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"ELECTRONIC COMMERCE ACT, 2000"

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TABLE OF CONTENTS

INTRODUCTION	1
THE ELECTRONIC COMMERCE ACT, 2000	1
Application	1
Legal Effect	2
Specific Exclusions	2
Electronic Contracts - Specifics	3
(i) Offer and Acceptance	3
(ii) Timing	4
Electronic Signatures	4
Documents or Information Required to be in Writing	5
Original Documents	6
Opting Out of the Act	7
CONCLUSION	8

INTRODUCTION

The *Electronic Commerce Act, 2000*, S.O. 2000, c. 17 (the "Act"), came into force in Ontario on October 16, 2000.

The Act was passed in an effort to remove barriers to electronic commerce. However, the Act is not limited in scope to "commerce" but, rather, applies to almost any legal relationship that requires paper documentation. The driving principle of the Act is that documents and communications should not be denied legal effect or enforceability simply because they are in electronic form. In essence, the Act gives electronic contracts the same legal status as their paper counterparts.

The Act is based on the Uniform Electronic Commerce Act which the Uniform Law Conference of Canada adopted in 1999. It is also consistent with the United Nations Model Law on Electronic Commerce. While Ontario was the first province in Canada to adopt electronic commerce legislation, Manitoba recently passed similar legislation and several other provinces are expected to follow suit shortly.

THE ELECTRONIC COMMERCE ACT, 2000

Application

The definition of "electronic" is the central underlying concept of the Act and is defined under Section 1(1) as follows:

"electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and "electronically" has a corresponding meaning.

Subject to the specific exclusions discussed below, it was the goal of the drafters to have the Act apply to *all* electronic documents and communications. The definition was made deliberately broad and inclusive in order to encompass common place technology such as computer files (i.e. text files) and e-mail correspondence, as well as new technologies that may arise in the future. The only restriction in the definition is that anything described as electronic must be in "digital or other intangible form". Hence, paper documents do not fall within the scope of the Act whereas computer generated or digital documents do.¹

¹

N. Swais, "Maximizing the benefits of electronic commerce: the Uniform Electronic Commerce Act (Part 1)" (Feb. 2000) L. Now No. 4, 42.

Legal Effect

The basic principle of the Act is explicitly set out under Section 4:

Section 4 - Information or a document to which this Act applies is not invalid or unenforceable by reason only of being in electronic form.

Section 4 ensures that electronic documents are not denied validity or enforceability solely by reason of the fact that they are in electronic form. This means, for example, that a lease or license agreement that exists only in electronic form (for example, as a MS Word file) is just as binding as an agreement that has been set out on paper. This is true notwithstanding the written requirements set out in the *Statute of Frauds*.² It should be noted, however, that the Act does not guarantee the effect of electronic documents. There may be many reasons to challenge the validity of a particular electronic document (which can only be decided by reference to established legal principles relating to the validity of contracts). The purpose of Section 4 is merely to ensure that the electronic form alone does not invalidate a document.³

While it is virtually a "given" that drafts of commercial lease contracts exist in electronic form, it is only the paper versions thereof that are executed by the parties. The fact that they are drafted in electronic form should be of no significance in terms of the application of the Act. If, however, it becomes common place to move to a "paperless lease" environment, Section 4 would have the effect of supporting the validity or enforceability of draft leases (to the extent they are otherwise valid and enforceable at law). However, note the "specific exclusions" to be discussed next.

Specific Exclusions

Certain documents are explicitly excluded from the scope of the Act on the basis that these documents require detailed rules and safeguards for their use that could not be established by a general purpose statute such as the *Electronic Commerce Act*.⁴ Section 31(1) of the Act provides as follows:

Section 31(1) - This Act does not apply to the following documents:

1. Wills and codicils.
2. Trusts created by wills or codicils.
3. Powers of attorney, to the extent that they are in respect of an individual's financial affairs or personal care.

² R.S.O. 1990, c. S.19. See "Documents or Information Required to be in Writing", below.

³ *E-Commerce Law: The Law of the Internet, Computers and the Electronic Marketplace* (Kingston: Business Law Reports, 2000) at page 1009.

⁴ *E-Commerce Law: The Law of the Internet, Computers and the Electronic Marketplace* at page 1008.

4. *Documents, including agreements of purchase and sale, that create or transfer interests in land and require registration to be effective against third parties.*
5. Negotiable instruments.
6. Documents that are prescribed or belong to a prescribed class.
[emphasis added]

Item 4 is clearly relevant to commercial leasing practice. However, due to its vague wording, it is impossible to conclusively ascertain whether leases (as well as offers to lease, subleases, surrender agreements etc...) fall within the purview of the exclusion. While it is clear that these documents create or convey interests in land, it is not entirely clear what the drafters of the legislation intended by adding the further stipulation that the document require registration in order "to be effective against third parties". When, if ever, are leases required to be registered to be effective against third parties? Under the Registry system of land registration, leases that have not been registered on title are not void as against prior mortgagees or subsequent purchasers if the term does not exceed seven years and the tenant is in actual possession of the premises.⁵ Under the Land Titles system, leases for a period *yet to run* that does not exceed three years enjoy a similar status.⁶ If a particular property falls under the Registry system, does this mean that a lease for a term of six years falls within the scope of the Act, while a lease for eight years is excluded? Matters are further complicated by the fact that unregistered leases are nonetheless "effective" as against third parties where there is actual notice of the lease. As the Act does not provide a conclusive answer as to applicability, prudence would dictate that the Act should be regarded as potentially applying to executed leases.

While there may be an issue as to the Act's application to leases, there is no doubt that the Act applies to licenses (for example, antenna, telecommunication and storage) as licenses merely provide a right to use or occupy but do not create or transfer interests in land. It is also clear that the Act applies to many other agreements familiar to commercial leasing practice such as non-disturbance agreements and construction agreements. Again, these agreements do not create or convey interests in land.

Electronic Contracts - Specifics

(i) Offer and Acceptance

Although Section 4 is sufficiently broad in itself to include electronic contracts, Section 19(3) removes any doubt that electronic contracts are not to be denied validity or enforceability solely by reason of the fact that they are in electronic form:

Section 19(3) - A contract is not invalid or unenforceable by reason only of being

⁵ R.S.O. 1990, c. R.20, s. 70(2).

⁶ R.S.O. 1990, c. L.5., s. 44(1).

in electronic form.

In addition, Section 19(1) ensures that electronic communications are capable of conveying the kinds of intention that are necessary to form contractual relations. Section 19(1) reads:

Section 19(1) - An offer, the acceptance of an offer of any other matter that is material to the formation or operation of a contract may be expressed,

- (a) by means of electronic information or an electronic document; or
- (b) by an act that is intended to result in electronic communication, such as,
 - (i) touching or clicking on an appropriate icon or other place on a computer screen, or
 - (ii) speaking.

It is possible, therefore, for parties to enter into a binding agreement by merely exchanging the document by way of e-mail. The offer would presumably take place when the agreement is sent over the internet by the offeror. Acceptance could occur by way of an e-mail message (sent by the offeree) confirming that the offeree intends to be bound by the agreement or, alternatively, the offeree could click on an icon agreeing to be bound by the terms of the agreement.

(ii) Timing

Unless the parties agree otherwise, Section 22(1) of the Act deems electronic information or an electronic document to be sent when it "enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee".

Accordingly, the Act deems that a document or message is sent when it leaves the control of the sender. For all practical purposes, this is when the sender can no longer stop the communication from reaching the recipient. However, if the sender and recipient use the same system (e.g. Sympatico or AOL), then the document or message is deemed to be sent when the recipient may retrieve it and process it (that is, when the recipient computer has received the transmission, even if the desktop may at that time be disabled or powered off or the individual recipient is at a remote/inaccessible location).

Electronic Signatures

Section 11 of the Act provides that an electronic signature satisfies the legal requirement that a document be signed or endorsed. Under the Act, an electronic signature consists of "electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document". Accordingly, clicking on an icon or the typing of a symbol or name may constitute valid electronic signatures. An electronic signature is simply *electronic information* and it does not need to resemble a hand-written signature. However, no matter the type of

information used, an electronic signature *must* be capable of linking a person with a document or communication and the signature must have been applied by that person with the intent of signing that document.⁷

Note that the Act does not stipulate how one is to establish who signed an electronic document. As with paper documents, attribution is left to ordinary methods of proof.⁸ Further, the Act does not stipulate how one is to establish that the person who signed the document had the authority to do so. Again, as electronic documents are not afforded special status, such a determination is left to ordinary methods of proof. Accordingly, anyone who wishes to rely on the signature takes the risk that it is invalid. The Act does provide, however, that Regulations may be made to deal with the reliability of electronic signatures.⁹ To date, no regulations have been passed.

Documents or Information Required to be in Writing

Section 5 provides that wherever there is a legal requirement that information or a document be in writing, the requirement is satisfied in electronic form provided the information or document is accessible so as to be useable for subsequent reference:

Section 5 - A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be useable for subsequent reference.

In terms of commercial leases, section 5 effectively overcomes the written requirements set out under the *Statute of Frauds*.¹⁰

Similarly, when there is a legal requirement to provide information or a document to someone in writing, section 6(1) permits the use of electronic information or documents:

Section 6(1) - A legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in a form that is,

- (a) accessible by the other person so as to be useable for subsequent reference; and
- (b) capable of being retained by the other person.

⁷ *E-Commerce Law: The Law of the Internet, Computers and the Electronic Marketplace* at page 1012-1013.

⁸ *E-Commerce Law: The Law of the Internet, Computers and the Electronic Marketplace* at page 1013.

⁹ Section 32(b) and (c).

¹⁰ For example, leases that expire more than three years from the making thereof, must be evidenced in writing.

When compared to section 5, it is important to note that section 6(1) adds the further requirement that the electronic transmission must be capable of being retained by the person to whom it is provided. It is not "capable of being retained" if the person providing it prohibits its storage or printing, nor it is "provided" by being made passively available, for example on a web site.¹¹

In a leasing context, section 6(1) has several implications. For example, before a landlord can terminate a tenancy for a breach of lease (other than non-payment of rent), section 19(2) of the *Commercial Tenancies Act*¹² requires that the landlord provide the tenant with written notice of the breach and the opportunity to cure it within a reasonable period of time. Section 6(1) explicitly permits the landlord to send such notices electronically. In addition, while the provision applies to *legal requirements*, due to the broad and inclusive definition of "legal requirement" under the Act, section 6(1) may also apply to *contractual requirements*. As such, any written notices required to be sent under the terms of a lease (for example, notice of a tenant's intention to exercise an option), may be sent electronically. Again prudence would dictate that section 6(1) should be treated as potentially applying to contractual requirements. As such, individuals should carefully consider whether they wish to receive such notices electronically. If they do not, steps should be taken to opt out of the Act (see below).

Original Documents

Section 8(1) of the Act allows parties to store a written document in electronic format without affecting the binding nature of the document:

Section 8(1) - A legal requirement that an original document be provided, retained or examined is satisfied by the provision, retention or examination of an electronic document if,

(a) there exists a reliable assurance as to the integrity of the information contained in the electronic document from the time the document to be provided, retained or examined was first created in its final form, whether as a written document or as an electronic document; and

(b) in a case where the original document is to be provided to a person, the electronic document that is provided is accessible by the person so as to be usable for subsequent reference and capable of being retained by the person.

Accordingly, section 8(1) allows landlords to move to an entirely "paperless lease" environment by permitting existing documentation to be stored in an electronic form. For example, existing leases could be digitally stored on CD-ROMs thereby allowing landlords to do away with their vast (and costly) lease libraries. It should be noted that before an original document may be

¹¹ See Sections 9 and 10 of the Act.

¹² R.S.O. 1990, c. L-7.

stored in this manner, there must exist a reliable assurance as to the integrity of the information contained in the electronic form. The criterion for assessing integrity is whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display.¹³

Opting Out of the Act

Section 3(1) provides that the Act does not oblige persons to use electronic communications if they do not wish to do so:

Section 3(1) - Nothing in this Act requires a person who uses, provides or accepts information or a document to use, provide or accept it in an electronic form without the person's consent.

However, Subsection 3(2) provides that a person's consent may be inferred from the person's conduct. Accordingly, despite a party's wish not to be bound by the Act, that party can unwittingly find itself to have consented to the use of electronic documents. In this regard, it is interesting to note that some commentators have suggested that handing out a business card with an email address may be taken as consent to receive email for the purposes of that business.¹⁴

Parties should carefully consider whether they wish to conduct their transactions electronically. To date, the e-mail approach to business communication has been characteristically informal in style, often "stream-of-consciousness"-like. Potential for unauthorized editing also exists and while ultimately such tampering may be capable of being traced, a fairly high level of sophistication is called for to conduct the exercise with accuracy. To shift to a practice of accepting contractual commitments through electronic means of communication would require the application of far more vigorous internal/corporate standards than are, in our view, currently observed by many if not most corporate executives and other representatives in their use of electronic means of communication.

Parties who do not wish to bind themselves to a contract by electronic means of communication should insert a provision in their agreements expressly stating that the parties have not consented to the use, provision or acceptance of the agreement in electronic form. Furthermore, the agreement should also state that all notices or communications required to be sent pursuant to the agreement are not validly delivered if sent by way of an electronic communication. Of course, existing agreements not containing these statements are subject to the Act.

Parties who wish to communicate electronically but not for the purposes of binding themselves to a contract should insert a statement in their e-mail communications to the effect that

¹³ See Section 8(2) of the Act.

¹⁴ *E-Commerce Law: The Law of the Internet, Computers and the Electronic Marketplace* at page 1010.

such communications may not be taken as an expression of any legally binding communication. Moreover, upon receiving an electronic communication, the recipient should notify the sender that its communication will not be treated as being legally binding.

CONCLUSION

The *Electronic Commerce Act* is reflective of the recent world-wide embrace of activities conducted in cyber-space. Its simple premise is that parties may make legally binding commitments communicated electronically. This in itself is not particularly troublesome as a concept. Where corporate leadership is required is in (1) formulating the policies by which corporations intend to abide in this regard, (2) communicating those policies to those with whom they have dealings, and to those who may, in their capacity as corporate representatives, bind (or not bind) the corporation to otherwise legally valid and enforceable transactions. In summary, the Act raises more questions than it answers, while at the same time, mercifully, it does not presume to force a style of doing business on anyone.