likely because they have never considered their relationship with online service providers in legal terms. Their general belief that this is unfair notwithstanding, they were largely unconcerned about the lack of legal dispute resolution mechanisms. The only situation where participants believed there should be legal recourse (and where there already is) was in a violation of privacy rights. No one reported ever having stopped using a service because of an issue involving changes to the terms of service. When people stop using a service, it is typically because it has been superseded by a newer better service (e.g., no one uses MSN chat anymore). The consensus was that Terms of Use are unreadable “legalese” and no one really understands them.

## How service providers make a profit

At the outset of this conversation, participants appeared largely unconcerned about how free online service providers actually make money. Most assumed that they make money through advertising, as they have all seen many ads on the sites of the services they use. For the most part, they well understand that their personal demographic information is likely aggregated so that advertising can be sold. They also understand that advertising is targeted at them as a result of patterns such as what they “like” on

Facebook. People are not bothered by this. They feel it is a fair tradeoff that they get to use the service for free, and that they get exposed to advertising that is more useful and interesting to them in exchange for being a user of the service and thereby allowing the service to charge more to advertise.

Most participants would like some rough idea of how these services make money, and how their individual data and information may be aggregated – but they also recognized that there were limits as to how much detail the service providers could ever be expected to give out. Most people felt that, as long as they were not being targeted as individuals, and that they were only being exposed to advertising as a result of their general demographic profile and preferences, they did not really mind. One person said that only someone who was really "paranoid" would demand full disclosure of exactly who the provider was selling advertising to, etc.

There was little strong feeling about whether paying a premium for enhanced premium service means that all your information should suddenly be off limits. It was noted that what you get as a result of paying a small premium varies by service. In some cases, you are paying for an "ad-free" experience. In other cases, you are paying for extra services or more capacity, etc.

## INSTAGRAM CASE STUDY

Participants in each session were told about the recent controversy over Instagram after it was bought by Facebook and initially changed terms of use – and was going to start selling people's pictures, etc. Only a few participants (mostly younger) had heard about this controversy. The general view was that Instagram had tried to "pull a fast one" on their users, and had been caught out and had to backtrack due to negative publicity. There was a mix of opinions as to whether Instagram had a right to try to get away with selling people's pictures in this way. It was noted that, when the term of use changed, people always had the option of withdrawing from Instagram and withdrawing their pictures – or so they thought.

For the most part, though, people did feel that they had a contract with Facebook or Instagram and that they as consumer ought to have some legal protection from wanton changes in policy that could have an impact on privacy and copyright. It was also noted that, in the case of Facebook – and by extension Instagram – it is actually very difficult to remove a profile and people wondered whether users can ever really opt out.

## Is there a contract with a free service provider?

There was a widespread perception that users enter into a contract with the organization providing the service when they agree to the "terms of service" before using it for the first time. Participants viewed the terms of service (ToS) as a formal agreement between users and the company providing the service. Most admitted that they do not read the ToS, even though they think of the document as a legally binding contract. Moreover, even participants who said they read the ToS believe that the ToS constitutes a consumer contract, although one did note that the ToS referred to it as a "unilateral contract. It's for the benefit of them [the service provider] only, really, it's not like I can negotiate their terms of service. I do actually read them – but, ultimately, it's not that big of a problem." Most participants, especially younger people, felt strongly that when they click on "I agree" after reading the terms and conditions of a service, they are essentially signing a contract and that it should be viewed that way legally.

When participants were shown the quote from the Quebec court case regarding Facebook, they tended to agree with all the points in the statement about the lack of obligations on the part of Facebook users, but despite it all, they still felt that as a user who had clicked on agreement to Terms of Use, they did in fact have a contractual arrangement with Facebook and that their rights as users needed to be protected in some way – even if they were not paying money to use the service. It was noted that Facebook should not "hide behind the fact that it does not charge a fee" to evade any obligation to its users or clients. Several participants noted that Facebook needs users to make money and so, in a small way, we each "sell ourselves" when we join, since our membership in the site is what allows the site to make a profit. Only a few mostly older participants took the view that if a person partakes in a free service, they don't really have a contract since no money is exchanged. Younger participants have grown up in a world where free services are almost the norm and they expect some consumer protection. That being said, most participants were also very cynical about whether any individual consumer could ever take on a giant like Facebook even if, under consumer protection laws, they had a right to do so – though it was pointed out that class action law suits could be a potential avenue for such cases. It was noted that, while it is currently hard to imagine circumstances where a consumer might want to sue a free online service provider, this is uncharted territory and there could be circumstances in the future – particularly in areas involving breaches of privacy settings. It was noted that rendering an opinion on whether agreeing to terms of use of a free service is necessarily a "contract" is a complex legal decision that a layperson may not be equipped to express an opinion on.

# APPENDIX

**February 11, 2013**

**Discussion Guide**
**Environics Research**
**Attitudes towards free online services**
**Public Interest Advocacy Centre**

## 1.0 Introduction to Procedures (10 minutes)

Welcome to the group. We want to hear your opinions. Not what you think other people think – but what you think!

Feel free to agree or disagree. Even if you are just one person around the table that takes a certain point of view, you could represent many Canadians who feel the same way as you do.

You don't have to direct all your comments to me; you can exchange ideas and arguments with each other too.

You are being taped and observed to help me write my report.

I may take some notes during the group to remind myself of things also.

The host/hostess will pay you your incentives at the end of the session.

Let's go around the table so that each of you can tell us your name and a little bit about yourself, such as what kind of work you do if you work outside the home and who lives with you in your house.

## 2.0 Defining free/paid services (25 minutes)

As you may have guessed from the questions we asked you when we invited you to this session, we are going to be discussing some of the services that we all use online. Could each of you write down the services you use at least once a week, and how often you use each of them. For example, there are email services, social networking sites, cloud storage services, entertainment sites, photo sharing services and communication services. Once you're done, we'll discuss them as a group.

WRITE SERVICES ON FLIPCHART – add a few key free with paid component services if they do not use any of them (such as Skype, Dropbox, LinkedIn, Flickr, etc.)

Are there any other services that you use less frequently?

Working in pairs, could you please brainstorm some potential advantages and disadvantages to using services like the ones on this chart. PROBE FOR DISADVANTAGES: privacy concerns, inability to remove information, limitations to the "free service," have to pay to access the "full service," company sells personal information, etc.

PROBE FOR ADVANTAGES: increased connection between friends/family, increased public profile, listen to music, share files, network/get a job, etc.

Does any of these services replace something that you traditionally pay for (i.e., Skype)?

Do you come across any limitations when using any of these services? Are there elements of the service that you cannot access? If so, what are they? Why are you not able to access them? (If they don't get it, then maybe discuss boundaries – what types of boundaries do any of these services have?)

IF NOT MENTIONED PREVIOUSLY: Aside from when there may be server issues, are there times when you cannot access any of these services?

Looking over this list of services (i.e., Instagram, Facebook, LinkedIn, YouTube, Flickr), do you consider these to be free services? Why?

PROBE: What do you mean by "free"? (Free to use, no monetary value?)

Do any of them have a paid component? Which ones?

Do any of you pay to use any of these services? If so, why?

Are there any differences in the "free" and "paid" features offered by these services?

### 3.0 Customer support and quality of service (5 minutes)

What kind of technical support do these "free" services provide, if any?

Do you think that companies providing free online services for social networking and file sharing should be obliged to maintain a particular quality of service or customer service? What should that level of service be?

Have you ever stopped trying to access one of these services, or one like it for any reason? Why? (PROBE: too many time-consuming plug-ins, downloads, and registration forms, bugs, change in functionality, privacy issues, etc.)

Have you ever stopped using one of these services because the terms of use changed? Why?

## 4.0 Dispute resolution (5 minutes)

Have any of you ever experienced a dispute, or some sort of conflict, with an organization providing any of these services? What happened?

For the services you currently use, do you know if there is any dispute resolution mechanism available to you?

As it stands right now, the only recourse you have is to raise the issue directly with the company, in an informal (non-legal) manner. Do you think that it's fair that there are no dispute resolution mechanisms available to people who use "free" services (i.e., you cannot sue them) in place for you to access? Why/why not?

## 5.0 Consumer relationships with free service providers (5 minutes)

I'd now like each of you to quickly jot down how you would characterize your relationship with services like these services we have been discussing. Please focus on how you relate to the service, rather than whether you're satisfied with the service. Take a minute, but you only need to write a word or two, or a single sentence at maximum. In other words, in relation to Facebook – what are you?

What did each of you say? Why do you see yourself as a CONSUMER? USER? CLIENT?

Thinking of services that you do NOT pay for, do you believe that you have a contract with the business providing the free service?

## 6.0 Monetizing personal information and consumer rights (15 minutes)

Do any of you know – or how do you think – free services make money as a business? How are they successful?

Do any of the providers of these services give you an indication of what they plan to do with the information they collect about you? What do you think they do? PROBE FOR MONETIZING PERSONAL INFORMATION

Should they be obligated to tell users what they do with the information?

Do you know if these companies providing free service leverage data about you in order to reap monetary returns? What about through advertising – do they use your information to benefit themselves by increasing advertising revenue?

FOR REFERENCE: Google earned $37.5B in revenue last year. Facebook earned $3.71B in revenue last year. (I believe that they classify these revenues as from "advertising" primarily – though Google does have some subscription and royalty revenue).

Should they be obligated to tell users whether they make money using this information? What about the end-buyer of your information – should they tell you who these people are?

Do you end up “paying” with your privacy and subject yourself to increased advertising targeted specifically to you based on your actions while using the service? Some might see this as an acceptable exchange – do you? Why/why not?

What if you’re paying a premium for the service, or if you start paying for a premium version of a service, do you think companies stop selling information they collect about you once you a paying for the premium version of the service? Should they?

## 7.0 Instagram case study (20 minutes)

I’d like to move on to discuss a recent case study. I’m interested in hearing what all of you think about it. We’re going to be discussing Instagram’s recent proposed changes to their terms of service. Did any of you hear about this? What did you hear? What happened?

EXPLAIN ISSUE – SHOW PRE-PREPARED FLIP CHART SHEETS THAT CONTAIN KEY FACTS

- Facebook bought popular photo sharing site Instagram (for $715 million).

- Instagram announced it would change its terms of service regarding how it shares personal information with third-party advertising partners – it would require users to agree to terms that allow a business to pay Instagram to display the user's name and photos in connection with paid or sponsored content or promotions without any compensation to the user.

- After considerable user pushback and threats to leave, Instagram said: "It was interpreted by many that we were going to sell your photos to others without any compensation. This is not true and it is our mistake that this language is confusing," wrote Kevin Systrom, one of Instagram's co-founders. "To be clear: it is not our intention to sell your photos. We are working on updated language in the terms to make sure this is clear."

Now that I've explained what happened, do any of you remember it? Where do you remember hearing about it?

What are/were your reactions? Why did Instagram react the way it did?

Since Instagram's services are free to use, do you think there is a contract between the consumer and the service provider? Why or why not?
What rights should users or consumers have? What obligations/responsibilities does Instagram have to its users/consumers?

What if Instagram was successful in changing its Terms of Service to monetarily benefit from its users' photographs (by selling them to advertisers), or if another organization such as Flickr or Twitter successfully implemented a similar change.

In this situation, would you believe that you had a contract with the organization?

Does this situation change your view of what rights the consumer should have? Or what obligations/responsibilities Instagram owes the consumer?

Hypothetically, if Instagram had not retracted its initial proposed changes to the terms of service, what remedies (if any) should have been available to its users?

For any Instagram users in the room, what would you have done? And to the rest of you, how would you have reacted if you regularly used the service?

*Focus on expectations:* Let's discuss a hypothetical situation: if you paid for a service, what would you expect – would you have a contract with the organization? And what about if the service was free to use – do your expectations change?

## 8.0 Consumer protection law (35 minutes)

There is a legal debate ongoing about whether consumers using free services have entered into an enforceable consumer contract. Some think that, since consumers haven't directly paid for a service, there is no contract. Others think that consumers pay with their information (we don't get anything for free), and consumers should therefore be protected under consumer protection laws.

Which position do you agree with? Which approach is fairest to consumers like you?

How would you like to see the debate resolve: is there a contract? Or is there no contract? NB: Under current contract law, if companies breach their terms of service, you don't have any recourse under the consumer protection laws – cannot sue in the conventional way, since you can't sue them for failing to provide a service.

NB: Consumers not completely immune from legal remedy (may be able sue under privacy or other laws), but not consumer protection or contract law, which is the most common way of enforcing consumer rights.

I'm going to pass around a short quote from a recent case in Quebec. I'd like you to read it over and underline phrases where you agree, and circle phrases where you disagree. We'll discuss the quote as a group once you're all done.

DISTRIBUTE QUEBEC QUOTE TO PARTICIPANTS

> Access to the Facebook website is completely free. Therefore, there exists no consumer contract when joining and accessing the website, because it's always free. Users pay Facebook nothing at all. In joining and accessing the website,
>
> Users:
> (a) do not pay Facebook;
> (b) do not undertake to pay Facebook at a later date;
> (c) do not undertake to remain Users for any period of time;
> (d) do not undertake to post anything on the Website;
> (e) do not undertake to encourage friends or family to join the Website; and

(f) do not undertake to promote the Website in any way.

Thinking about this case study, and about the services you use every week, what rights should you have when dealing with a company that provides you with a free service?

Do you think Facebook is a free service?

Thinking back to the last time (or every time) you agreed to a service's or website's terms of service, do you think you entered into a consumer contract with the organization providing the service?

In fact, in Canada, consumer protection law and regulations generally apply only to consumer contracts. If you do not have a contract with a "free service," then there is a risk that consumer protection law and regulations will not apply. This is how the law stands now. But when you use to one of these free services, do you think consumer protection laws should apply? Why or why not?

Do you think it's fair that users have no right to sue the company for breach of contract if the service was provided for free?

Returning to a previous issue: when you use free services, do you think you have made some exchange with the company in order to receive the service?

What about the money they make by selling your personal information – should a company be required to disclose whether, or how, they monetize user information?

BACKGROUND INFORMATION, FOR IF IT COMES UP: [For example, if consumer protection law does not apply because the terms of use for a free service does not constitute a consumer contract, then consumer protection legislation prohibiting mandatory arbitration clauses would not apply. This means that consumers would not have the right to sue free services in the jurisdiction of their choice if they felt that the service provider violated consumer protection laws. This also means that consumer remedies such as through class action mechanisms would not be valid against free services.]

## 9.0 Additional material (time permitting)

Moving on to a few final questions…

Now that we've had a chance to discuss all of these issues, I'd like to ask you again: should companies/service providers be obligated to tell you what they plan to do with the information they collect about you? Why/why not?

Now that we've discussed all of this, what is your definition of a "free" service? Are there any "free services"?

Have you ever experienced working with a program that was given away for free, and then you were asked to pay for it? How did you react?

If you begin using a service that is free, and proceed to pay for the premium version of the same service, do you feel that once you start paying for the service, you now have a contract with that service provider?

How did you feel about the prospect of paying for extra features of a program or service, such as LinkedIn?

**Thanks for your participation!**