

**Summary: For the purposes of administration of the *Real Estate Act*, Rules, Regulations, and Bylaws, RECA has adopted the position that contracting via electronic agreements is a valid and enforceable method of contracting. RECA's position is subject to judicial consideration of electronic contracting and the development of case law in this area.**

With commerce becoming increasingly digitized, electronic agreements and contracts have grown in popularity. In certain circumstances, the legal enforceability of electronic agreements and contracts in Alberta may be at issue. While it appears essential contract requirements will apply to electronic agreements, i.e. parties must be known, terms must be clear and agreed to by the parties, at this time there are no known legal precedents in the province to provide assistance with regard to the enforceability of electronic contracts.

## Background

Many in the residential real estate industry have started to use “electronic tablets” (tablets) when conducting trades in real estate. These tablets contain an electronic version of service agreements and real estate purchase contracts. The signature of a buyer or seller is electronically/digitally captured in the tablet, similar to the process used by couriers when an electronic signature “pad” is signed on receipt of a package. Electronic agreements may be printed or emailed directly from the tablet.

With the increasing use of tablets and other types of electronic agreements and contracts i.e. lease agreements, mortgage service agreements, appraisal engagements and others, the Real Estate Council of Alberta (RECA) reviewed the validity of electronic agreements in relation to Alberta laws and specifically whether the *Statute of Frauds* and the *Electronic Transactions Act* (Alberta) applied.

The issues RECA considered included:

- whether electronically signed service agreements and real estate purchase contracts are valid in law; and,
- how, if at all, does the *Statute of Frauds* or the *Electronic Transactions Act* or other Alberta legislation apply to electronic transactions involving the supply of services or the sale of land.

## Statute of Frauds (Alberta)

According to the *Statute of Frauds*, agreements pertaining to interests in land, including the buying and selling of land, must be in writing and signed by the parties to the agreement. It applies to real estate purchase contracts. Whether electronic signatures satisfy the requirements of the *Statute of Frauds* does not appear to have been judicially considered in Alberta. However, the definition of “writing” in the *Interpretation Act* (Alberta) and the *Interpretation Act* (Canada) is helpful as is a court case that decided the definition of “writing” in the *Interpretation Act* (Canada) included “facsimile transmission or electronic mail.”

Although there is no judicial interpretation of whether an electronic agreement or signature satisfies the *Statute of Frauds*, it is RECA's opinion that they will satisfy the *Statute of Frauds* because the agreement or signature is simply represented or reproduced in visible form through electronic means, much the same as a facsimile transmission or an email.

### ***Electronic Transactions Act (Alberta)***

The Alberta *Electronic Transactions Act* was proclaimed in force in 2003 but has yet to be judicially considered. The *Electronic Transactions Act* was created to ensure that electronic records and transactions have the same validity and enforceability as traditional paper-based transactions.

It is RECA's opinion that the *Electronic Transactions Act* applies to real estate service agreements and real estate purchase agreements. They create rights and obligations and in the case of real estate purchase agreements, equitable interests in land are created. The *Electronic Transactions Act* and its General Regulation provide that the statute does not apply to "records that create or transfer interests in land (interests that require registration to be effective), including interests in mines and minerals." In the case of service agreements or real estate purchase agreements, neither creates an interest in land requiring registration to be enforceable against third parties. Both are enforceable without registration and therefore the *Electronic Transactions Act* applies.

The *Electronic Transactions Act* contains conditions that must be satisfied in order for information in electronic form to satisfy the legal requirements of information in writing or other non-electronic form including:

*A legal requirement that information be provided to another person in a specified non-electronic form is satisfied if the information is in electronic form, organized in the same or substantially the same manner as the specified non-electronic form, accessible so as to be useable for subsequent reference, and capable of being retained by the other person.*

An electronic signature is defined as "electronic information that a person creates or adopts in order to sign a record and that is in, attached to or associated with the record."

Further, an electronic signature will meet the requirement that a record be signed if the electronic signature is reliable for the purpose of identifying the person and the association of the electronic signature with the record is reliable for the purpose for which the record was created. Electronic signatures do not create a different legal meaning in the electronic world but have the same status as written ones.

In RECA's view, the *Electronic Transactions Act* applies such that electronic real estate purchase agreements and real estate service agreements with electronic signatures are equivalent to those written on paper. It is important to note that because the Act has yet to be judicially considered, the Courts may decide at a later date that this is not the case.

Further, the *Electronic Transactions Act* will apply to different service agreements and contracts in the real estate, property management, mortgage and appraisal industries.

## Conclusion

For the purposes of administration of the *Real Estate Act*, Regulations, Rules and Bylaws, RECA has adopted the position that contracting via electronic agreements with electronic signatures is a legally valid method of contracting. Although not tested in the Alberta courts, it appears real estate service agreements and real estate purchase contracts in electronic form will satisfy the requirements of the *Statute of Frauds* and are by with the *Electronic Transactions Act*.

RECA supports industry professionals adopting new technologies to advance industry efficiency and improve the quality of service to consumers. RECA is prepared to research the application of emerging technologies to the industry and identify potential regulatory issues. Where it is appropriate to do so, it has amended and will continue to amend the *Real Estate Act* Rules to respond to new technologies and business models.

As indicated, RECA has developed its position on the use of tablets and electronic agreements for the purposes of administering the legislation. This Information Bulletin should not be construed as legal advice or advice to industry members to incorporate this technology into their business practices. It is important to reinforce that RECA's position is subject to judicial consideration of the *Electronic Transactions Act* and the development of case law in this area. Industry members who have incorporated this technology into their business practices are encouraged to monitor this issue as well.