



Use of electronic signatures

The *Electronic Commerce Act, 2000*, (ECA) was created to facilitate the exchange of electronic information and sets out the rules for conducting business electronically, i.e., the creating, recording, transmitting and storing of information and documents electronically. Regulations to the Act, which should clarify the requirements and technology standards for important elements such as electronic signatures, have not yet been created.

Questions have been raised within the real estate industry, however, as to the applicability of this legislation to different aspects or activities typical of real estate transactions, and whether electronically executed agreements are enforceable.

It is worthwhile to start by distinguishing between four (4) different types of electronic documents registrants may encounter:

- Electronic documents that are not agreements
- Agreements that are reduced to writing, but do not require signatures
- Agreements that typically have signatures
- Written agreements that must have signatures, and create or transfer an interest in land

1. **Electronic documents that are not agreements** would include a myriad of documents that one party delivers to another. Electronic correspondence would be the most common. In the course of fulfilling an agreement, one party may choose to send correspondence by email. This is not an agreement, but use of an electronic document to support fulfillment of an agreement.
2. **Agreements that are reduced to writing, but do not require signatures** would include many types of on-line purchases, like business supplies, where an agreement is clearly entered into by a party, through electronic documentation where the transaction is completed without a signature.
3. **Agreements that typically have signatures** would include such items from real estate transactions as listing agreements, buyer representation agreements, and so on. In accordance with Code Sec. 13 and 14, registrants are to reduce agreements to writing and present them to their client/customer for signature. The client/customer, however, is not required to sign. The other critical differentiator for this type of contract is that it does not create or transfer an interest in land.

UPDATE – July 2013

The 2013 Ontario budget bill contained an amendment to the *Electronic Commerce Act, 2000* (ECA), which would remove any uncertainty about the use of electronic signatures on Agreements of Purchase and Sale.

However, the amendment has not yet been proclaimed into law.

When, and if, the amendment to the ECA is proclaimed, RECO will inform registrants via e-mail and a revised Registrar's Bulletin will be issued.

The ECA is clear that electronic signatures on such agreements would be binding as if they were signatures on written agreements. However, it is worth emphasizing that this only applies for agreements that do not involve a conveyance of an interest in land, such as those listed above. As such, as long as the two contracting parties agree, electronic documents with electronic signatures are permissible for listing agreements, buyer representation agreements, and all other agreements that do not involve a conveyance of an interest in land.

- 4. Agreements that create or transfer an interest in land** must be reduced to writing and must have signatures of the parties to the contract. These agreements are excluded from the provisions of the ECA, and are covered by requirements of the Statute of Frauds. The current debate revolves around the specific wording of this provision in the ECA.

Section 31 (1) 4 of the ECA reads:

This Act does not apply to the following documents:

- 4. Documents, including agreements of purchase and sale, that create or transfer interest in land and require registration to be effective against third parties.*

The Act specifically articulates the exclusion of Agreements of Purchase and Sale (APS), or other agreements (i.e., leases) where there is conveyance of an interest in land. Some parties have suggested that an Agreement of Purchase and Sale does not require registration – in fact, it cannot be registered on title – and as such electronic signatures ought to be permitted for an APS, and like agreements (i.e., leases). It would appear, however, that the intent of the legislation was to specifically exclude agreements that are covered under the Statute of Frauds, which requires agreements to be in writing, with signatures of the parties to the agreement. As a result of this disagreement, it is the prudent course of action to have all agreements that convey an interest in land completed in writing, with signatures affixed by the parties and not affixed electronically.

Registrants who do wish to take advantage of the provisions of the ECA must ensure compliance with the procedures and mechanics as outlined in the legislation (i.e., what types of agreements it applies to, ensuring the electronic documents are unalterable and stored adequately, etc.).

Ultimately it will be the courts that determine the applicability or exclusion of APS and like agreements under the provisions of the ECA. Until such time as sufficient legal precedence has been established, registrants are advised to act prudently and seek legal advice.

Other noteworthy tips on conducting business electronically:

Brokerages may store documents electronically. Refer to the Registrar’s Bulletin on Electronic Document Storage for details on REBBA 2002 document retention requirements.

Registrants may also wish to review the Registrar’s Bulletin on the use of Electronic Funds Transfers in real estate transactions, and how to ensure compliance with REBBA 2002 record keeping requirements while doing so.