

PROPTech: PROPERTY TECHNOLOGY, THE NEW FRONTIER IN REAL PROPERTY, PART 3: CHALLENGES

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In [Part 1](#) and [Part 2](#) of McMillan's PropTech series, we addressed what PropTech is and several of the benefits this technology provides to both developers and consumers. However, industry participants need to be cognizant of the risks and challenges that go along with the introduction and use of PropTech. In this Part 3, we examine some of those challenges.

What are the Concerns When Using or Developing PropTech?

While PropTech can make interacting with a physical space more seamless, cost- and energy-efficient, users and developers of PropTech should be aware of the various risks commonly accompanying reliance on technology.

Privacy. With the introduction of any technology comes privacy and data storage risks, as well as obligations. PropTech technology uses and relies on information for optimal performance. As a result, it generally collects and uses data, including personal information, from users of the PropTech. While consumers generally understand their information is being used, such collection may, however, result in occasional uses or access to details of an individual user which go further than the user understands or expects. For example, technology can collect and transmit information about users' habits, such as when users lock their doors or increase or lower the temperature in their home. On their own, each of these data points is not necessarily problematic, but when aggregated with other data points from other technologies in the home, a third party may be able to develop a very clear picture of a users' daily routine. As another example, some technologies in the rental management space collect credit scores and employment information. Accordingly, companies developing and using such technologies must carefully consider the consequences of their collection, access, and processing of such personal information so they can ensure they have the appropriate level of informed consent from users prior to accessing such personal information. Failure to properly inform users about how their personal information might be used or processed can make any consent received for such use or processing invalid and put the company at risk of violating privacy legislation. Relatedly, companies must ensure they have reasonable and industry-standard data protection processes in place with respect to any personal information they process and store, along with robust data breach protocols to allow them to address

potential breaches. The privacy rules and regulations with respect to the collection, processing, storage and use of personal information vary across provinces and countries. We strongly recommend developers and businesses implementing PropTech review their policies and agreements closely, with the help of [legal professionals](#).

Cybersecurity. As PropTech becomes more ubiquitous, and given the centralized nature of the delivery of PropTech services (via SaaS), PropTech companies may become targets for cybercriminals because of the sheer amount of information they possess and the sensitive nature of that information. Whether it is a sophisticated cybercrime organization looking to hack into a PropTech company's accounts to discover information regarding its licensees, or a lone hacker trying to create problems, PropTech companies are like any other data company and they may become targets. As a result, introducing PropTech into a development without properly investigating the security protocols which the PropTech company has in place can cause involved parties a great deal of trouble. If a hacking incident occurs, a breach notification will most likely need to be sent to anyone affected. Every organization associated with the hack, from the developer, to the PropTech company, to the end user, could suffer a reputational hit. At the same time, companies involved will need to determine who is responsible for dealing with the costs of the hacking and related issues. The costs in terms of money, time, as well as distraction, can be significant during any such incident. Accordingly, it is important to invest the time, resources and energy up front to ensure strong cybersecurity is in place, and clearly articulate who is responsible for addressing any cybersecurity incident in any related agreements.

Licensing. When multi-functional PropTech is licensed into real property, it is important for all parties involved to clearly establish who owns which part of the technology, the terms of the license grant, what limits are on the license grant, where the liability for use of the PropTech starts and stops, and who has rights of use. Payment for the license must also be carefully considered as there are many options for how payment can be made and who is obligated to collect and retain such payments. Parties must also consider who, for the purposes of the PropTech, will actually be the licensee. The licensee can, for example, be the property owner, a property management company, or a resident (owner or tenant). In some cases, it may be that the licensee is the owner or property management company, while the authorized users will be the residents (owner or tenant). Each of these details is fundamental to ensuring a clear understanding and allocation of the rights and obligations on all parties.

Warranties. PropTech also stirs up warranty concerns. Given that PropTech may affect the basic functions of a home, office or other facility (heating, cooling, safety, etc.), a key consideration to the business model of producers targeting their products to consumers includes who is obligated to correct deficiencies or failures in the technology. For example, if the PropTech allows a homeowner to control the locks in a unit, but the PropTech is offline (either due to scheduled maintenance, an emergency fix or other issue), is there a

reasonable workaround which can be immediately implemented so the occupant of the unit can access or lock the space? Generally, most PropTech will allow for manual overrides (for example, a good old-fashioned key), however, consideration needs to be given to a situation where a manual override is not possible. In those cases, it is imperative to ensure redundancies or some form of technology continuity plan is built into the system to allow for uninterrupted service.

Maintenance and Repair. Like all real property (but with a software twist), PropTech requires periodic maintenance and repairs, and attention must be paid to options available to consumers when there is a period of required maintenance, emergency repairs/upgrades or general upgrades. Developers, owners and PropTech companies need to consider issues around notifying the users of any scheduled maintenance and repairs, or if there is an emergency shutdown needed.

Functionality. With technology comes issues of functionality or “bugs”, which can give rise to problems ranging from simple annoyances and reputational harm, to serious liability. On the less severe end, if certain apps controlling outdoor home lighting malfunction (for example), this may reflect on the developer or landlord instead of the PropTech producer, including bad-press or negative reviews on the company’s website or social media accounts. On the more serious end of the scale, if, for example, the PropTech is expected and relied on to alert emergency services, major liability exposure can arise if the technology fails at a crucial moment. Questions such as risk allocation between involved parties, including software designers, PropTech producers, installers, and ultimate owners, should be given consideration and clearly addressed in each level of contract, from design and construction, to licensing, to purchase and tenancy agreements. Risk is normal with every new development in an industry – it is simply that the determination of risk allocation must be considered and accounted for.

Sustainability. The potential lifecycle of PropTech should also be considered. While PropTech software may be continuously updated in the cloud, the users’ equipment needs to be periodically replaced and/or upgraded. In addition, consideration must be given as to the ongoing maintenance and support of any PropTech software in the event the owner of the software goes out of business or ends the PropTech offering. These transactions can be further complicated if the relevant equipment necessary to run the PropTech software is leased and not owned. For example, if a new condo building includes ‘smart’ products (light fixtures, door locks, etc.), does ownership and liability associated with those ‘smart’ products pass on to the purchaser or renter of the condo upon possession, or is the developer/manager responsible for the upkeep of these products? Such questions should be contemplated and addressed as early as possible in the agreements governing the relationships. Scale of use may also factor into this consideration. For example, a commercial customer considering upgrading their PropTech throughout a property may face time-consuming projects and unexpected expenses. Companies like SmartOne have considered this factor when developing their products. SmartOne

integrates technology through software and hardware (think community cameras, smart smoke and leak detectors, smart locks and doorbells, built in consoles to turn on/off lights, contact the concierge, set door alarm, review visitor logs and contact emergency services) and has made clear that when developing their technology, it is made to “operate long-term”^[1]. That being said, changes to technology are common, and the quickly-changing nature of the industry means software and hardware could fast become out-dated.

Consumer Protection. Ensuring ongoing compliance with “Consumer Protection” legislation applicable to the subject jurisdiction(s) is paramount for any PropTech company. Most personal transactions between businesses and consumers are regulated under such legislation, which provides substantial protections to vulnerable consumers for many of the reasons outlined above and more. Additionally, there may be multiple relevant laws to consider if the product is located in one jurisdiction but stored in another. Accordingly, this leads to substantial statutory obligations and liability on suppliers of PropTech products. Consulting with the right team of professionals is key in helping to both identify such obligations, and manage them through contract and other means.

Closing Thoughts

Canada is becoming a key hub for real estate innovation, with PropTech startups and accelerators located all over the country. A recent report found that, of the largest 50 tech markets in North America, four Canadian cities are considered to be in the top five on this list, taking into account the average annual cost of wages and rent. Moreover, two of the fastest growing tech markets in North America are found in Canada (Vancouver and Toronto).^[2] Canada’s talent, government funding and support programs, as well as our thriving real estate industry, provide excellent opportunities for business growth. Whether your business is innovating internally, building strategic partnerships with technology companies, or investing directly or through third parties in emerging technologies, McMillan’s national team can assist with your needs.

If you are looking for advice navigating PropTech matters including real estate acquisition or leasing, development and construction, software licensing, privacy and data protection, or capital-raising, please reach out to the authors of this bulletin to discover how McMillan LLP’s technology, construction, real estate, capital markets and intellectual property teams can assist.

[1] “SmartONE” (last visited 17 January 2022), online: [SmartOne](#).

[2] Proptech Collective, PropTech in Canada 2021 Report (February 2021), online: [Proptech Collective](#) at 40.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against



making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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