

# focus

## on Technology



FRASER MILNER CASGRAIN LLP

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### QUEBEC SUPERIOR COURT PROVIDES DIRECTION ON THE ENFORCEABILITY OF "WEB-WRAP" AGREEMENTS

On April 11, 2003 the Quebec Superior Court provided guidance on the validity and enforceability of "web-wrap" agreements in the case of *The Canadian Real Estate Association v. Sutton (Québec) Real Estate Services Inc.* In this decision, the Canadian Real Estate Association ("CREA") successfully obtained an interlocutory injunction to prevent Sutton (Québec) Real Estate Services Inc. ("Sutton") from downloading real estate listings from CREA's well established MLS website, including postings from other realtors, and uploading such data onto its own website, without consistently providing the name and contact information of listing agents. Instead, Sutton would post its logo as well as the name and contact information of one its own agents, alongside the information scraped from the MLS website.

CREA took the position that when Sutton accessed the MLS website, it implicitly consented to the terms and conditions governing the website as set out in its "web-wrap" agreement, even if no explicit consent was given. As opposed to "click-wrap" agreements, whereby a user consents to the terms and conditions of a website by clicking on an "I agree" or similar button, "web-wrap" agreements are usually located in a hyperlink located at the bottom of a website's homepage or on a side

panel. In this case, CREA's terms of use included the following notable provisions:

- "All materials on this site are copyrighted and are owned either by CREA or the real estate board who has supplied the property listings and other data";
- "By downloading the property listings and data, the user confirms agreement with, and acceptance of the foregoing conditions of use"; and
- "Anyone legally licensed to sell real property in their province or territory may download, transmit and distribute property ads and the web pages of REALTORS and real estate firms for the sole purpose of introducing a potential buyer of the property. Such ads cannot be modified, re-posted or otherwise used."

Moreover, despite the fact that CREA used technological measures to attempt to block Sutton from unauthorized access to the website, Sutton managed to circumvent such measures by enhancing its own program, and varying its internet source address with each request sent to the MLS website.

Sutton, on the other hand, argued that since it had not expressly consented to the terms and conditions of the “web-wrap” agreement by clicking on an “I agree” button, that it had never consented to the terms and conditions of the MLS website.

The Court ruled that the final determination of the issue would be set aside for consideration at trial, rather than at the preliminary stage of an interlocutory injunction. However, the Court recognized that CREA had a *prima facie* right to preserve the integrity of its website. Hence, the Court issued the interlocutory injunction as the violation of the contractual terms and conditions of the site was to be discontinued until the resolution of the matter at final judgment. In making its decision the Court considered that without the granting of an injunction, CREA would suffer serious irreparable harm, because realtors such as Remax Québec Inc., as well as the *Chambre Immobilière de Montréal*, had threatened to stop sending their listing information to CREA if Sutton did not cease its “illegal” scraping activities. The Court also noted the fact that Sutton has similar terms of use on its own website, in which it claims proprietary rights to all materials displayed on its site, as well as to the organization and layout, and that it should therefore be able to recognize the existence and importance of such agreements.

It should be noted that section 1386 of the *Civil Code of Quebec* recognizes that the exchange of consents in the formation of a contract may be “accomplished by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person.” It will be interesting to see how this legislative provision, which is consistently applied to traditional contracts, will effect the outcome of the enforceability questions surrounding the “web-wrap” agreement.

Although the Court may not have definitively settled whether “web-wrap” agreements are in fact enforceable in Quebec, the decision rendered in *The Canadian Real Estate Association v. Sutton (Québec) Real Estate Services Inc.* has summarily ruled on the importance of respecting such agreements and has set the stage for the resolution of a very interesting question.

## ALBERTA PRIVACY LEGISLATION UPDATE

As recently reported in the October, 2003 edition of *Focus on Technology*, virtually all private businesses and organizations in Alberta are now for the first time subject to private sector privacy legislation. Alberta’s *Personal Information Protection Act* (“PIPA”) was passed in December, 2003 and was proclaimed into force on January 1, 2004. A number of amendments from the original bill were made prior to passage, including:

- In the original draft bill, information collected on potential employees for recruitment purposes would have to be returned or destroyed if the person was not hired. This provision has been deleted and the information may be retained for as long as required by legitimate business or legal purposes;
- with respect to “personal employee information”, there is now also a requirement to provide reasonable notification to an employee that information is going to be collected, used or disclosed and the purposes for which it is to be collected, used and disclosed; and
- for the purposes of PIPA, where an organization engages another person to perform services on its behalf, the engaging organization is responsible for that person’s compliance with PIPA with respect to those services.

In addition, the Personal Information Protection Act Regulation has been passed and addresses such matters as (1) the types of information that are considered to be “publicly available” for the purposes of exceptions to the requirement of consent to collection, use and disclosure, and (2) processes relating to the charging of fees.

The federal Personal Information Protection and Electronic Documents Act (“PIPEDA”) will not apply if PIPA is determined to be substantially similar to PIPEDA. At this point in time, no formal determination has been made regarding this point. In any event, should organizations have operations outside of Alberta, they will be subject to PIPEDA in those jurisdictions, except in Quebec and British Columbia which each have their own private sector privacy legislation.

## CONTACT US

For more information, please contact any one of the following members of our National Technology Law Practice Group:

### Montréal

Dean Chenoy	514-878-5838	dean.chenoy@fmc-law.com
Pierre Dondo	514-878-8877	pierre.dondo@fmc-law.com
Barbara Farina	514-878-8819	barbara.farina@fmc-law.com
Neil Katz	514-878-8883	neil.katz@fmc-law.com
Stefan Martin	514-878-5832	stefan.martin@fmc-law.com

### Ottawa

Tom Houston	613-783-9611	tom.houston@fmc-law.com
Tom Reaume	613-783-9610	tom.reaume@fmc-law.com
Eric Smith	613-783-9632	eric.smith@fmc-law.com

### Toronto

Gillian Akai	416-862-3432	gillian.akai@fmc-law.com
Michael Beirsto	416-862-3412	michael.beirsto@fmc-law.com
Andrea Feltham	416-367-6816	andrea.feltham@fmc-law.com
Colin Ground	416-863-4571	colin.ground@fmc-law.com
Tom Lo	416-863-4507	tom.lo@fmc-law.com
Don Luck	416-863-4564	don.luck@fmc-law.com
Rachael Mendicino	416-863-4569	rachael.mendicino@fmc-law.com
David Ujimoto	416-863-4484	david.ujimoto@fmc-law.com

### Edmonton

Dana Bissoondatt	780-423-7184	dana.bissoondatt@fmc-law.com
Dwight Bliss	780-423-7262	dwight.bliss@fmc-law.com
Colleen Cebuliak	780-423-7136	colleen.cebuliak@fmc-law.com
Craig McDougall	780-423-7398	craig.mcdougall@fmc-law.com
Robert Roth	780-423-7228	robert.roth@fmc-law.com
Michael Obert	780-423-7238	michael.obert@fmc-law.com

### Calgary

Corina Dario	403-268-3049	corina.dario@fmc-law.com
Kristine Eidsvik	403-268-7077	kristine.eidsvik@fmc-law.com
Gail Harding	403-268-7139	gail.harding@fmc-law.com
Sean Ralph	403-268-7101	sean.ralph@fmc-law.com
Laura Safran	403-268-7318	laura.safran@fmc-law.com
Gord Tarnowsky	403-268-3024	gordon.tarnowsky@fmc-law.com

### Vancouver

Blair Horn	604-443-7116	blair.horn@fmc-law.com
Sara McCracken	604-443-7106	sara.mccracken@fmc-law.com
Richard McDerby	604-443-7147	richard.mcderby@fmc-law.com

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