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B.C. courts affirm "browse wrap" agreements

Applying laws that pre-date the "electrification" of North America to circumstances that currently exist with the omnipresent use of information technology socially and in commerce is an enormous challenge. However, the ability of the law to adapt to new realities is one of the greatest strengths of our common law system.

The recent **BC Supreme Court** decision in **Century 21 Canada Limited Partnership vs. Rogers Communications Inc.** is a timely example. In that case, the court found that Internet users can be legally bound by the terms of use on a website simply by using that website in what are called "browse wrap" agreements.

Traditional contract law principles evolved and adapted with the recognition of "shrink wrap" agreements, which referred to new forms of software licensing agreements that became effective once the purchaser removed the shrink wrap from a purchased piece of software.

Many cases turned on whether or not adequate notice was given to the purchaser before the action that was deemed to be an acceptance of the agreement – tearing off the shrink wrap.

As technology advanced, the need to purchase software as physical media decreased, leading to "click wrap" agreements. Click wrap agreements became popular as the Internet expanded into popular usage and required that users acknowledge their acceptance of terms before entering a website or installing software by clicking a button, generally labelled, "I Agree."

The ability to bind users to a set of posted terms and conditions – referred to as "browse wrap" agreements – is the next logical extension of this progression, as the law continues to respond to the reality in which business is conducted and the purposes for which the Internet is used. As the practice of posting terms and conditions governing access to and use of websites has become more common and accepted, the law's expectations of users has evolved as well.

The Century 21 decision

should provide comfort to website owners who have been relying on posted terms and conditions to govern the use of their website's content. Until now, the application and enforceability of those terms has been largely untested in Canadian courts.

What this means for website owners is that language such as "by accessing or using this website, you agree to be bound by these terms" actually carries legal weight.

While it may be the case that many users do not bother to read the terms and conditions on a website, ... the careless or uncaring failure to do so will not be an excuse if reasonably prominent notice has been given

This can be very important to a website owner wishing to limit generally the way in which users interact with its website and specifically the manner or extent of use of the content on its website.

What would otherwise simply be a list of the website owner's desired user behaviours instead becomes a legally binding and enforceable contract.

For website users, this means they must exercise greater caution when accessing and using a website that has posted terms and conditions governing its use.

This is particularly true if the user plans to use the content of the website in some way other than the direct and intended purpose of the website, such as by indexing, scraping or aggregating content for re-publication on another website.

According to the Century 21 judgment, re-posting of real estate listing content was not simply a copyright issue, but was in fact a breach of contract based on the terms posted to the Century 21 website.

The process of binding users to a browse-wrap agreement

requires simply that the user must have:

(i) reasonable notice of the terms of use;

(ii) the opportunity to review the terms of use; and

(iii) ultimately, the ability to decide whether or not to agree by continuing to use the website, or not.

Importantly, there is no specific requirement that the user has actually read the posted terms.

If the terms of use are afforded reasonable prominence with adequate notice to the user as to what they are accepting by continuing, the terms will be enforceable.

While it may be the case that many users do not bother to read

the terms and conditions on a website (or for that matter, the terms and conditions provided in a "click wrap" agreement by clicking the "I Agree" button), the careless or uncaring failure to do so will not be an excuse if reasonably prominent notice has been given.

In principle, a browse-wrap agreement should be able to encompass anything that would be binding if found in a traditional agreement.

However, it is also reasonable to anticipate that if a browse-wrap agreement contains particularly onerous obligations, the courts will likely require a higher standard of notice to the user. For example, what notice would be required to create positive

obligations for users to pay \$1 for every page visited within the website?

Regardless, users should always ask themselves what they are agreeing to by using a website, and this goes beyond downloading information for alternative usage. Before uploading content, for example, users should make sure to know whether they are assigning rights to that content to another party. ■

Karl E. Gustafson, QC, is a partner at McMillan LLP's Vancouver office. This article was written with contributions from Michael E. Reid, associate in McMillan's Vancouver office. *Law Corporation*

ONE YEAR LATER

Uber-green building to be lit with natural sunlight

By Nelson Bennett

One of the greenest buildings in Canada will feature technology developed by a **University of British Columbia** spinoff company that uses sunlight to light the interior of buildings.

Okanagan College's Jim Pattison Centre of Excellence in Sustainable Building Technologies in Penticton will feature a lighting system designed by Richmond-based **SunCentral Inc.**

As reported one year ago in *Business in Vancouver*, SunCentral is working toward the commercialization of a system developed by UBC professor **Lorne Whitehead** that uses optics to beam sunlight from collectors on the exterior of a building through small wall openings in the interior to provide natural light.

Founded in 2008, SunCentral now has a staff of 13 employees and has had raised \$6.4 million in federal and provincial government funding to bankroll the project.

Since March 2011, SunCentral has raised an additional \$3 million in private investment and is on track with a number of demonstration projects, one of which is the Centre of Excellence in Penticton.



Jim Pattison Centre of Excellence in Sustainable Building Technologies at Okanagan College in Penticton with SunCentral's lighting system

The building was built according to Living Building Challenge standards – the highest in the world for sustainability. SunCentral's lighting system will be fully installed in the building in the next couple of months, according to **Tony Formby**, SunCentral's president and CEO.

"There are only about 12 [buildings] in North America that are attempting to achieve this status right now, so that's a very exciting project for us."

In June 2011, the **BC Technology Industry Association** awarded SunCentral the Technology Impact Award for excellence in product innovation.

Formby said Ottawa is now looking for a federal government building in which to implement the SunCentral lighting system.

"They will find a government building that wants to deploy this, and then they will sign a contract with us to purchase it." ■
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