**ELECTRONIC SIGNATURE REGULATION**

**FOR CONSULTATION PURPOSES ONLY**

**NOVEMBER 2014**

**Background**

Ontario’s legislation removing legal barriers to the use of electronic communications is the *Electronic Commerce Act, 2000* (ECA). The ECA was based on the Uniform Electronic Commerce Act (UECA), which in turn was based on the United Nations Model Law on Electronic Commerce.

The ECA and the UECA allow a legal signature requirement to be satisfied by an electronic signature. An electronic signature is defined as information in electronic form applied to, or associated with, a document in order to sign it.

There are no standards of reliability or security for e-signatures in the statute. Just as with handwritten signatures, it is up to the person relying on them to decide if they are sufficiently reliable.

However, the ECA allows the Lieutenant Governor in Council to make regulations about e-signatures for particular uses, specifying security or other rules. No such regulation has been made since the ECA was adopted in 2000.

The ECA and the UECA excluded from their application transactions for the transfer of land, if the transfer would need to be registered. The principle was that it might be risky to allow people to create their own electronic documents; they might expose themselves to fraud, especially if what they created was not acceptable for registration in the land titles system. Low-value transfers that did not need registration, such as short-term leases (for example, the rental of a cottage for a week) were covered by the ECA.

Since the ECA was adopted, Ontario’s electronic land title registration system has been expanded to cover the whole province. In that system, parties’ transactional documents, such as agreements of purchase and sale, are not registered. Also, people have become increasingly comfortable with electronic documents in all areas of life.

As a result, the Legislature repealed the land transfer exception to the ECA in the Budget Measures bill of 2013. Several provinces have followed a similar path; others had already included land transactions in their equivalent legislation.

**The current issue for consultation**

The regulators of lawyers and real estate agents, while supportive of the general use of electronic communications, have expressed concern that such a use should not increase opportunities for real estate fraud. They have expressed a desire for a regulation to govern these signatures.

Specifically, they have asked that any e-signature system to be authorized under the *Electronic Commerce Act* for agreements of purchase and sale of land in Ontario should have these characteristics:

* Verification: Any transfer of an interest in land should only take place on a system capable of providing verification and authentication of the signature that clearly identifies it with the person who executes the document. Currently, this is done through password systems and redundancy processes including confirmation through voice mail and email.
* Audit trail: The regulation should stipulate that all electronic signed documents include some form of audit trail (e.g. using metadata) to enable an auditor to reconstruct who sent what communication related to a transaction, and when.
* Access to information: The regulation should stipulate that any system used to facilitate electronic signatures of real estate documents must expressly enable regulatory and law enforcement agencies to have access to information relevant to a transaction and required to investigate fraud.
* Retention: The regulation should stipulate a minimum duration for which a system for electronic signature on real estate documents must store such documents and associated metadata. To avoid deletion in the face of a fraud investigation, such a retention protocol must not be capable of being overridden.

The power to make regulations for this purpose is stated in the ECA as follows:

Other requirements

s. 11 (4)  If the document is prescribed for the purposes of this subsection or belongs to a class prescribed for those purposes, the legal requirement [that a document be signed] is satisfied only if,

(a) the electronic signature meets the prescribed requirements, if any, as to method; and

(b) the electronic signature meets the prescribed information technology standards, if any.

In other words, the government may make a regulation about the method to be used in e-signing and state standards for the technology involved.

The following text could be included in a potential regulation under the E-Commerce Act that aims at satisfying those concerns, to the extent possible in a regulation under the authority stated above. Comments and points for discussion follow the text of the regulation, which has been informally prepared for the purpose of obtaining this input.

Draft Regulation

1. For the purpose of subsection 11(4) of the Act, the following class of documents is prescribed: agreements of purchase and sale of land in Ontario.
2. A legal requirement that a document of the prescribed class be signed is satisfied by an electronic signature only if the method of signature used:
	1. Is reliable for the purpose of identifying the person who signs;
	2. Ensures that the electronic signature is permanent and cannot be removed from the signed document; and
	3. Is accessible so as to be usable for subsequent reference by any person who is entitled to have access to the document or who is authorized to require its production.

**Should Ontario adopt a regulation to support the reliability of electronic signatures on agreements of purchase and sale of land, and if so, is the text above an appropriate regulation?**

**Points for discussion**

* The Act permits a regulation to be made only about the method of electronic signature. It does not authorize a requirement to create a reliable document workflow, management or retention system.
* Is it reasonable for the regulation to require a signature and document system that is more resistant to fraud, or more subject to audit and retention, than the paper documents now used?
* There is, at present, no generally agreed method of identifying people or of authenticating their assertions of identity. A number of systems can be established for particular transactions or among particular parties. It may be that none of these are suitable to be prescribed by regulation, as none will be equally relevant to all transactions.
* Audits are likely to focus on the electronic document and not on the electronic signature as such. The electronic signature is only one way of authenticating the source of an electronic document. The authentication of an electronic document depends on the reliability of the electronic record system in which it is contained or the underlying electronic information (metadata) it contains. The Act does not authorize a regulation about electronic record systems. The Ministry understands that it is very hard in practice to destroy an electronic document beyond recovery.
* The regulation-making authority of the Act does not extend to a regulation on the method of electronic signatures that deals with access to signed documents. However, the Act says that meeting a writing requirement in law requires an electronic document that is ‘accessible so as to be usable for subsequent reference’.
* The regulation-making authority of the Act does not extend to a regulation on the retention of signed documents. However, the Act contains at least two relevant provisions on this point:
	+ If the law requires information to be ‘provided’ to a person, then the information in electronic form must be provided in a manner that permits it to be stored or printed. Thus, it can be retained in a manner out of the control of the person providing it, and to some extent safe from inappropriate alteration or deletion.

s. 7(1)(c), s. 9 and s. 10.

* + The Act requires electronic documents to be retained for the same period as corresponding paper documents. s. 12.
* There is a risk that making the validity of an electronically signed land transfer document depend on compliance with these requirements will create uncertainty about the enforceability of transactions where none would otherwise exist.
	+ While the requirements would be set out as clearly as possible, they are all matters of degree that could be challenged by someone with an interest in invalidating the transaction, such as creditors of the parties.
	+ The provisions are essentially a reinforcement of the *Statute of Frauds*, since they are designed to prescribe how one may satisfy that Statute electronically. Three provinces have repealed their *Statute of Frauds* as inappropriately restrictive. The Ontario Law Reform Commission recommended the repeal of Ontario’s *Statute of Frauds*’ rule on land transfers as long ago as 1987 (Report on Amendment of the Law of Contract pp 103 – 109).
* The impact of the regulation, and the attendant risk of unexpected invalidity, will be greatest on parties to transactions who are not supported by real estate agents or lawyers. The regulators of these professionals can make it clear what their members should look for, and insist on, in creating electronic documents. These will be additions to the existing set of rules, some provincial and some federal, requiring proper identification of parties and retention of records. (Many of these rules apply as well to financial institutions that would be involved in transactions.) While transacting parties who are unrepresented at the time of the transaction may be more exposed to the risk of fraud, they are also more exposed to the risk of unintentional invalidity if the regulatory requirements are too great or simply overlooked.
* It may be desirable to add to the draft regulation a provision like that of the United Nations Electronic Communications Convention of 2005, allowing for the validity of an electronic signature that has been shown to be reliable in fact, even if it does not meet the technical rules of reliability in the regulation. This would protect less well-advised users from invalidity of a document on technical grounds, despite there being no question in practice of the identity or intention of its apparent signers.
* It is possible that the e-signature could be ‘removed’ – just as a paper signature can be erased or severed – but then the record of the transaction is not complete. See the points above about subsequent reference and retention. The signature can be a separate ‘file’ from the signed document, so long as they are logically associated so you do not get one without the other.
	+ The Law Society has expressed hope that an electronic signature system should produce evidence of the transaction, or the attribution, that is indestructible, to help their investigations and prosecutions. That may be a higher degree of certainty than paper documents offer.
* Is there a risk that requiring an e-signature with these criteria will add costs to transactions that might unduly discourage the use of electronic communications, or lead to the capture of the market by monopoly service providers?

**Note**

Any comments submitted to the Ministry will be considered to be in the public domain and may be published by the Ministry or released under the *Freedom of Information and Protection of Privacy Act*.

**Contact**

Comments should be submitted to the Justice Policy Development Branch, Ministry of the Attorney General, 7th floor, 720 Bay Street, Toronto ON M7A 2S9, attention John D. Gregory, General Counsel, or by email to john.d.gregory@ontario.ca. Questions may also be addressed to him at (416) 326-2503.

**Comments are requested before December 31, 2014**