



New In Electronic Commerce

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The Electronic Commerce Act, 2000 has been in effect for over a decade. While this Act applies to most commercial transaction documents, sub-section 34(1) of the Act sets out a number of exceptions. Until July 1, 2015 one of the exceptions included "... agreements of purchase and sale, that create or transfer interests in land and require registration to be effective against third parties". This exclusion was contained in sub-section 34(1)4 of the Act, which sub-section was repealed in 2013, receiving Royal Assent effective as of July 1, 2015.

As long as agreements of purchase and sale, among other documents, remained outside the purview of the Act, it was at best uncertain as to whether an electronic agreement could meet the requirement of the Statute of Frauds for all such agreements to be in writing. This uncertainty resulted in a reluctance to rely on electronically created purchase agreements. While the repeal of this exception should encourage the use of electronically created purchase agreements, there no doubt remain numerous factors limiting immediate wide spread use.

The Act does not change any of the requirements with respect to the formation of contracts such as the necessity for execution and delivery; rather, it establishes a set of "functional equivalency rules" which, if complied with, gives an electronic document the same legal effect as an equivalent paper document. As with paper documents, it remains the responsibility of each party to satisfy themselves as to the reliability and authenticity of the electronic document. In this regard, section 3 of the Act provides that no party is required to accept electronic documents but rather must consent to their use. Such consent can, however, be implied from the parties' conduct.

The functional equivalency rules of the Act are general, requiring documents to be accessible to the other party, capable of being retained for subsequent use, and reliable as to the integrity of the information contained in the electronic document. Whether any particular electronic document satisfies these requirements is for each party to determine, and ultimately, such reliability must be sufficient to satisfy

rules of evidence in a Court proceeding. Also key to the effective use of electronic agreements is of course the ability to create electronic signatures which will allow parties to go beyond simply transmitting pdf copies of agreements. Satisfaction of the foregoing rules is going to be largely a function of the document management systems used, and its widespread use a function of the availability of such systems.

Ontario has had an electronic registration system for real property since prior to the enactment of the Electronic Commerce Act, 2000, and as such, the effect of this amendment is largely limited to real property purchase agreements. Nonetheless, it is no doubt well overdue and will ultimately serve to facilitate the timely creation of binding agreements and, maybe most importantly, eliminate the inevitable illegible agreement caused by numerous fax transmissions as offers of purchase and sale go through the negotiation process.

About the Author

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