

**UNIFORM LAW CONFERENCE OF CANADA
CIVIL LAW SECTION**

REAL ESTATE TRANSACTIONS IN THE UNIFORM ELECTRONIC COMMERCE ACT

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**Winnipeg,
Manitoba
August 2011**

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[1] Much of the legal status of electronic communications in Canada rests on legislation based on the [Uniform Electronic Commerce Act](#),¹ adopted in 1999 (the “Uniform Act”), which in turn is based on principles from the United Nations Model Law on Electronic Commerce² (the “Model Law”) All the common law provinces, Yukon and Nunavut have enacted the Uniform Act, as shown in the chart on the ULCC web site.³ Quebec adopted its [Act to establish a legal framework for information technology](#)⁴ in 2001, mainly based on the principles of the Model Law though not using the Uniform Act as its template. The electronic documents part of the federal government’s [Personal Information Protection and Electronic Documents Act](#) (PIPEDA)⁵ was inspired by the draft of the Uniform Act available in mid-1998 when the federal statute was prepared, though some significant variations were made.

[2] The purpose of the Uniform Act, and thus of most Canadian legislation, was to remove barriers to the legally effective use of electronic communications. They did not intend to regulate that use. They wanted to be sure that legal rules that appeared to require ink and paper, such as writing and signature requirements, did not stand in the way of electronic communications. They did so by setting out a `functional equivalent` to the existing form requirements. Electronic communications that performed the specified function were taken to satisfy those form requirements.

[3] These were new principles in the mid-1990s when UNCITRAL developed them in its Model Law. People were not sure whether they would work, and thus how widely it was safe to apply them. The Model Law thus allows for exceptions to the operation of its rules, though it does not say what those exceptions should be. Thus articles 6 (on writing requirements), 7 (on signatures) and 8 (on originals) all have a paragraph reading ‘The provisions of this article do not apply to ...’. Each implementing country was left to decide the scope of the rule and what to carve out of it.

[4] In deciding what to include or leave out, Canada had to consider the two main features of both the Model Law and the Uniform Act: they were minimalist and they were technology-neutral. They set out their rules for functional equivalence but did not say how to achieve them

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nor what technology to apply to do so. (Quebec's statute is less minimalist but still technology neutral. Parts of PIPEDA are not technology neutral.) Parties to electronic communications were left to decide what was prudent. Just as a contract written on a Kleenex tissue in pencil, signed with an X, can be a legally effective contract but is unlikely to be acceptable in commercial practice, so too certain kinds of electronic communications will not satisfy basic business considerations. The legislation does not make that choice for the users.

[5] With such considerations in mind, the Uniform Law Conference excluded from the Uniform Act a number of communications: wills, testamentary trusts, personal powers of attorney and land transfers that would require registration to be effective against third parties. These documents shared the characteristic that they are often prepared by people without legal advice, people who may have little knowledge of what makes an e-document secure. The decision about prudent practice was thought to be particularly risky to leave open for those people. The chances were considered too high that people would make a document ineffective for security reasons for its purpose, and that fraudulent documents could be created too credibly in this context of free-form documents created by lay people.⁶

[6] In addition, not everyone might appreciate the risks of buying land without registration. Most provinces at the time of the Uniform Act did not have electronic land registration, and Ontario's system, for example, was tightly controlled as to access and technology. Thus whatever people might come up with to transfer land might not be registrable in any event. The Uniform Law Conference's decision to exclude these land transfers reflected the same decision made in then-recent statutes in Australia (see for example the [regulations](#) under the [Electronic Transactions Act, 2000](#)⁷ of New South Wales) and Singapore (see s. 4 and Schedule 1 of the [Electronic Transactions Act](#).⁸)⁹

[7] Recently a number of people have been asking whether the real estate exclusion is still needed, if it ever was. Should the Uniform Act and its provincial enactments be amended to remove that exception, so the legislation would apply to real estate transfers? This paper submits that the Uniform Act should be amended to remove its exception for land transfers. Here are some of the relevant considerations.

[8] First, we need to appreciate the limited scope of the 'exception'. The Uniform Act says

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that where the law requires writing or an original, the requirement may be satisfied by an electronic document of certain characteristics. A signature requirement may always be met by an electronic signature. Thus if the law does not require any of these forms, the legal effect of electronic communications does not rely on the legislation based on the Uniform Act.

[9] Our law rarely requires writing or signatures. As a matter of business prudence, people do tend to ‘get it in writing’, and signatures are widely used for authentication and for the ceremonial purpose of making people realize they are doing something with serious consequences. Just as business prudence leads people to demand these practices, business prudence can govern whether and how they do them electronically.

[10] However, in real estate transactions there are statutes that require writing. In particular, the *Statute of Frauds*,¹⁰ which most if not all of the common-law Canadian jurisdictions have, says that an interest in land needs to be made or created in writing signed by the parties. That statute was certainly present in the minds of the drafters of the Uniform Act. The *Statute of Frauds* applies to the creation of the interest in land, but not to the negotiation that leads to that creation. None of the surrounding documents and correspondence needs to be in writing.

[11] The second consideration deals with our understanding of ‘writing’ requirements. When the Model Law and the Uniform Act were drafted, it was at least an open question whether electronic communications could be considered to be ‘writing’ for legal purposes. Both documents were created on the assumption that ‘writing’ meant ‘on paper’ (or some other tangible medium), and an electronic communication was not in writing. Given the uncertainty on that point, it made sense to remove the doubt by spelling things out.

[12] Since that time, however, the world has become much more familiar with electronic communications. Courts in several common law countries have held that electronic communications satisfy the *Statute of Frauds* writing and signature requirements without any statutory help. The Alberta Court of Queen’s Bench in *Leoppky v Meston*¹¹ found a series of emails capable of constituting an enforceable transfer of a house (though on the evidence, intention to convey was not present). The Court did not mention Alberta’s *Electronic Transactions Act*,¹² which excludes land transfers in any event (section 7(e)).

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[13] Despite our better understanding of the basis in common law for electronically satisfying writing and signature requirements, the presence of the exception in the Uniform Act continues to create uncertainty about the state of the law. Those in the business community, the regulatory community, and elsewhere who are risk adverse continue to point to the exception as a source of doubt and confusion. This greatly limits the ability of people to rely on electronic communications, which in turn impedes progress and the adoption of more efficient and convenient practices in this area.

[14] The third consideration is that not all Canadian jurisdictions have excluded real estate transfers. New Brunswick did not put any exclusions into its *Electronic Transactions Act*.¹³ Manitoba did not exclude interests in land.¹⁴ Quebec's legal framework statute does not mention immovable property. The operation of the law on this point in those provinces has not created problems, to my knowledge. More dramatically, Prince Edward Island¹⁵ and Newfoundland and Labrador¹⁶ originally enacted the Uniform Act with the land exception, and later repealed the exception in order to facilitate their new electronic land registration systems. The American equivalent to the Uniform Act, the *Uniform Electronic Transactions Act*,¹⁷ did not exclude land transfers. It left the question of registrability to the recorders of land transactions.

[15] Furthermore, UNCITRAL revisited the question of the legal effect of e-communications in the *Electronic Communications Convention*¹⁸ in 2005. Confidence in the use of such communications, and in UNCITRAL's 'solution' for removing barriers to them, had grown to the extent that the Convention makes binding on member states what the Model Law had simply put out for adoption or adaptation. The Convention spells out the exceptions, too, as the Model Law had not done. No exception was given for transactions involving land, though that had been suggested in the Working Group's discussions leading up to the Convention. UNCITRAL decided that since some countries already allowed electronic land transfers, there was no global principle against them. Individual countries could exclude them, if desired, by a reservation under article 19.¹⁹

[16] The Uniform Act and its enactments say that they yield to any other law that authorizes, prohibits or regulates electronic communications (section 2(5)). The purpose of this provision was to avoid conflict between the generic permission of the Uniform Act and any existing laws that already created a statutory regime for e-documents or e-filing. The provision clears the way

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for electronic registration statutes, and ensures that even a general permission to satisfy writing and signature requirements of land transfers would stop short of making an e-transfer registrable without further compliance with the registry's rules. That said, as noted PEI and NL repealed their exception to clear the way to e-registration.

[17] Some provinces interpret the text of the statutory exception to mean that only documents that must be registered are excluded. Thus in a system that has specific forms that must be registered, any other document creating an interest in land would still be covered by the Uniform Act. That is not an inevitable reading of the statute, since the unregistrable documents cannot be effective against third parties. The point of the exception was to protect buyers against claims by subsequent buyers (i.e. third parties) either because the original buyers did not know that the transaction had to be registered (by the particular document or some other) or because the electronic transfer was not in registrable form and in the absence of registration, the vendor resold to someone else.

[18] However, even if the law on registration relies on special forms of document or special instructions from an authorized user of the system (generally a lawyer for one of the parties), it may be helpful to have the underlying legal obligation in enforceable electronic form. Moreover, some land title or registry systems, such as Ontario's, provide for registration even of non-standard documents, so a self-created format would not be fatal to protection.²⁰

[19] There are other important benefits to being able to resort to the Uniform Act that go beyond meeting writing and signature requirements. The Uniform Act also contains provisions that support electronic documents, like the validation of electronic contracts (s. 20), the support for the use of electronic agents (s. 21), the ability to correct errors (s. 22) and the presumptions about the time and place of sending and receipt of electronic message (s. 23), that are all useful in contracts about land. The protection of the addressee where information has to be provided to him or her (ss. 8, 9 and 12) would be welcome in land transfer documents. None of these applies while the Act excludes land deals.²¹

[20] Most of Part 2 of PIPEDA applies only to statutes and regulations specially designated under the Act. It is interesting that the only federal legislation to which it applies, over eleven years after it came into force, is the [*Federal Real Property and Federal Immovables Act*](#).²² There

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may be some real demand for electronic land transfers.

[21] The Uniform Act was clear in its policy that excluding land transfers was not a statement that these transfers should never be done electronically, but only that additional security might be needed. “They seem to require more detailed rules, or more safeguards for their users, than can be established by a general purpose statute like this one.”²³ One key concern was how a general purpose statute might affect electronic land registration in a regulatory vacuum. While this risk may have been more imagined than real, the provinces have since had the opportunity to put in place any specific registration rules that they thought necessary.

[22] Industry practice seems to have evolved since then as well. Real estate documents are frequently exchanged by fax, and closings done on the basis of faxed documents. Yet faxes are essentially electronic documents, and a faxed signature is no more reliable than a digitized signature that reproduces the handwriting by electronic means. Further, fax transmissions are sometimes poorly transmitted or hard to read. Banks are known to close mortgage financing on the basis of documents in Portable Document Format (PDF), often with signed paper documents to follow – but the money changes hands on the strength of the electronic versions (and no doubt on the presence of considerable other legally enforceable security).

[23] Most land transfers are not done by people all on their own. If they do not have lawyers, they generally rely on at least one and often two real estate agents, who are licensed professionals entirely capable of watching out for basic questions of security, and who of course know about the need for registration of interests being created. Likewise most real estate transfers involve a financial intermediary that is also aware of procedural requirements. The risk of fraud, say by the creation of multiple inconsistent transfer agreements, is arguably no higher for electronic than for paper documents. (The various incidents of [mortgage fraud](#) in recent years have not depended on electronic documents in particular. The usual key to fraud is misidentification of the parties or their assets, not the manipulation of the text of documents.)²⁴

[24] In the light of these considerations of law, policy and practice, it is submitted that the exclusion of real estate transfers from the Uniform Act and its provincial enactments is no longer justified. Given the case law, one might think that the Act could simply be ignored; the *Statute of Frauds* seems to be comfortable with e-communications – though only one Canadian trial-level

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court has so held. However, the exclusion is still a message, not a prohibition but a warning, a special status that can lead to confusion and lack of certainty about the applicable legal rules and thus to a chilling effect on innovation. The exclusion also prevents resort to the other constructive elements of the Act. It is time for that to change.

[25] **RECOMMENDATION:** The Uniform Act should be amended to repeal s.2(3)(d).

RESOLUTION:

That clause 2(3)(d) of the Uniform Electronic Commerce Act be repealed.

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- 1 Uniform Electronic Commerce Act, [1999] *Proceedings of the Uniform Law Conference of Canada*, p.380, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1999&sub=1999ia>.
- 2 http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf
- 3 The chart is online: <http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4b>.
- 4 R.S.Q., chapter C-1.1, online: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_1_1/C1_1_A.htm
- 5 S.C. 2000 c. 5, online: <http://laws-lois.justice.gc.ca/PDF/P-8.6.pdf>
- 6 An image used at the time was of someone walking into a funeral, pulling a diskette (1999 technology) out of his pocket and announcing he had a previously undiscovered version of Uncle Henry's will.
- 7 S.N.S.W. 2000 c. 8, online: http://www.austlii.edu.au/au/legis/nsw/consol_act/eta2000256/. Electronic Transactions Regulation 2007 – Reg.7, online: http://www.austlii.edu.au/au/legis/nsw/consol_reg/etr2007347/s7.html.
- 8 *Electronic Transactions Act*, Singapore, originally Revised Statutes of Singapore 1999 c. 88, re-enacted 2010 c. 16, online: <http://bitly.com/bJof9X>.
- 9 The Uniform Act also excluded negotiable instruments, for other reasons.
- 10 R.S.O. 1990 c. S.19, R.S.N.S. 1989 c. 442, etc.
- 11 ABQB 45, online: <http://www.canlii.org/en/ab/abqb/doc/2008/2008abqb45/2008abqb45.html>.
- 12 S.A. 2001 c. E-5.5, online: <http://www.canlii.org/en/ab/laws/stat/sa-2001-c-e-5.5/latest/sa-2001-c-e-5.5.html>
- 13 S.N.B. 2001, s. E-5.5, online: <http://www.canlii.org/en/nb/laws/stat/snb-2001-c-e-5.5/53654/snb-2001-c-e-5.5.html>.
- 14 *The Electronic Commerce and Information Act*, C.C.S.M. c. E55, online: <http://www.canlii.org/en/mb/laws/stat/ccsm-c-e55/latest/ccsm-c-e55.html>
- 15 *Electronic Commerce Act*, R.S.P.E.I. 1988 c. 4.1. Amended by S.P.E.I. 2004 c. 29 s.1 to repeal the land transfer exception formerly in s. 2(3)(d) of the Act.
- 16 *Electronic Commerce Act*, S.N.L. 2001 c. E-5.2. Amended by S.N.L. 2009 c. R-10.01 s. 42 to repeal the land transfer exception formerly in s. 4(1)(d) of the Act.
- 17 Uniform Electronic Transactions Act, 1999, online: <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm>.
- 18 UNCITRAL, *United Nations Convention on the use of Electronic Communications in International Contracts*, UNCITRAL 2006, online: http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.
- 19 *Ibid.*, page 35, paragraphs 82 and 83.
- 20 *Land Titles Act*, R.S.O. 1990 c. L.5, s. 82. Section 21 of the *Land Registration Reform Act*. R.S.O. 1990 c. L.4, provides that “an electronic document that creates, transfers or otherwise disposes of an estate or interest in land

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is not required to be in writing or to be signed by the parties and has the same effect for all purposes as a document that is in writing and is signed by the parties,” despite the *Statute of Frauds* or any other statute or any rule of law. The exception in the province’s *Electronic Commerce Act* may have little effect beside this. However, even this broad provision does not provide the advantages mentioned in the next paragraph of the text.

21 In Manitoba the 'functional equivalent' provisions of its implementing statute have not been proclaimed in force, but the contract validation rules have applied since 2000 to land transfers as to other contracts.

22 S.C. 1991 c 50, online: <http://laws-lois.justice.gc.ca/PDF/F-8.4.pdf>.

23 See the annotation to s. 2 of the Uniform Act, above, note 1, at page 385.

24 See for example Ontario’s Lawyers’ Professional Indemnity Company (LAWPRO)’s site on fraud, notably the section on real estate fraud: <http://www.practicepro.ca/practice/fraud.asp>.

Uniform Electronic Commerce Act

Commentary to s. 2 (Application), 2011

That clause 2(3)(d) of the Uniform Electronic Commerce Act be repealed.

Comment: The Act will apply to all legal rules within the authority of the enacting jurisdiction, whether in statute, regulation, order-in-council or common law. This section sets out a short list of exceptions, such as wills and some powers of attorney. The principle of exclusion is not that such documents should not be created electronically. Rather, they seem to require more detailed rules, or more safeguards for their users, than can be established by a general purpose statute like this one.

Until 2011 this section also excluded “documents that create or transfer interests in land and that require registration to be effective against third parties.” That provision was removed for several reasons: the law had become more accepting of electronic communications and increasingly gave them the effect of writing even without statutory direction; real estate documentation other than the actual transfer could be electronic; half the provinces did not have the exception in their e-commerce legislation; real estate transfers would benefit from the other facilitating provisions of the Uniform Act; and most people who transferred real estate did so with the assistance of licensed real estate agents who could advise on matters of form and registration. Any formal or writing requirements imposed by the applicable registration regime continue to apply, regardless of the Uniform Act. (See subsection (5) below.) More detail on this amendment can be found in the Civil Section documents for the 2011 Annual meeting.