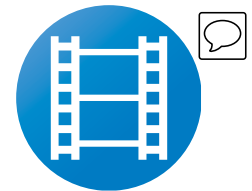


# Electronic Transactions Act

by

ED WILSON



This section features information on specific legislation that adheres to the *Electronic Transactions Act*<sup>169</sup> and covers:

- › important provisions;
- › legislation governing BC and the US;
- › legally binding agreements;
- › litigation;
- › Council Rules;
- › storing records; and
- › litigation.

## Introduction

The Real Estate Council of British Columbia has come to recognize the increasing presence of digital tools and documents in the profession of real estate. The downloading of standard forms and other relevant documents for licensees and clients, phone applications that utilize global positioning systems, file management applications that assist licensees in managing their business operations, and the mortgage calculator, have all been developed to minimize time and maximize efficiency. However, in order to ensure professional responsibility within the confines of real estate law, further understanding of legislation and Council rulings must be taken into account.



**Ed Wilson**, a partner with Lawson Lundell LLP, practices real estate law and acts for developers and investors in commercial and residential projects. Ed has been named as a Leading Practitioner in Real Estate Development by *Expert Magazine*. The Continuing Legal Education Society of BC also awarded Ed the 2007 recipient of CLEBC's Leaders in Learning Award, an award that recognizes volunteers who have made exceptional contributions to continuing professional education.

In addition to assisting BCREA and the provincial government in drafting legislation, including the *Real Estate Services Act* and the *Strata Property Act*, Ed is also the Canadian Bar Association's representative on BCREA's

*continued . . .*

<sup>169</sup> *Electronic Transactions Act*, S.B.C. 2001, c. 10.

continued . . .

Standard Forms Committee. Ed was the principal drafter of the Assignment of Contract of Purchase and Sale, the Commercial Offer to Lease and the Commercial Contract of Purchase and Sale forms.

## The Legislation Governing Electronic Transactions in British Columbia

The *Electronic Transactions Act*, (the “Act”) governs electronic transactions in British Columbia.

The following definitions are found under section 1 in this Act:<sup>170</sup>

**“electronic”** means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

**“electronic agent”** means a computer program, or other electronic means, used to initiate an activity or respond to electronic information, records or activities in whole or in part without review by an individual at the time of the response or activity;

**“electronic signature”** means information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record.

Essentially, the Act grants legal recognition to information that is in electronic form. Section 5 of the Act states:<sup>171</sup>



### SEC. 5 Requirement for a record to be in writing

A requirement under law that a record be in writing is satisfied if the record is:

- (a) in electronic form, and
- (b) accessible in a manner usable for subsequent reference.

Specifically, with respect to the formation and operation of contracts, section 15(1) provides that:<sup>172</sup>



### SEC. 15(1) Formation and operation of contracts

- (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed
  - (a) by means of information or a record in electronic form, or
  - (b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter

<sup>170</sup> *Electronic Transactions Act*, S.B.C. 2001, c.10, s.1.

<sup>171</sup> *Electronic Transactions Act*, S.B.C. 2001, c.10, s. 5.

<sup>172</sup> *Electronic Transactions Act*, S.B.C. 2001, c.10, s. 15(1).

Furthermore, section 15(2) of the Act stipulates:<sup>173</sup>

**SEC. 15(2)** (2) A contract is not invalid or unenforceable solely by reason that information or a record in electronic form was used in its formation.



## The Legislation Governing Electronic Transactions in other Provinces

All Canadian provinces have similar legislation to BC's *Electronic Transactions Act*.

## The Legislation Governing Electronic Transactions in the USA

The *Electronic Signatures in Global and National Commerce Act* is an American federal legislation that was established to validate the use of electronic records and electronic signatures.

Section 101(a)(1) of the *Electronic Signatures in Global and National Commerce Act*<sup>174</sup> states that, "a signature, contract or other record relating to such transaction may not be denied legal effect, validity or enforcement solely because it is in electronic form;" Section 101(a)(2) states that,<sup>175</sup> "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." Furthermore, section 101(e) states:<sup>176</sup>

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

## Can a legally binding agreement be entered into through electronic means?

Sections 3 and 15(2) of the *Electronic Transactions Act*<sup>177</sup> and section 101(a)(1) of the *Electronic Signatures in Global and National Commerce Act*,<sup>178</sup> and equivalent sections in other provinces, provide that contracts and legally binding agreements entered into in electronic form are valid and enforceable. Therefore, as long as the requirements for contract formation are met under the common law rules, a contract formed via electronic means is valid.

## Real Estate Transactions

Transactions and contracts formed via electronic means meet the requirements of the *Electronic Transactions Act*.<sup>179</sup> Section 5 of the *Electronic Transactions Act*<sup>180</sup> establishes the requirement that a record be in writing, is satisfied, if the

<sup>173</sup> *Electronic Transactions Act*, S.B.C. 2001, c.10, s. 15(2).

<sup>174</sup> *Electronic Signatures in Global and National Commerce Act*. Contracts. 15 USC 7001, s. 101(a)(1).

<sup>175</sup> *Electronic Signatures in Global and National Commerce Act*. Contracts. 15 USC 7001, s. 101(a)(2).

<sup>176</sup> *Electronic Signatures in Global and National Commerce Act*. Contracts. 15 USC 7001, s. 101(e).

<sup>177</sup> *Electronic Transactions Act*, S.B.C. 2001, c. 10, ss. 3 and 15(2).

<sup>178</sup> *Electronic Signatures in Global and National Commerce Act*. Contracts. 15 USC 7001, s. 101(a)(1).

<sup>179</sup> *Electronic Transaction Act*, S.B.C. 2001, c. 10, s. 5.

<sup>180</sup> *Electronic Transaction Act*, S.B.C. 2001, c. 10, ss. 5 and 6.

record is in electronic form. However, section 5 and section 6 of the *Electronic Transactions Act* establish that in order for the electronic record or contract to qualify as a “writing,” the electronic record must be in a form that is capable of being retained and accurately reproduced for subsequent reference by all parties to the record.

The Real Estate Council of British Columbia recognizes in the *Professional Standards Manual*, as well as in their publication of *Report from Council*<sup>181</sup> that:

*“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.”*

Section 2(4)(d) of the *Electronic Transactions Act* states under the heading “Applications and exceptions,” that:<sup>182</sup>



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## SEC. 2

### (4) This Act does not apply to

- (d) documents that create or transfer interests in land and that require registration to be effective against third parties.
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The Contract of Purchase and Sale may not create an interest in land per se (it is the Form A Freehold Transfer or Form B mortgage that do that). Therefore, its registration is not required to create rights.

## Record Storage

The primary purpose of requiring an original Contract of Purchase and Sale is to provide evidence that the parties reached an agreement as to the terms of the transaction. The retention of originals by any party may be preferred for evidentiary purposes.

Section 8(1) of the *Electronic Transactions Act* provides:<sup>183</sup>

A requirement under law that a person provide an original record is satisfied by the provision of the record in electronic form if:



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## SEC. 8(1)

- (a) there exists a reliable assurance as to the integrity of the record in electronic form; and
  - (b) the record in electronic form is accessible by the person to whom it is provided and is capable of being retained by that person in a manner usable for subsequent reference.
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<sup>181</sup> Real Estate Council of British Columbia, *Report from Council*, Vancouver, June 2010, p. 1 and August 2011, p. 4.

<sup>182</sup> *Electronic Transaction Act*, s. 2(4)(d).

<sup>183</sup> *Electronic Transaction Act*, s. 8(1).

The criterion for assessing integrity is whether the record has remained complete and unaltered, apart from the introduction of changes that arise in the normal course of communication, storage and display. The standard of reliability required must be assessed in view of the purpose for which the record was created and any other relevant circumstances. Proper technological means must, therefore, be used to provide assurances regarding the integrity of an electronic record.

An electronic or digitally signed contract is certainly capable of complying with the record keeping requirements of the *Electronic Transactions Act*.

### Litigation

In a typical real estate litigation matter, a copy of the contract, offer to lease, a lease or a mortgage is provided to the court as part of the materials filed with the court registry. Parties rarely submit an originally signed copy to the court. For example, in a foreclosure action, where a paper copy of the mortgage in foreclosure was filed in the Land Title Office, it is a copy of that document that is filed with the court registry, not the original signed copy. The original mortgage is not filed. Rather a copy is obtained from the Land Title Office (thus a copy is produced from the microfiche or a scanned copy).

Where the foreclosure relates to an e-filed mortgage, a copy of the e-filed mortgage is provided to the court. That e-filed document does not include any signatures of the mortgagor or the officer. In the case of an e-filed mortgage, a copy of the mortgage, with the signatures, is not provided to the court, unless and until the mortgagor takes the position that they did not execute the mortgage. At that time, a copy of the mortgage showing the signatures is provided to the court registry. It is only if the mortgagor alleges that the signature is a forgery that the provision of the originally signed mortgage becomes an issue.

### Fax/Scanned Copies

As per the *Professional Standards Manual*,<sup>184</sup> the Real Estate Council of British Columbia specifies that, “*fax copies or scanned copies that are emailed are commonly used in real estate transactions where one party or the other is unavailable or residing in a different location.*” Faxed/scanned copies are a suitable way to comply with the requirement that real estate contracts be recorded in writing and signed by both parties to the contract. Faxed/scanned copies should not substitute for the face-to-face interaction with the parties to a contract, where signatures on original documents are obtained.

The Real Estate Council of British Columbia further advises that when sending faxed/scanned copies of a contract, licensees should ensure that the entire contract is faxed or scanned on both sides, as well as any additional addenda or schedules. It is mandatory that the entire contract be complete and legible.

There is a clause in the standard Contract of Purchase and Sale which states:

*This offer if accepted is a legal and binding Contract. See information on back. Read it all before you sign.*

<sup>184</sup> Real Estate Council of British Columbia, *Professional Standards Manual*, 2010, 7th Edition, online at <http://www.recbc.ca/licensee/psm.htm#ch2>.



**The *Electronic Transactions Act* does not provide for electronic signatures to be used on certain types of documents such as:**

- a. wills;**
- b. trusts created by wills;**
- c. powers of attorney; or**
- d. documents that create or transfer interests in land and that require registration to be effective against third parties . . .<sup>1</sup>**

<sup>1</sup> Taylor, Brian, *Legally Speaking*, (British Columbia Real Estate Association, Vancouver, November 2011).



## LICENSEE PERSPECTIVES

*Electronic signatures are beginning to make inroads into business. They are tremendous time-savers in our profession and will save you countless hours of travel and meetings. As well, the real estate public appears to be quite accepting of the practice. There are some suppliers that have made these programs available in the real estate profession. Check with the Real Estate Council of British Columbia to ensure that the program you're thinking of using has gone through their due diligence procedures and is approved for use in BC. Maintain strong documentation of conversations and actions to indicate that your client did indeed sign the document electronically.*

{ STEWART HENDERSON }

Licensees should request that the receiver of the fax/scanned copies confirms that the faxed/scanned copies have been received. If the transmission is unsuccessful, the sending licensee should follow up and make sure that the copies have, in fact, been received.

Sometimes the paper used to receive faxes can deteriorate quite rapidly. Therefore, it is advised that the licensee make a photocopy of the fax copy and keep that on file. A copy of the fax should also be made for acceptance and/or a counter-offer.

The faxed/scanned copy represents adequate evidence of an otherwise legally binding contract. Once the fax includes the signatures from all of the parties in the offer acceptance or counter-offer acceptance, and all of the parties have received the signed fax, the contract becomes valid.

The Real Estate Council of British Columbia cautions that licensees should remember that sending a signed contract by fax or sending a signed scanned copy by email, has the same legal effect as sending a signed original of a contract. It is important that all involved persons be advised as to the binding legal nature of the obligation created by sending a fax or scanned copy by email.

### Council Rules

Notwithstanding the provisions of the *Electronic Transactions Act*, the licensee must still comply with any Council Rules regarding written service agreements. This applies whether they are prepared in paper copy and signed in person, or in electronic form and then printed, signed and scanned, or digitally signed. All written agreements must still comply with the requirements listed in section 5-1 of the Council Rules.

As per the *Professional Standards Manual*,<sup>185</sup> the Real Estate Council of British Columbia states that:

*“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<sup>186</sup> 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.”*

<sup>185</sup> Real Estate Council of British Columbia, *Professional Standards Manual*, 2010, 7th Edition, online at <http://www.recbc.ca/licensee/psm.htm#ch2>.

<sup>186</sup> *Law and Equity Act*, R.S.B.C. 1996, c. 253.

The Real Estate Council of British Columbia reminds licensees 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.

Similarly, the written disclosure requirements under Part 5 can be made electronically. It must be noted, however that the licensee must be able to prove that the disclosure was made and received. As with the Real Estate Council of British Columbia’s warning of email communications not representing the actual signatures required on a paper copy or electronic tablet, sending an email to confirm receipt of a written disclosure does not prove that it was received. Even an email acknowledgement may not be sufficient as the licensee cannot prove it was acknowledged by the correct person.

## Other issues

### Storage and retention of electronic records

The Real Estate Council of British Columbia has highlighted other possible concerns for licensees and their brokerages who incorporate electronic technology into their businesses.

- 1) Many companies that promote electronic software are based in the US and the privacy laws function differently with regards to the production and storage of information. The example provided by the Real Estate Council of British Columbia is the *Patriot Act*.<sup>187</sup> This is a US federal law which may result in the disclosure of confidential client information in circumstances which would not be required in Canada.
- 2) Several Canadian regulations such as:
  - › Section 25 of the *Real Estate Services Act*<sup>188</sup> which requires the brokerage to keep proper books, accounts and other records in British Columbia;
  - › Section 8-9.1 of the Council Rules<sup>189</sup> where the electronic storage of records is permitted, but requires the immediate transfer to a printed form of any record upon the request of the Real Estate Council of British Columbia; and
  - › Section 8-10 of the Council Rules<sup>190</sup> that regulate that licensees save records for a period of seven years;

raises issues of security and accessibility when considering an electronic storage location. The Real Estate Council of British Columbia suggests that brokerages may wish to obtain appropriate legal, accounting, and IT advice when considering a paperless record keeping system.

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<sup>187</sup> *Patriot Act*, 115 Stat. 272(2001).

<sup>188</sup> *Real Estate Services Act*, S.B.C. 2004, c. 41, s. 25.

<sup>189</sup> Council Rules 8-9(1).

<sup>190</sup> Council Rules 8-10.

## Closing dates

In addition to signing and storing documents electronically, the age of computer technology has enabled many public sector organizations to collect documents outside of regular business hours. For example, the Electronic Filing System for land title documents enables lawyers and notaries to electronically submit land title documents between the hours of 6 am and 8 pm Monday to Saturday. However, conveyancing staff and the lending staff at many financial institutions may not be available on Saturdays or after 4:30 pm on Monday to Friday. This can create a potential problem if the intended closing date were to be on a Saturday. Licensees need to ensure, if their clients opt for a Saturday as a closing date, that their clients fully understand any potential problems that may arise.

## The Take-Aways

As a buyer's or seller's representative or both, please consider the following:

- › Based on current legislation in BC and globally, contracts and legally binding agreements entered into in an electronic form are valid and enforceable. The requirements for the contract formation need to be met under section 5-1 of the Council Rules. These include signatures from the party involved or an agent of the party.
- › Any electronic record must be in a form that is capable of being retained, as well as accurately reproduced in both electronic and paper form as requested by the Real Estate Council of British Columbia, and as a subsequent reference to all parties involved with the transaction.
- › Email communication, where the name of the sender may appear, is not acceptable as a signature.
- › Email acknowledgement, regarding the receipt of written disclosure, is not sufficient enough evidence to prove that the acknowledgement was received by the correct person.
- › Be mindful of US-based companies which offer electronic software for file storage and file management as their privacy laws differ.
- › Be mindful that many public organizations, financial institutions, and municipalities have set up electronic filing systems that enable documents to be sent outside of business hours, the staff required though to acknowledge or process the documents may not be available at those times. This can become quite cumbersome and needs to be explained to a client who is considering the close of a real estate transaction outside of established business hours.



## resources

### LINKS

- › Real Estate Council of British Columbia, "E-signatures, electronic agreements and electronic tablets," *Report from Council*, June 2010 Volume 45, No. 6 at [www.recbc.ca/pdf/rfc/2010/june2010.pdf](http://www.recbc.ca/pdf/rfc/2010/june2010.pdf)