

Electronic Commerce Act - Draft With Comments 1998

1998 Halifax NS

Uniform Electronic Commerce Act

[text and commentary]

Definitions

1. The definitions in this section apply in this Act.

(a) "electronic document" means information recorded or stored by electronic, magnetic, optical or similar means.

(b) "law of [enacting jurisdiction]" means an Act of the legislature of [enacting jurisdiction] or an instrument, regardless of its name, issued, made or established under an Act of the legislature of [enacting jurisdiction].

Comment:

The draft Act uses the term "document" rather than "record" in part because "document" seems to cover information that is not yet recorded, and in part because the French version of the Act would have used "document" in French even if the English had been "record".

Paragraph 1(a) is intended to ensure that the type of technology will not be a barrier to the general permission of the Act, so long as the general characteristics of the documents produced make the Act relevant.

Paragraph 1(b) in effect makes the enabling parts of the Act apply to statutes, regulations, and other instruments, but not to the common law. It was felt that few if any common law rules require writing, signature, the use of originals, or the retention of records.

PART 1 - PROVISION AND RETENTION OF INFORMATION

Application

2. (1) Subject to subsection (2), this Part applies in respect of provisions of a law of [enacting jurisdiction], other than provisions in respect of which Part 2 applies.

(2) This Part does not apply to

- (a) wills, trusts, powers of attorney;
- (b) negotiable instruments and documents of title; and
- (c) dealings in land and interests in land.

Comment:

Part 2 deals with transmission of information into and out of government. The general permissions of Part 1 do not apply to such transmission.

Paragraph (2)(a) excludes transfers of personal property management especially where one party may be vulnerable, or dead, at the time they take effect. **Question:** Should we exclude from the exclusion, as Singapore has done, constructive or resulting trusts?

Paragraph (2)(b) excludes negotiable instruments and generally documents that derive much of their legal effect from being traded as if they were goods themselves. To be traded as valuable, they must be unique. Technology has not given us yet a widely-available unique electronic document. All is easily copied.

Dealings in land often depend on a sophisticated registration system. Parts of the system would be excluded from this Part because they fall into Part 2. The working group thought that specialized rules would be needed for electronic land transfers, as have been passed in Ontario. The general permission here will not apply.

*Legal recognition of electronic documents***3. Information shall not be denied legal effect solely on the grounds that it is in the form of an electronic document.****Comment:**

This is the basic principle of the draft Act, and of the Model Law from which it is taken (Article 5). Since the section does not refer to a "provision of law", it applies to common law rules as well as statutes and regulations.

*Saving***4. Nothing in this Part requires a person to use or accept information in the form of an electronic document.****Comment:**

This provision makes clear that the draft Act is intended to remove barriers to, but not to enforce, electronic commerce. It is also the answer to the concern that people will take undue advantage of the draft Act's general permission to use electronic records, risking confusion among people who would receive electronic

documents without knowing how to deal with them. Parties to communications would have to agree to accept information in electronic form.

Question: Should the draft Act limit in any way the right of people to agree to use electronic documents? Should it spell out that such agreements must be genuine, or at least not unconscionable? Otherwise standard form agreements may proliferate by which people dealing with large sophisticated organizations may agree to receive communications in formats they cannot really manage. The Australian working group referred to in Appendix F raised this issue. Likewise NCCUSL's Uniform Electronic Transactions Act discourages

businesses from imposing a "commercially unreasonable security procedure" on those with whom it deals, at the risk of loss from insecure transactions.

Providing information in writing

5. A requirement under a provision of law of [enacting jurisdiction] for a person to provide information in writing to another person is satisfied by the provision of the information in an electronic document, if the electronic document will be under the control of the person to whom it is provided and the information contained in it will be accessible so as to be usable for subsequent reference.

Comment:

This is adapted from Article 6 of the Model Law. Like writing on paper, an electronic document need not have any specified durability. On the other hand, it is important that the recipient of the electronic document have the power to decide how long to keep it, just as he or she would with paper. So putting a notice on one's own Web site would not satisfy a provision that one must give notice in writing, at least until the intended recipient downloads it.

The draft Act is silent on provisions of law that simply require someone to provide information, without saying anything about the form of the information. Under such provision one could use electronic documents today. To the extent that there is any doubt, section 3 should resolve it by ensuring equal legal effect to electronic documents in the absence of specific rules that would deny the effect.

The draft Act does not allow parties to opt out of the standards in the Part, except where specifically provided. Sections 8 on signatures allows a court to take account of an agreement, though the agreement would not be definitive. The reason for the limit is that these rules tell people how to satisfy provisions of law; they are not allowed to opt out of rules of law any more electronically than they would be on paper (or any less).

Providing information in prescribed form

6. A requirement under a provision of a law of [enacting jurisdiction] for a person to provide information in a specific form to another person is satisfied by the provision of the information in an electronic document

(a)if an electronic form has been prescribed for the purpose and the resulting electronic document will be under the control of the person to whom it is provided and the information contained in it will be accessible so as to be usable for subsequent reference; or

(b)if no electronic form has been prescribed, the information is provided in the same form as in the prescribed form and the electronic document will be under the control of the person to whom it is provided and the information contained in it will be accessible so as to be usable for subsequent reference.

Comment:

Besides requirements to provide information in writing, the law may require it to be provided in a prescribed form. This section allows this to happen whether or not there is a prescribed electronic form. Even if there is an electronic form, paragraph (a) requires some control by the recipient, for the same reason as in section 5. Paragraph (b) requires that an electronic form look the same as the paper form, though it may have coding and other communications information in it that the paper form does not have.

Provision of originals

7.(1) A requirement under a provision of a law of [enacting jurisdiction] that requires a person to present or provide a document in original form to another person is satisfied by the provision of a document in electronic form if

(a) there exists a reliable assurance as to the integrity of the information contained in the document in electronic form from the time it is made to the time it is presented or provided; and

(b) where the document in original form is to be provided, the document in electronic form will be under the control of the person to whom it is provided and the information contained in it will be accessible so as to be usable for subsequent reference.

(2) For the purpose of paragraph (1)(a),

(a) the criterion for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any changes that arise in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the document in electronic form was made and in the light of all the relevant circumstances.

Comment:

The basic criteria for serving as a functional electronic equivalent to an original document are taken from the Model Law, Article 8. The principle is that one looks for an original record as some guarantee of its integrity, i.e. that it has not been altered. This is the test reflected in the Model Law and this section. The draft Act adds section 7(1)(b) for the same reason that element was added to sections 5 and 6.

Signature

8. A requirement under a provision of a law of [enacting jurisdiction] for the signature of a person is satisfied by a signature in electronic form if

(a) the signature in electronic form identifies the person and associates the person with the electronic document that the signature is incorporated in, attached to or logically associated with; and

(b) the signature in electronic form is reliable for the purpose for which the document was made, in the light of all the circumstances, including any relevant agreement and the time the electronic document was made.

Comment:

This rule originates in Article 7 of the Model Law. However, the Model Law requires that the person signing should choose a method that indicates the person's "approval" of what is signed. The working group took the view that the legal effect of the signature should be left to the general law, and that the element of approval was not essential to the function of a signature. The element of identification and association in some way, for some purpose, was essential.

The draft Act indicates how the signature may be connected to the document, i.e. it may be "incorporated in, attached to or logically associated with" it. This is intended to cover rather than describe all the methods of signing electronically.

Question: Must there be an element of intention to sign, to associate oneself with the document? If so, must that be stated, as it is in the Uniform Commercial Code's definition of signature - a mark made "with present intent to authenticate". Or is the intent implied in the draft Act by using the term "signature" at all, thus importing the mental elements of the general law about signatures and merely adding the ideas needed to support its being done electronically?

Retention of documents

9. A requirement under a provision of [enacting jurisdiction] to retain a document for a specified period is satisfied by the retention of an electronic document if

(a) the electronic document is retained in the format in which it was made, sent or received, or in a format that can be demonstrated to represent accurately the information in the electronic document;

(b) any information that identifies the origin and destination of the electronic document and the date and time when it was sent or received is retained, other than information the sole purpose of which is to enable the electronic document to be sent or received; and

(c) the information in the electronic document remains accessible for the period that the document is to be retained.

Comment:

These rules are taken from Article 10 of the Model Law and speak for themselves. Paragraph (c) extends the Model Law's "accessible for subsequent reference" to encompass the period specified in the legal requirement that the electronic document is intended to satisfy.

PART 2 - INFORMATION TO AND FROM GOVERNMENT

Application

10. This Part applies in respect of provisions of a law of [enacting jurisdiction] that involve the submission of information to the Government of [enacting jurisdiction] and the treatment of information by the Government of [enacting jurisdiction].

Comment:

Information coming into government cannot be left to the general permission to use electronic documents, since governments do not have the resources to accommodate all possible forms of electronic communications. Rather the draft Act provides for rules to say how information is to be submitted electronically. When these rules are in place, legal requirements to submit information will be able to be satisfied electronically. This solution to the form and volume problems seemed more reliable than depending on the government to consent to the use of electronic documents, under section 4 of Part 1. It gives rule-making power that

might not otherwise exist.

The Part applies as well to information in the hands of government, which is dealt with under section 11.

Collection, storage, etc.

11. A minister of the Crown in right of [enacting jurisdiction] or a department or an agency of [enacting jurisdiction] may use electronic means to create, collect, receive, store, transfer, distribute, publish or otherwise deal with documents or information, even if a law of [enacting jurisdiction] does not specify how that thing is to be done or specifies that the thing is to be done by other than electronic means.

Comment:

This section applies to information in the hands of government and deals with its handling of the information internally and its publication of the information, generally or by individual communication. There are few barriers to the use of electronic information by government now, but the section was thought to be helpful to remove remaining uncertainties.

The section has however a provision that might strike some as radical: it allows a minister or department to use electronic documents *even if* a provision of law "specifies that something is to be done by other than electronic means".

This provision will of course be useful in overcoming old rules about notices in writing, and the like. However, the section would also apply where the legislature had addressed its mind to the use of electronic records and had decided against it. This section will itself be a legislative provision, if the legislature wishes to give the executive this kind of option. It

allows for changing times and technologies. The only practical alternative may be a rule that would prevent the use of electronic records in the face of rules "clearly inconsistent" with the permission in the statute. This rule is no easier to apply within government than it would be for private records.

Writing requirements

12. A requirement under a provision of a law of [enacting jurisdiction] for a document to be in writing is satisfied by an electronic document if

(a) the provision is listed in Schedule 1 or 2; and

(b) the rules respecting the application of this section to the provision have been complied with.

Comment:

This format is common to satisfying writing, original, signature and copying requirements in submitting information to government. The provision of law, whether a statute or a regulation, must be specifically designated as being subject to this Act. Schedule 1 covers statutory provisions and Schedule 2 covers regulations.

In addition, the Act contemplates rules about how electronic documents are to satisfy each provision. The rules need not be the same for each, since the technical environment and the purposes of the programs will differ widely across government.

Question: Should the draft Act require that the rules be standardized as much as possible, or as appropriate, or be subjected to some general harmonizing principle such as those in the Model Law, in order to prevent fragmentation of communications with government as each department chooses different standards for each of its programs? Or should that be left to the common sense of the enacting jurisdictions?

Original documents

13. A requirement under a provision of a law of [enacting jurisdiction] law for a document to be in its original form is satisfied by a document in electronic form if

(a) the provision is listed in Schedule 1 or 2; and

(b) the rules respecting the application of this section to the provision have been complied with.

Comment:

This tracks the general formula of the Part as described in the comment to section 12, as applied here to originals.

Signatures

14. A requirement under a provision of a law of [enacting jurisdiction] for a signature is satisfied by a signature in electronic form if

- (a) the provision is listed in Schedule 1 or 2; and
- (b) the rules respecting the application of this section to the provision have been complied with, including a rule respecting the signing of the document with a signature in electronic form.

Comment:

This tracks the general formula of the Part as described in the comment to section 12, as applied here to signatures.

Copies

15. A requirement under a provision of a law of [enacting jurisdiction] for one or more copies of a document to be submitted is satisfied by the submission of an electronic document if

- (a) the provision is listed in Schedule 1 or 2; and
- (b) the rules respecting the application of this section to the provision have been complied with.

Comment:

This tracks the general formula of the Part as described in the comment to section 12, as applied here to copies. It means little to ask for several copies of an electronic document that is readily copied by the recipient, especially where the document is submitted by electronic submission. Each department will figure out what they really need copies for and dispose of their rules accordingly.

Authority to prescribe forms and manner of filing forms

16. (1) If a provision of a law of [enacting jurisdiction] requires a person to submit information, the minister of the Crown responsible for the provision may prescribe an electronic form to be used for the submission of the information.

(2) If a statute of [enacting jurisdiction] sets out a form, the minister of the Crown responsible for the form may make an electronic form that is substantially the same as the form set out in the statute and the electronic form is to be considered as the form as set out in the statute.

(3) If a non-electronic version of a form is prescribed under a provision of a law of [enacting jurisdiction], an electronic version of the form that is made or authorized by the person or body that prescribed the form and that is substantially the same as the prescribed form is to be considered as the prescribed form.

(4) A provision of a law of [enacting jurisdiction] that authorizes the prescription of a form or the manner of filing a form includes the authority to prescribe an electronic form or an electronic manner of filing the form, as the case may be.

(5) If a non-electronic manner of filing a document is prescribed under a provision of a law of [enacting jurisdiction], an electronic manner of filing the document that is authorized by the person or body that prescribed the manner of filing is to be considered as the prescribed manner of filing.

(6) The definitions in this subsection apply in this section.

(a) "filing" includes all manner of submitting, regardless of how it is designated.

(b) "prescribe" includes all manner of issuing, making and establishing, regardless of how it is designated.

Comment:

This section allows the responsible Minister or department to make electronic forms, either in the absence of specific authority to make forms at all (subsection 1) or to prescribe an electronic version (subsection 4) or despite a provision of statute (subsection 2) or regulation (subsection 3) that already lays out a paper-based form. Subsections (4) and (5) deal as well with the method of submitting the form.

Electronic submission of payment

17. A payment that is authorized or required to be submitted under a law of [enacting jurisdiction] may be submitted in electronic form in any manner specified by the Receiver General for the [enacting jurisdiction].

Comment:

Payments to government are subjected to the general principle of this Part, which is that electronic methods of communication may be used if they comply with the rules set down by the authorities who receive the communications.

Amendment of schedules

18. For the purposes of sections 12 to 15, the minister responsible for a provision of a law of [enacting jurisdiction] may, [by order], amend Schedule 1 or 2 by adding or striking out a reference to that provision.

Comment:

The list of provisions subjected to this Act will be centralized, that is, there will be only one list (two Schedules) under a single Act. However, the list can be amended by any minister responsible for any Act. This gives "local" control to deciding whether to opt in, but ready access to the public, who will know where to look for the information. Each enacting jurisdiction will have to decide the process by which the responsible minister may amend the list.

Question: Should the minister be able to delete items from the list, essentially barring matters from being done electronically after they have been done in this form? Is this provision needed to avoid errors or to account for the evolution of technology or threats to security?

Rules

19. (1) For the purposes of sections 12 to 15, the minister responsible for a provision of a law of [enacting jurisdiction] may make rules respecting the application of those sections to the provision, including rules respecting the electronic formats that may be used and electronic signatures.

(2) Rules made under subsection (1) in relation to a provision of a law of [enacting jurisdiction] must be made on the same day as the [order] is made under section 18 adding the provision to Schedule 1 or 2, but the rules may be amended at any later time.

Comment:

This authorizes the technical standards referred to in sections 12 through 15. Subsection (2) requires that the initial rules be made the same day as the provision of law is added to the permission list under the Act. This will ensure that people know how to submit their information from the first day, without uncertainty as to procedure or as to effect. However, the standards will evolve with changing practices, equipment and technology.

SCHEDULE 1

(List of provisions in statutes)

SCHEDULE 2

(List of provisions in regulations)