



FIELD LAW

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Tips and Trends in Online Contracting

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Wondering if your online contract will hold up? Here's the good news: online contracts are enforceable in Canada. For a number of years the courts have shown that they will uphold online agreements in the same way as written paper agreements signed by the parties. Contracting parties can show their consent to online terms by means of a click or even by "implied consent", as seen in cases such as:

- i. *Kanitz v. Rogers Cable Inc.*, in which the licensee's conduct of continuing to make use of the service after receiving notice of certain amendments indicated assent to the terms of the agreement;
- ii. *Canadian Real Estate Association v. Sutton (Québec) Real Estate Services Inc.*, where certain Terms of Use were upheld even without express consent to the terms of the agreement;
- iii. *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, in which, once again, assent was communicated by the user even in the absence of express consent. Assent was implied, after notice of the Terms of Use was established, together with the knowledge that continued use would indicate assent.

The bad news is that some online businesses still don't take the necessary steps to ensure their terms are enforceable.

It's important to remember that, despite this line of decisions, online contracts are not "guaranteed" to be enforceable. In the US case *Schnabel v. Trilegiant*, the court considered the enforceability of terms that were emailed *after* the contract was formed. The court commented:

"The question presented to us on this appeal is whether the plaintiffs are bound to arbitrate their dispute with the defendants as a consequence of an arbitration provision that the defendants assert was part of a contract between the parties. Neither of the plaintiffs acknowledge being aware of the existence of the arbitration provision when their contractual relationships with the defendants were formed. But, according to the defendants ... an email sent to the plaintiffs after their enrollment..."

The court concluded that "the email did not provide sufficient notice to the plaintiffs of the arbitration provision." In this case, the online terms were not enforceable, because they were provided to the user *after* the formation of the contract, rather than as a condition of entering into the contract. The practice of emailing online terms to the user is certainly a good practice, but it should not take the place of terms that are presented to the user at the point of contract formation.

Here are several tips for ensuring enforceability of online terms:

- First the user should be provided with proper notice of the existence of the terms. In other words, the user should be made aware that terms apply to this transaction, service, subscription, license, or whatever it is.
- Next, the user should be given a chance to review those terms.
- Lastly, the user should be told that a particular action will indicate consent to those terms – for example, clicking "I accept", tapping "Continue", selecting a radio-button or typing a name. Then the user has to take that action.

- Emailing a copy of the terms after the transaction, or making those terms available for offline viewing, is recommended. However, the email should confirm what has already been presented to and accepted by the user.

If you want advice on ecommerce, online contracting or internet law, contact [Richard Stobbe](#) in our Intellectual Property & Technology Group.

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