Report from Council

E-signatures, electronic agreements and electronic tablets

With commerce becoming increasingly digitized, electronic agreements and contracts have grown in popularity. Some licensees have started to use electronic tablets when providing real estate services. The tablets contain, for example, the electronic version of service agreements and Contracts of Purchase and Sale of real estate. The signature of the buyer and seller may be captured by their signing on the tablet, much like when we sign on a tablet for receipt of delivery of a couriered package or at a credit card terminal. The agreements can be printed or emailed directly from the tablet.

The Council has considered the question of whether electronic contracts are enforceable when the signature of a party to the contract is not signed in ink, known as a "wet" signature.

The Council has concluded that electronic agreements and the use of signatures written onto an electronic tablet can create enforceable agreements, whether these are service agreements or Contracts of Purchase and Sale of real estate, so long as all of the essential elements of a contract are in place, e.g. the parties to the contract are known, the terms of the contract are clear and the parties have agreed to those terms.

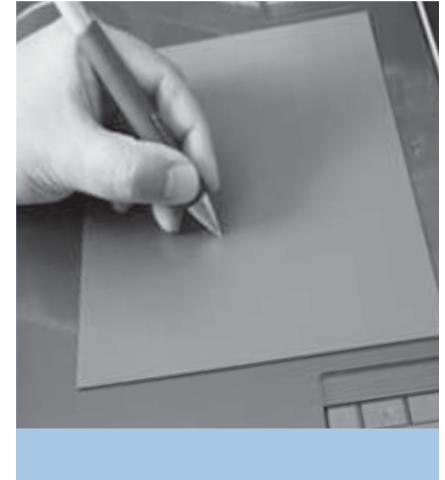The *Law and Equity Act* requires that a Contract of Purchase and Sale of real estate, in order to be enforceable, must be in writing and signed by the party to be charged or an agent of the party. The courts have expressly supported the view that, while the traditional form of writing is a paper document, the definition does not preclude other forms of expression, including electronic communications.

The reason for the requirement of a signature to a contract is to ensure that there has been acknowledgement and approval of the terms of the contract. The signature need not be in any particular form and the courts have supported both manual "wet" and electronic signatures, and electronic signatures that are password protected, as well as those that are not.

Licensees are reminded that email communications, where the name of the sender may appear, **are not** sufficient as a replacement for a "wet" signature on a paper contract or an electronic signature captured on a tablet.

Other Issues: Storage and retention of electronic records

There are other issues which should be considered by licensees and their brokerages using electronic technology. The first concern is that many of the companies promoting electronic agreement software are based in the USA and both the production and the storage of the information is subject to different privacy laws, such as the U.S. federal *Patriot Act* which may result in disclosure of confidential client information in circumstances which would not be required in Canada. As well, section 25 of the *Real Estate Services Act* requires that a brokerage must keep proper books, accounts and other records in British Columbia. Several Council Rules may also apply. For example, section 8-9.1 of the Council Rules permits electronic storage of records but requires the prompt transfer to a printed form of any record upon the request of the Council. Since section 8-10 of the Council Rules requires licensees to keep records for 7 years, the security and accessibility of the storage facility must also be considered when setting up a method of electronic storage within the brokerage. Brokerages may wish to obtain appropriate legal, accounting and IT advice when considering a paperless record keeping system.

Licensees with questions may contact the Council office at 604-683-9664, toll-free 1-877-683-9664 or e-mail info@recbc.ca. ■