

Electronic Transactions Legislation

Legislative Services Branch

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Introduction

In the Throne Speech for the 2000-2001 legislative session, the government of New Brunswick announced its intention to introduce an *Electronic Transactions Act*. The Legislative Services Branch of the Department of Justice has been developing the legislation, and in this paper we invite New Brunswickers and other interested parties to contribute to the process.

The key document on this subject in Canada is the Uniform Law Conference of Canada's *Uniform Electronic Commerce Act*, which was finalized in 1999. The Uniform Law Conference ("ULC") is an organization established by the federal, provincial and territorial governments to promote the harmonization of laws within Canada. The Conference develops "Uniform Acts" which it recommends to governments for enactment. Its *Uniform Electronic Commerce Act* is designed to convert the *United Nations Model Law on Electronic Commerce*, which is the key international document on this subject, into a legislative package for adoption in Canada.

Several provinces and territories have enacted, or are in the process of enacting, legislation based on the *Uniform Electronic Commerce Act* ("the *Uniform Act*"). We are recommending that New Brunswick should do the same. The Bills elsewhere, however, have all made changes, sometimes small, sometimes larger, to the *Uniform Act*, and we, too, feel that there are some changes that should be made. However, we would like to have some feedback on these before final recommendations are made to the government. Members of the public and other interested parties may also wish to make their own suggestions for improvements.

This paper therefore sets out the complete text of the *Uniform Act* (with minor editorial corrections), along with the ULC's commentary on the text. We then add (in italics on the right-hand page) our own "Discussion" of each section and our "Recommendation." After discussing the final section of the *Uniform Act* the paper presents some "Additional Topics" that a New Brunswick Act might address. This package of material will enable readers to understand not only the *Uniform Act*, which is the basic model that we are working with, but also what we are considering changing and why. Comments and new suggestions from the public or other interested parties will be helpful.

Please send your comments to the Legislative Services Branch, Department of Justice, P.O. Box 6000, Fredericton, New Brunswick, Canada E3B 5H1. Please mark any correspondence for the attention of Tim Rattenbury (tel. (506) 453-2569; fax (506) 457-7899; e-mail Tim.Rattenbury@gnb.ca). If you wish to respond electronically, a Response Form is available on the internet (<http://www.gov.nb.ca/justice/>), where an electronic version of the paper is also available. We will need to receive responses no later than February 14th, 2001, in order to ensure that they can be taken into account before final recommendations are made to the government on the content of the Bill.

Uniform Electronic Commerce Act

ULC Introduction:

Legal relationships have long been based on paper documentation. Many rules of law are expressed in language that suits documents on paper. Over the past generation, however, paper has been giving way to computer-generated communications. In the past decade, networked computers and particularly the Internet have accelerated the replacement of paper and spread it into new domains, notably to consumer and domestic transactions.

The effect of these developments on the law is uncertain. To some extent the courts have come to terms with technology, to some extent people made contracts to provide standards for computer communications, and to some extent special legislation has clarified the rules. The Uniform Law Conference of Canada adopted its Uniform Electronic Evidence Act in 1998.

The benefits of efficiency and interactivity that flow from the expansion of electronic communications are reduced by persistent legal uncertainty, however. In particular, it is difficult to be sure that such communications will satisfy statutory rules that require writing, or signatures, or the use of original documents. Many legal relationships, especially contracts, depend on the intention of the parties. It has not been clear to what extent such intention can be communicated automatically, or by symbolic actions like clicking on an icon on a computer screen.

Numerous efforts have been devoted to resolving these uncertainties. The international standard in that direction has been the United Nations Model Law on Electronic Commerce, adopted by the General Assembly of the United Nations in November, 1996. (<http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm>) The Model Law seeks to make the law "media neutral", i.e. equally applicable to paper-based and electronic communications. It does so by proposing "functional equivalents" to paper, i.e. methods to serve electronically the policy purposes behind the requirements to use paper. It does so in a "technology neutral" way, i.e. without specifying what technology one has to use to achieve this functional equivalence.

The result may be described as "minimalist" legislation. The rules may appear very simple, even self-evident. They are also flexible, allowing many possible ways of satisfying them. They are, however, a vital step forward toward certainty. They transform questions of capacity ("Am I allowed to do this electronically?") into questions of proof ("Have I met the standard?"). This is a radical difference. Many computer communications occur between people who have agreed to deal that way. (Indeed the Model Law does not force people to use computer communications against their will.) Without provisions like those of the Model Law, however, the legal effectiveness of electronic transactions on consent may not be clear.

It is important to note that the Model Law does not purport to improve the quality of documents on paper when they are replaced by electronic documents. Defects of form or reliability or permanence that people accept on paper will not affect the validity of electronic equivalents. Parties in practice may ask for more assurance than bare validity gives them, just as they may do for paper records. Oral contracts can be binding, but many people want them in writing anyway. In any medium, the minimal requirements for legal validity may not meet the standards for prudent business or personal transactions. Removing barriers to electronic commerce does not require a change in this philosophy.

The Uniform Electronic Commerce Act is designed to implement the principles of the UN Model Law in Canada. It applies, however, beyond the scope of "commerce", to almost any legal relationship that may require documentation. A list of exceptions appears in section 2. The

commentary to each section explains the principles and, where necessary, the operation of the section. Further assistance may be sought in the UN Guide to Enactment of the Model Law, which is at the same World Wide Web address as the Model Law, noted above.

The Uniform Act has three parts. The first part sets out the basic functional equivalence rules, and spells out that they apply when the people involved in a transaction have agreed, expressly or by implication, to use electronic documents. This avoids the need to amend all the many statutes that may state or imply a medium of communication.

This part applies some special rules to governments. It has been widely considered, not just in Canada but in several other countries, that the general permission to use electronic communications may expose governments to an overwhelming variety of formats and media that they may not have the capacity to handle and that may not work for their particular purposes. Private sector entities can limit their exposure by contract; governments often deal with people with whom they have no contract. Part 1 therefore allows governments to set their own rules for incoming electronic documents. Outgoing documents would have to conform to the general standards of the Act, unless authorized to do otherwise by some other legislation.

Part 2 of the Uniform Act sets out rules for particular kinds of communications, including the formation and operation of contracts, the effect of using automated transactions, the correction of errors when dealing with a computer at the other end of the line, and deemed or presumed time and place of sending and receiving computer messages. Part 3 makes special provision for the carriage of goods, to permit electronic documents in a field that depends, on paper, on the use of unique documents, the creation of which is challenging electronically.

Discussion: *We have three general comments about the ULC Introduction.*

First, we underline the ULC's comment about the Uniform Act being "minimalist" legislation. It does not provide a complete "how to" manual for electronic transactions. It is designed to work in conjunction with existing laws, but to remove some (not all) of the obstacles to electronic transactions that those laws present. Readers should bear in mind the limited purpose of the Act.

Second, we highlight the fact that, despite its title, the Act is not limited to "commerce." The perfect title for the Act remained elusive throughout the ULC's deliberations. We believe, though, that the "Electronic Transactions Act" is a more suitable title.

Third, we should point out that the Bills in other provinces have approached the principles of the Uniform Act rather differently. In Manitoba (as well as at the federal level) they only apply to legislation that is expressly designated by regulation. In other common law provinces, they apply to the law in general unless an exception is made. (This is the Uniform Act's approach.) Quebec's Bill is broader and more philosophical, dealing with electronic information and other forms of information at the same time. The discussion in this paper assumes that a New Brunswick Act would follow the Uniform Act's approach, and would therefore apply to the law in general, not just to designated legislation. For brevity, this paper will refer to the Bills in the other common law provinces and territories as "the ULC-based Bills."

The special rules for governments have also been treated differently. B.C. has omitted them completely. Saskatchewan includes some special rules, but only in relation to what they call "electronic filing" of documents with the provincial government. Whether the special rules are needed in New Brunswick is currently under review.

Definitions

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

- (a) "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.**
- (b) "electronic signature" means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document .**
- (c) "Government" means**
 - (i) the Government of [enacting jurisdiction];**
 - (ii) any department, agency or body of the Government of [enacting jurisdiction], [other than Crown Corporations incorporated by or under a law of [enacting jurisdiction]]; and**
 - [(iii) any city, metropolitan authority, town, village, township, district or [rural municipality or other municipal body, however designated, incorporated or established by or under a law of [enacting jurisdiction].]**

ULC Comment: The definition of "electronic" intends to ensure that the application of the Act is not unduly restricted by technical descriptions. For example, digital imaging relies on optical storage, which is technically not electronic, but which is generally seen as properly subject to this Act. Likewise, new technologies may arise that fit within the principles of the Act that might be excluded by a literal reading of "electronic". The only limit is that the product must be in digital or other intangible form. This prevents the definition from extending to paper documents, which have similar capabilities as the electronic media.

The definition of "electronic signature" does not create a different legal meaning of signature in the electronic world. That is why it refers to an intention to sign, thus importing the general law on the mental state required for validity. The definition serves two purposes. First, it makes clear that an electronic signature is simply electronic information; it does not need to "look like" a handwritten signature, though it is possible to digitize handwriting so that it is displayed in that way. Second, it acknowledges that the electronic signature will not be "attached" to an electronic document the same way as an ink signature is to paper. The electronic signature may be "associated with" the document, by mathematical logic or otherwise. The reliability of the association will affect the validity of the signature. That question is dealt with in section 10, not in the definition.

"Government" is broadly defined to include all parts of the government of enacting jurisdictions. However, at the margins each jurisdiction will have to decide when particular entities are more like private sector bodies that should be subject to the general rules of the Act. Crown Corporations are the most likely candidate for such treatment, but not all of them may be given identical status in each jurisdiction.

Municipal governments may be problematic as well. The reasons for separate rules for governments apply to municipalities. The general permission to communicate electronically in section 17 may be very useful. However, the number of municipalities in most enacting jurisdictions creates the potential for diverse and incompatible technical standards, rendering communications expensive if not impossible. Some kind of central coordination may be advisable. This is beyond the scope of the Uniform Act, however. For this reason the reference to municipalities has been square bracketed.

Discussion 1:

(a) **“electronic”**: As the **ULC Comment** notes, the reason for including an expanded definition of “electronic” was to avoid the argument that “digital” or “optical” or other forms of information were not, technically speaking, “electronic,” and that the Act therefore did not apply to them. We doubt that there is much danger of “electronic” being interpreted so narrowly, and we suspect that the expanded definition would itself provide a fertile source of technical arguments for those who were so minded. A simpler response to the concern that led to the expanded definition may be just to say that “‘electronic’ includes digital and optical.” Several of the ULC-based Bills have simplified the ULC’s definition somewhat, though none have gone quite this far.

Recommendation 1.1: Shorten s.1(a) to something like “ ‘electronic’ includes digital and optical.”

(b) **“electronic signature”**: This definition links up with s.10, which deals with the effect of an electronic signature. Our major comment on electronic signatures will be made when we discuss s.10. Our one observation on the definition itself is that it is deliberately flexible, and we sometimes wonder whether it is in fact so flexible that what it means in practice becomes obscure. We have considered making s.1(b) more concrete by adding that the information that constitutes an electronic signature should “represent the name or the identity of a person,” which we take to be the essence of a signature. A “person” would include a corporation or other legal entity, and any kind of electronic mark can “represent the identity of a person,” even if it does not reproduce a name. At present, however, we think it may be better to stick with the flexibility of the ULC definition rather than to add new words. Later in this paper, when discussing s.10, we present a separate recommendation which should help to convert the flexibility of s.1(b) into a practical rule of thumb which could avert many of the questions that s.1(b), standing alone, might raise.

Recommendation 1.2: Adopt s.1(b) substantially as is.

(c) **“Government”**: The definition of “Government” feeds through into a number of provisions that apply different rules to “Government” than to other “persons.” The **ULC Introduction** explains that this is because “the [Act’s] general permission to use electronic communications may expose governments to an overwhelming variety of formats and media that they may not have the capacity to handle and that may not work for their particular purposes. Private sector entities can limit their exposure by contract; governments often deal with people with whom they have no contract.”

In our **Discussion** of the **ULC Introduction** we mentioned that the ULC-based Bills had taken different positions about whether special rules for Government were needed. We are currently asking other government departments whether they feel the need for special protections beyond those that the Act provides for other “persons.” We hope that municipalities (who are also mentioned in the ULC text) will consider the same question. If we conclude that the Act should apply to Government on the same basis that it applies to others, there would be no need to define “Government.” At present, though, that issue is undecided.

Recommendation 1.3: No recommendation at present in relation to “Government.”

Application

2. (1) Subject to this section, this Act applies in respect of [enacting jurisdiction] law.

(2)The [appropriate authority] may, by [statutory instrument], specify provisions of or requirements under [enacting jurisdiction] law in respect of which this Act does not apply.

(3) This Act does not apply in respect of

(a) wills and their codicils;

(b) trusts created by wills or by codicils to wills;

(c) powers of attorney, to the extent that they are in respect of the financial affairs or personal care of an individual;

(d) documents that create or transfer interests in land and that require registration to be effective against third parties.

(4) Except for Part 3, this Act does not apply in respect of negotiable instruments, including negotiable documents of title.

(5) Nothing in this Act limits the operation of any provision of [enacting jurisdiction] law that expressly authorizes, prohibits or regulates the use of electronic documents.

(6) The [appropriate authority] may, by [statutory instrument], amend subsection (3) to add any document or class of documents, or to remove any document or class of documents previously added under this subsection.

(7) For the purpose of subsection (5), the use of words and expressions like "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of electronic documents.

ULC 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 land transfers. 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.

Subsection (5) says that the Act also does not limit the operation of any rule of the law of the enacting jurisdiction that already provides expressly for the use of electronic documents or expressly bars their use. Subsection (7) ensures that words like "in writing" are not taken to prohibit their use; more specific reference to electronic documents is needed for that purpose. The Uniform Act intends to remove barriers to electronic communications, but not to reform existing law or to bring existing law into harmony with its standards. That is a separate task for the legislature. Enacting the Uniform Act will avoid the need to amend all the statutes of a jurisdiction that impose or imply paper documents. Where such statutes have already been amended, the Uniform Act does not limit their operation. For example, if the enacting jurisdiction has passed the Uniform Electronic Evidence Act, then the provisions of this Act on originals will not apply to the best evidence rule in that jurisdiction.

Subsections (2) and (6) are safety valves, allowing the government to add to the list of exceptions, (2) by provisions of law, (6) by types of document, in case examples of paper-based documents arise after enactment of the Uniform Act where it is thought that electronic communications should not substitute. If such examples are known at the time of enactment, they can be added to the statutory list here. Advance health care directives (if thought not to be

included as a power of attorney for personal care) and agreements on domestic or matrimonial matters might be examples. In the interests of maximizing the benefit of electronic communications, the Uniform Law Conference has kept the exceptions to a minimum.

The Act also allows the government to take the regulatory exceptions off the list again, but not to delete by executive action the exceptions made by statute. While each enacting jurisdiction may choose the legal tool by which the list may be made and amended, the action should be public, as is suggested by the bracketed term "statutory instrument".

There is no general exception for consumer transactions. Consumers want to be sure of the legal effect of their electronic dealings as much as anyone else. Many rules of consumer protection can be satisfied by the functional equivalents to writing in the Uniform Act. However, the general issue of consumer protection in electronic commerce is being separately reviewed by a federal-provincial- territorial working group, and that group may propose complementary harmonized legislation where appropriate.

Discussion 2: *Our main comments here relate to the exceptions provided for by subsections (2), (3), (4) and (6). The rest of the section seems acceptable in substance (though as a matter of drafting, s.2(1) might be considered self-evident, and s.2(7) might perhaps tend to confuse rather than to clarify).*

Subsections (2) and (6) provide authority to create exceptions to the Act by regulation. In an Act which is as wide-ranging as the Uniform Act, we think this is a wise precaution, though we have no particular legal provisions or documents in mind at present as needing to be excluded. We would welcome suggestions.

We would also welcome comments on whether the five specific exclusions in subsections (3) and (4) should be made. They are what remains from a list that was originally longer but was whittled down as the Uniform Act developed. At present, we do not see a convincing reason for making these five exclusions, though we note that all of the ULC-based Bills except Manitoba's (where the issue does not arise) have done so. We will comment on each of the five in turn.

(a) Wills and their codicils. *Though we do not see why anybody would want to prepare a will electronically, we do not see, either, why it should be denied effect if they did. The will would be signed (electronically) by the testator and the witnesses together, so there should be plenty of evidence that the document was signed as a will. If so, it should not be prevented from being admitted to probate – especially so once the new s.35.1 of the Wills Act comes into force. That section will permit the probating of any document that a court is satisfied “embodies the testamentary intentions of the deceased,” even though it is not executed in compliance with the formal requirement of the Wills Act. A court will probably not be easily persuaded to admit an electronic document as a will, especially if there are disagreements about the contents. However, it does not seem right to exclude the possibility.*

(b) Trusts created by wills and their codicils. *If wills are not excluded from the Act, the trusts they create should not be either. If, on the other hand, wills are excluded, the trusts they create will automatically be excluded too. Either way, the specific exception in para.(b) seems unnecessary.*

(c) Individuals' powers of attorney. It will not be possible to prepare powers of attorney electronically unless and until the legislation creates an electronic equivalent to the physical application of a legal seal (which the Uniform Act does not). Powers of attorney therefore exclude themselves from the Act, and do not need to be expressly excluded. It would be odd, furthermore, to exclude a "power of attorney . . . in respect of the financial affairs . . . of an individual" while not excluding agency appointments, which have substantially the same legal effect (except in relation to land transactions).

(d) Documents transferring interests in land. These too normally need seals. Furthermore, the documents that this exclusion refers to need to be registered in order to be effective. Whether they can be registered will depend on whether the Registry will accept electronic documents. If it will, there will be no need for the exclusion. If it will not, an exclusion under the Electronic Transactions Act will still not be needed; the document will not have its intended legal effect, but this is because the Registry will not register it, not because the Electronic Transactions Act excludes it.

(e) Negotiable instruments and documents of title. As we understand things, in order for a document to be accepted in commercial law as being either a "negotiable instrument" or a "document of title" the document must be one that is ordinarily accepted in commercial practice as having a particular effect. The law then confirms that the document has that effect, but it is commercial practice that leads, and the law that follows. On this basis, an exclusion of "negotiable instruments" and "documents of title" seems unnecessary. Until commercial practice develops generally acceptable forms of electronic documentation to serve as a "negotiable instrument" or a "document of title," the exclusion would not be excluding anything. If, though, commercial practice does develop such forms, legislation such as the Electronic Transactions Act should not stand in the way of their legal recognition.

Recommendation 2: Do not exclude the documents mentioned in s.2(3) and (4). If there are to be exclusions, deal with them all by regulation rather than partly in the Act and partly by regulation. Suggestions for exclusions would be welcome.

Crown

3. This Act binds the Crown.

ULC Comment: The Crown is covered by this Act, and its electronic communications will be affected by it. Part 1 contains special provisions for government communications that limits this section somewhat. For greater certainty about the rest of the Act, this section has been inserted.

Interpretation

4. The provisions of this Act relating to the satisfaction of a requirement of law apply whether the law creates an obligation or provides consequences for doing something or for not doing something.

ULC Comment: This section ensures that the enabling rules of the Uniform Act apply broadly to "requirements" to use paper, even if the law does not appear to create an obligation. For example, a statute may say "An acceptance in writing is valid", or "An acceptance not in writing is invalid", instead of "An acceptance must be in writing". The principle of the rule in either case may have been to ensure that oral communications would not be relied on. It was unlikely to have been intended to prohibit an acceptance by electronic document.

Discussion 3: *The Act is intended to apply to the Crown. This needs to be spelled out in order to overcome the presumption in s.32 of the Interpretation Act that “No Act or regulation impairs or adversely affects the rights of the Crown unless it is expressly stated therein that the Crown is bound thereby.”*

Note that saying that the Act binds the Crown does not affect the question of whether special rules for “Government” should be included. Whether special rules were included or not, the Act would still apply to the Crown. The difference would be whether it applied the same rules to Government as to everybody else, or different ones.

Recommendation 3: *Adopt s.3 substantially as is.*

Discussion 4: *This section is intended to clarify the meaning of later provisions such as sections 7 to 16, which say how an electronic document can satisfy a “requirement under [New Brunswick] law” that a document be “in writing” or “signed” or “retained,” and so on. The other provincial Bills contain a similar provision, and we agree that it provides a useful clarification.*

We should add that although later provisions use the expression “requirement under [New Brunswick] law,” the expression “requirement of,” in s.4, seems preferable. A requirement “under” New Brunswick law could be misconstrued as including things such as contractual obligations. This is not the intention of the Uniform Act, which applies to the application of Acts, of delegated legislation such as regulations and by-laws, and of common law rules.

Recommendation 4: *Adopt s.4 substantially as is.*

PART 1

PROVISION AND RETENTION OF INFORMATION

Legal recognition

5. Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.

ULC Comment: This is the governing principle for the Uniform Act. Legal effect may not be denied to electronic communications only because of the electronic form. The reason for the double negative is that the Uniform Act cannot guarantee the effect of electronic communications. There may be many reasons to challenge validity of a particular electronic document. The purpose of this section is to ensure that the electronic form alone is not such a reason.

Much of Part 1 of the Uniform Act deals with particular form requirements, e.g. that information be in writing, or signed. If the law does not require particular forms or media, people should be able to provide information electronically under current law. Section 5 will help remove all doubt, by barring discrimination based on the medium of communication. For example, if someone has to give notice to someone else, electronic notice will satisfy that requirement. Section 5 simply underlines that fact.

Discussion 5: *S.5 sets out what is sometimes called the non-discrimination principle: electronic information is not to be less favourably treated than other forms of information. The Uniform Act is concerned with the “legal effect or enforceability” of information. In that context, non-discrimination means that in situations in which information does not have to be in a particular form in order to have legal effect, electronic information has the same legal effect as other forms of information. For example, an employee can be hired or fired verbally, or in writing, or by e-mail.*

*S.5 would apply across the whole range of New Brunswick law. However, its impact should not be taken as being more dramatic than it is. In some situations, as the **ULC Comment** points out, electronic information already has legal effect, so s.5 reinforces existing law but does not change it. In addition, there are many kinds of activities that do not produce “legal effect” at all. S.5 therefore has no direct bearing on them. These include things like ordinary correspondence and even pre-contractual negotiations and actions such as applying to a bank for a loan. People can decide for themselves whether or not to proceed or to respond to others electronically. S.5 neither limits nor expands their options.*

There are also situations in which s.5 will not apply because it is not “solely” electronic form that prevents electronic information from having legal effect. For example, a legal requirement to publish a notice of a mortgage sale in a newspaper (s.45, Property Act) could not currently be met by an electronic notice. Nor could an obligation to post specified information conspicuously in an apartment building (s.25, Residential Tenancies Act). Nor would it be possible under the Uniform Act to prepare electronically a document that requires a legal seal, because placing a seal on a document involves a physical act and a physical object. Later provisions of the Uniform Act remove some explicit legal obstacles to electronic transactions; the Act establishes electronic equivalents that can be used to satisfy particular legal requirements – e.g., that information be in writing (s.7), or even signed (s.10). However, in the absence of an electronic equivalent, explicit legal obstacles to the use of electronic information will remain. Electronic information will continue to be denied legal effect, but this will not be “solely” by reason of its electronic form.

We will continue the discussion of s.5 in our review of a companion principle – the so-called consent principle – that follows in s.6. For now, however, we will simply say that, subject to some possible minor adjustments of terminology, and to a possible clarification that we will mention shortly, we think s.5 is satisfactory.

We note, incidentally, that several of the provincial Bills have expanded the word “information” in s.5 to “information or a document.” We see this as a clarification rather than an alteration, and we think that such a clarification may well be desirable. In the rest of this paper, nonetheless, we will continue to use the word “information” as meaning the same thing as “information or a document.”

Recommendation 5: *Adopt s.5 substantially as is.*

Use not mandatory

6. (1) Nothing in this Act requires a person to use or accept information in electronic form, but a person's consent to do so may be inferred from the person's conduct.

(2) Despite subsection (1), the consent of the Government to accept information in electronic form may not be inferred by its conduct but must be expressed by communication accessible to the public or to those likely to communicate with it for particular purposes.

ULC Comment: This section ensures that the Act is not used to compel people to use electronic documents against their will. Many people are still uncomfortable with such documents, and of course many others do not yet have the capacity to use them. Nothing "in this Act" requires the use of such documents. However, people can bind themselves to use them, by contract or by practice.

Handing out a business card with an e-mail address in some circumstances may be taken as consent to receive e-mail for the purposes of that business, though possibly not for all purposes. Likewise, placing an order through a web site may be consent to deal with that vendor electronically, though that consent could be withdrawn. The effectiveness of a consent found in a standard form (not negotiated) contract may be open to dispute without some action to show it was intended. Failing to respond to an electronic message is not likely to constitute consent to receive the message in that form, if there is no other evidence of consent to the kind of electronic message received.

This consent rule does not undermine the usefulness of the Uniform Act, which aims at certainty, not compulsion. The Act seeks to give legal effect to electronic documents used by parties who want to use them. It does not give people a calculated or bad faith way out of transactions based on electronic communications, by "strategic" withdrawal of consent. The reality of consent and the effect of a purported withdrawal of consent will have to be judged on the circumstances of particular cases.

Information coming into government has a special status. The general permission to use electronic communications may expose governments to an overwhelming variety of formats and media that they may not have the capacity to handle and that may not work for their particular purposes. Private sector entities can limit their exposure by contract; governments often deal with people with whom it has no contract. Part 1 therefore allows governments to set its own rules for incoming electronic documents. The "consent" to accept electronic records must be express, not implied, and it must be communicated to those likely to need to know it. This could be done by posting requirements on a web site, or by issuing a directive, or by more or less formal means depending on the circumstances. It could also be expressed in a particular contract, if the policy applied to all such contracts.

Discussion 6: *The ULC Comment explains s.6 in some detail. The purpose of s.6 is to ensure that people are not forced to use or accept electronic documents against their will. It has two dimensions. First, the Act does not oblige people to use electronic communications at all if they do not wish to. Second, even when people are using electronic communications for some purposes, they are not required to use them for all purposes. Like s.5, s.6 applies across the board, not only to the particular kinds of electronic documents or activities for which later sections establish electronic equivalents.*

Described in those broad terms, s.6 makes good sense. Nonetheless, throughout our dealings with the Uniform Act, we have always felt that there is an unresolved tension between s.5 and s.6. S.6 is designed to permit people to refuse to accept electronic documents, possibly even after they have received them. This, though, seems hard to reconcile with the non-discrimination principle that “Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.” On the face of things, after all, “I will need this in writing” is an objection to the electronic form of a document and to nothing else. An example might be that of an employer attempting to fire an employee by e-mail. Is the employee (a) fired, because s.5 says that the e-mail cannot be “denied the legal effect” that a verbal or written dismissal would have had, or (b) not fired, because s.6 says that the employee is not required to accept the information in electronic form?

As we read the Uniform Act, the key to resolving these issues is “consent,” and in most cases probably “inferred consent.” In the example above, if e-mail was among the accepted methods for conducting this particular employer/employee relationship, the dismissal would be effective. If not, the employee should be able to reject the electronic dismissal, thus denying it legal effect.

Generally speaking, we would anticipate that the major elements in determining the extent of a person’s inferred consent would be (i) the nature of the document in question, (ii) the pre-existing relationship or dealings (if any) between the parties, and (iii) the specific legal effect that one party alleges (and the other presumably denies) that a communication has had. In addition, if the legal effect of the particular document depended on the use of one or more of the electronic equivalents established by later sections of the Act (e.g. an electronic signature), it would need to be shown that the consent extended to the use of the electronic equivalent.

Assuming that this is the desired effect of s.6, is it clear from the current wording? Other ULC-based Bills have adopted s.6 with some small but perhaps significant changes. Some of them use the word “receive” in place of “accept.” Arguably this weakens the “consent” principle, since an inferred consent to “receive” information seems easier to establish than an inferred consent to “accept” it. The Ontario Bill, by contrast, has retained “accept” and has added that in order for consent to be inferred, there must be “reasonable grounds to believe that the consent is genuine and is relevant to the information or document.” None of the Bills seem to have considered that there was any tension with s.5 that needed to be resolved.

We suggest that an adjustment similar to the latter part of Ontario’s provision is probably appropriate. This would make it clear that consent, whether express or inferred, must apply to the kind of communication received and to any electronic equivalent it embodies. Without this, s.6, could easily be read as making consent an all-or-nothing proposition, so that a person’s consent to receive any information electronically could be taken as a consent to receive all information electronically. A more nuanced approach matches the intention of the Uniform Act better.

We have also considered whether it would be wise for the Act to spell out that s.5, the ‘non-discrimination’ principle, is “subject to” s.6, the consent principle, thus avoiding the tension between the two principles that we have referred to above. Our present view is that this is not necessary, that the statement in s.6 that “Nothing in this Act” requires a person to accept electronic information is strong enough to prevail over the non-discrimination principle in s.5 in any case in which consent and non-discrimination seem to point in different directions. However, we would reconsider this if respondents to this paper disagreed.

We are aware, of course, that placing such emphasis on consent weakens the apparent force of the non-discrimination principle when read in isolation, but we believe (a) it reflects the intention of the Uniform Act better, (b) that preferring consent over non-discrimination may be no bad thing in these early days of electronic transactions, and (c) that over the course of time, expectations as to what is or is not done electronically will evolve, and the accepted scope of “inferred consent” will develop correspondingly.

Recommendation 6.1: Revise s.6 to make it clear that consent must apply to the kind of communication received and to any electronic equivalent it embodies.

Subsection (2), requiring “express” rather than “inferred” consent from Government, is one that we are examining in the context of our general review of whether special provisions for Government are required. Our only comment on it at this time is that, taken literally, s.6(2) seems like a major complication for electronic dealings both by and with government. One question we are reviewing with other departments is whether they do in fact need any greater protection than the ordinary consent principle, as described above, provides. Under that principle, governments, like anybody else, would be largely free to deal with anybody electronically or not, as they wished. The only real danger of “legal effect” being produced unintentionally would be that a court might interpret the government’s inferred consent in a particular situation as being broader than the government intended. The same danger would apply to other people, of course, though perhaps it may be different in nature or degree when government is involved.

Recommendation 6.2: No recommendation at present in relation to “Government.”

Requirement for information to be in writing

7. A requirement under [enacting jurisdiction] law that information be in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference.

ULC Comment: The Model Law takes as the basic function of writing the establishment of memory, that is the durable record of information. As a result, the equivalent of this function can be achieved if an electronic document is accessible so as to be usable for subsequent reference. "Accessible" means understandable as well as available. "Subsequent reference" does not specify a time for which the electronic document must be usable, any more than a piece of paper is guaranteed to last.

Providing information in writing

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

- (a) if the electronic document that is provided to the other person is accessible by the other person and capable of being retained by the other person so as to be usable for subsequent reference, and**
- (b) where the information is to be provided to the Government, if**
 - (i) the Government or the part of Government to which the information is to be provided has consented to accept electronic documents in satisfaction of the requirement; and**
 - (ii) the electronic document meets the information technology standards and acknowledgement rules, if any, established by the Government or part of Government, as the case may be.**

ULC Comment: When the law requires someone to provide information to someone else in writing, then more is needed than mere accessibility. The recipient has to receive the document in a way that gives him or her control over what becomes of it. One cannot give notice in writing by holding up a text on paper for the other person to read. One must deliver a paper. This section therefore requires the information to be accessible for subsequent use, but also that the information be capable of retention by the person who is to be provided with the information. How it is made capable of retention is not specified, as different types of enterprise may use different means for different purposes. In some cases the information may be sent by e-mail; in others, it may be made available for printing or downloading, if the intended recipient is given notice that it is so accessible.

Government may apply information technology standards, which would extend at least to hardware and software specifications and rules on the medium of communication (diskette, the Internet, dedicated phone line, and so on.) Government may also choose to make rules about acknowledgements, where information is to be provided to it, so the person submitting information has evidence that the information is received.

Discussion 7: *S.7 is the first of several sections that describe how an electronic document can satisfy various “requirements under [New Brunswick] law” that, at first sight, would seem to preclude the use of electronic documents. S.7 deals with requirements for information to be in writing. Later sections deal with things such as prescribed forms (s.9) and requirements for signatures (s.10).*

*These sections only apply to requirements of New Brunswick “law.” They do not, therefore, affect the interpretation of agreements or other private documents in which people have used language which, deliberately or otherwise, precludes the use of electronic documents. Nor do these sections require anyone to accept an electronic alternative to the conventional form of the document (see the **Discussion** of s.6, above). What the sections do mean, though, is that parties who do wish to deal with each other electronically will be able to overcome some specific legal obstacles to doing so.*

S.7 itself applies to legal requirements that information “be” in writing. All of the ULC-based Bills so far have accepted the idea that being “accessible so as to be usable for subsequent reference” is equivalent to being in writing. We believe that as a general rule, and subject to any specific exceptions that may be made, this is appropriate.

Recommendation 7: *Adopt s.7 substantially as is.*

Discussion 8: *S.8 builds on section 7. It sets out how people can satisfy a requirement of law for information to “be provided” (not merely to “be”) in writing. The key additional element is that the information must be “capable of being retained by” the person to whom it is provided. This expression has been followed by the other ULC-based Bills, and we see no reason to change it.*

The special provisions in s.8(b)(i) tie in with the requirement in s.6(2) that the Government’s consent must always be express. As noted above, the need for s.6(2) is under review. As for s.8(b)(ii), we see this as simply setting out expressly something that is already implicit in the consent principle, and therefore applies to everybody. Since people can decide for themselves whether to accept electronic equivalents at all, they can also set their own terms as to the kinds of electronic documents they will accept. Those terms could include both information technology standards and acknowledgment rules.

Recommendation 8: *Adopt the non-government part of s.8 substantially as is. No recommendation at present in relation to “Government.”*

Providing information in specific form

9. A requirement under [enacting jurisdiction] law for a person to provide information to another person in a specified non-electronic form is satisfied by the provision of the information in an electronic document,

- (a) if the information is provided in the same or substantially the same form and the electronic document is accessible by the other person and capable of being retained by the other person so as to be usable for subsequent reference, and**
- (b) where the information is to be provided to the Government, if**
 - (i) the Government or the part of Government to which the information is to be provided has consented to accept electronic documents in satisfaction of the requirement; and**
 - (ii) the electronic document meets the information technology standards and acknowledgement rules, if any, established by the Government or part of Government, as the case may be.**

ULC Comment: Sometimes writing requirements are more precise. Statutes or regulations may prescribe a form for presenting the information. This section describes the functional equivalent of those requirements. Electronic documents must have the same or substantially the same form as the requirement - format is a vital part of meaning.

The same rules for government documents apply as did in section 8.

Discussion 9: *The wording of s.9 is confusing. It uses the word “form” to refer to things such as the layout of standardized documents that are prescribed under various Acts. Several other sections use the word “form” differently (particularly in the expression “in electronic form”), as describing the medium in which information is expressed. The wording of s.9 needs adjustment.*

Once this is done, however, we believe that the approach of the section is acceptable. An electronic document that is in the same or substantially the same form as the prescribed document can satisfy the legal requirement for the prescribed form. (The Ontario and B.C Bills use the expression “organized in the same or substantially the same way [manner],” which may be a slight improvement.) This is all subject to s.6, of course: no one is required to accept the electronic version in place of the conventional form unwillingly. But parties that are content to deal with each other on the basis of the electronic form can do so.

In relation to the “Government” provisions in s.9(b) the same comments apply as under s.8.

Recommendation 9: *Adopt the non-government part of s.9 substantially as is. No recommendation at present in relation to “Government.”*

Signatures

10. (1) A requirement under [enacting jurisdiction] law for the signature of a person is satisfied by an electronic signature.

(2) For the purposes of subsection (1), the [authority responsible for the requirement] may make a regulation that,

(a) the electronic signature shall be reliable for the purpose of identifying the person, in the light of all the circumstances, including any relevant agreement and the time the electronic signature was made; and

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

(3) For the purposes (of subsection (1), where the signature or signed document is to be provided to the Government, the requirement is satisfied only if

(a) the Government or the part of Government to which the information is to be provided has consented to accept electronic signatures; and

(b) the electronic document meets the information technology standards and requirements as to method and as to reliability of the signature, if any, established by the Government or part of Government, as the case may be.

ULC Comment: A signature may mean many things in law, but the essential function is to link a person with a document. A signature without a document is only an autograph. This section therefore makes an electronic signature, as defined, function as a signature in law. The definition requires that the information purporting to constitute the signature be created or adopted by a person with the intent to sign the document, and that it be associated in some way with the document. Someone who alleges that an electronic signature meets a signature requirement will have to prove these characteristics to the satisfaction of the court or other decision maker.

The general law does not set any technical standard for the production of a valid signature. The essential question is the intent of the person who created the mark or symbol alleged to be a signature. This would normally be proved by evidence extrinsic to the document, though the position of a name written in ink may lead readily to the conclusion that it was intended to be a signature. Evidence of intent of electronic signatures will develop with practice.

Although the UN Model Law makes an electronic signature meet a test of appropriate reliability in order to meet a signature requirement, the Uniform Law Conference felt that such a test would detract from the "media neutrality" of the Uniform Act. However, where the authorities responsible for a signature requirement take the view that the requirement does imply some degree of reliability of identification or of association with the document to be signed, they may under subsection (2) make a regulation to impose a reliability standard. The language of subsection (2) is based on that in the Model Law.

Signatures submitted to government must conform to information technology requirements and also to any rules about the method of making them or their reliability. Different departments may have different standards for such matters, depending on what they need to do with the signed information.

The Uniform Act does not say how to show who signed an electronic document. Attribution is left to ordinary methods of proof, just as it is for documents on paper. The person who wishes to rely on any signature takes the risk that the signature is invalid, and this rule does not change for an electronic signature.

Discussion 10: *The key point to remember about s.10(1) is that under the consent principle in s.6, nobody is required to accept an electronic signature in place of a handwritten one. The definition of “electronic signature” in s.1 can therefore be broad, as it is, without there being a danger that people will be forced to accept as signatures electronic marks that, in their view, are completely unreliable.*

The argument is sometimes made that “electronic signatures” legislation should do more than this: that it should aim to make an “electronic signature” a reliable means of authenticating a document and associating a particular individual with it. This is one of the goals that the so-called “public key infrastructure” (“PKI”) is designed to achieve. PKI and similar schemes, however, can become operationally complex and are unlikely to spread to the public at large for some time. The Uniform Act is not designed to create a PKI structure, but it does provide support to PKI in that it permits the end product of PKI (an electronic mark applied to a document in order to sign it) to be accepted in law as a “signature.” With this in place, parties can choose to use PKI or whatever other authentication methods they find acceptable.

*Our one suggestion for a revision to s.10(1) is that we think the Act could usefully give some concrete guidance as to how an electronic document might be signed. We believe that if an electronic document said something like “Signed: John Doe,” or “This document was signed by John Doe,” it would clearly contain an electronic signature within the meaning of s.1. The words “John Doe” would be “information in electronic form” and the statement that the document had been signed would be clear evidence that the information “John Doe” had been placed in the document “in order to sign” it. We suggest, therefore, that the Act should state that where an electronic document expressly purports to be signed by a person, the document contains a signature. This would not prevent other things being recognized as signatures. Nor would it avoid the possible disputes the **ULC Comment** mentions about whether the person whose name is on a document is actually the person who signed it. It would, however, convert the abstract definition in s.1 into something concrete, and would make it clear that the most obvious way of signing an electronic document is in fact an “electronic signature” within the meaning of the Act.*

Recommendation 10.1: *Adopt s.10(1) substantially as is. Add that where an electronic document expressly purports to be signed by a person, the document contains a signature.*

In relation to s.10(2), our major comment is that the subsection leaves an important question unanswered. If regulations are made, what is the intended legal effect of a signature that complies with the regulations? Is the recipient of the signature (a) obliged to accept it as a valid electronic signature because it complies with the regulations, or (b) still free to reject it under the consent principle? Answer (a) would give the Act more force as a foundation for electronic transactions. However, answer (b) is more consistent with the general philosophy of the Act.

*We will return to this question later, when we deal with regulation-making powers generally (**Additional Topic 4**). For now we will simply say that we see answer (b) as being what the Uniform Act intends. We see regulation-making powers such as those in s.10(2) as being designed to enable lawmakers to establish common standards rather than impose uniform rules. They are designed to promote consistency, in partial response to the flexibility of the consent principle, which allows different parties to decide for themselves what they will accept, and may therefore lead to unevenness of practice. As we understand the Uniform Act, however, it is not intended that the common standard should be mandatory. If that were the intent, something more would need to be added.*

We have nothing to add at this point in relation to s.10(3), the familiar “Government” issue.

Recommendation 10.2 *See Additional Topic 4 in relation to s.10(2). No recommendation at present in relation to “Government.”*

11. (1) A requirement under [enacting jurisdiction] law that requires a person to present or retain a document in original form is satisfied by the provision or retention 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 presented or retained was first made in its final form, whether as a paper document or as an electronic document;**
- (b) where the document in original form is to be provided to a person, the electronic document that is provided to the person is accessible by the person and capable of being retained by the person so as to be usable for subsequent reference; and**
- (c) where the document in original form is to be provided to the Government,**
 - (i) the Government or the part of Government to which the information is to be provided has consented to accept electronic documents in satisfaction of the requirement; and**
 - (ii) the electronic document meets the information technology standards and acknowledgement rules, if any, established by the Government or part of Government, as the case may be.**

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

- (a) 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;**
- (b) the standard of reliability required shall be assessed in the light of the purpose for which the document was made and in the light of all the circumstances.**

(3) For the purposes of paragraph (1)(b), an electronic document is deemed not to be capable of being retained if the person providing the electronic document inhibits the printing or storage of the electronic document by the recipient.

ULC Comment: The Model Law considers the basic function of requiring an original document to be to support the integrity of the information in it. It is presumably harder to alter an original than a copy. This section makes an electronic document function as an original if there are sufficient assurances of integrity of the information in it. This is similar to the standards for meeting the best evidence rule in section 4 of the Uniform Electronic Evidence Act and in article 2838 of the Civil Code of Quebec. In addition, the rule requires the equivalent to writing, as set out in section 7. The standard for the assurances of integrity of the information varies with the purpose of the document, just as the degree of scrutiny of the integrity of a paper document will vary with its use. The usual rules about government apply in this section too.

Whether document is capable of being retained

12. An electronic document is deemed not to be capable of being retained if the person providing the electronic document inhibits the printing or storage of the electronic document by the recipient.

ULC Comment: Several sections require that a document must be capable of being retained in order to meet the legal requirement that information be provided. This section is intended to discourage the sender from doing anything that would inhibit the recipient from printing or storing the electronic document once it is received.

Discussion 11: *Several of the ULC-based Bills have improved upon the confusing expression “document in original form . . . first made in its final form.” All, though, have accepted the basic idea that an electronic document can serve as an “original” as long as there is a “reliable assurance as to the integrity of the information” that the document contains. The nature of this “reliable assurance of integrity” is set out in s.11(2).*

We have some reservations about whether preserving the “integrity of the information” should really be enough to satisfy a requirement to present or retain an original. We would have thought that things like layout and appearance would also be important. However, we are inclined to follow the pattern of the other ULC-based Bills on this, which is also the pattern of the UN Model Law.

One thing, though, that we think the section should make clearer is that it applies not only to documents that are initially electronic, but also to documents that are initially in some tangible form and are then converted to electronic form. Assuming that “the integrity of the information” is still the key issue, what the legislation should presumably specify is that the integrity of the information must survive the conversion process.

We have nothing to add at present in relation to the “Government” provisions in s.11(1)(c). As to s.11(3), what it says seems right in principle, but it does not seem to need stating in s.11 when s.12 says the same thing and applies more broadly.

Recommendation 11: *Adopt the substance of s.11(1) and (2) with some clarification. Delete s.11(3). No recommendation at present in relation to “Government.”*

Discussion 12: *This section provides a useful clarification, and has been included in the other ULC-based Bills.*

Recommendation 12: *Adopt s.12 substantially as is.*

13. A requirement under [enacting jurisdiction] law to retain a document 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 does not materially change the information contained in the document that was originally made, sent or received;**
- (b) the information in the electronic document will be accessible so as to be usable for subsequent reference by any person who is entitled to have access to the document or who is authorized to require its production; and**
- (c) where the electronic document was sent or received, information, if any, that identifies the origin and destination of the electronic document and the date and time when it was sent or received is also retained.**

ULC Comment: People may wish to retain records in electronic form, whether the records were created electronically or on paper. Paper documents may be made electronic by scanning, which makes the information treatable as data afterwards, or by imaging, which generally preserves a digital picture of the information that is not intended to be changed. In any event, the function of making people retain records is to retain the information contained in the record.

Record managers and archivists make clear that information about the records are important to understanding them, or even knowing what they are. However, the Uniform Act does not require more of such contextual information (sometimes known as "metadata") than does the current law about documents on paper. It does say that if an electronic document is transmitted, then any information available about the time of its transmission should be kept as well as the document itself.

This is more than is required for documents on paper, since someone who receives a paper document in the mail is not required to keep the envelope or other mailing information. However, the Act does not require the information to be created if it is not there. Again we distinguish between good practices and legal requirements.

The standard for electronic record retention is similar to that for original documents, that the integrity of the information be maintained and be accessible to those who have a right to see it. Satisfying the requirements for originals under section 11 is somewhat more stringent as to form. Not all retention requirements will demand the original document. Where they do, section 11 will apply as well as section 13.

The Act does not mention the time for which such records may be retained, since the time will not change with the medium of storage. Nor does it expressly require that the hardware and software used to store and read the information be kept current, but that is implied by the need for continued accessibility. The law does not prescribe the technology, any more than it requires a certain kind of paper or ink or other support for traditional records.

Discussion 13: *Here too we believe the section would be improved if the wording made it more obvious that the section refers to the electronic retention of both (a) documents that are originally electronic, and (b) documents that are originally in some other medium but are converted to electronic form for purposes of retention. The Ontario Bill has taken that step.*

Apart from this, we are inclined to adopt the section substantially as is, despite having some reservations about the details. For example, the references in paragraph (a) to retaining “the format” of information might seem more appropriate in s.11 (originals) rather than in s.13 (ordinary retention). The reference in paragraph (c) to retaining the transmission details (if any) might seem excessive. However, the ULC-based Bills have followed the Uniform Act on these points, which were drawn from the UN Model Law, and we are inclined to remain consistent with them.

Recommendation 13: *Adopt the substance of s.13, with some clarification.*

Copies

14. Where a document may be submitted in electronic form, a requirement under a provision of [enacting jurisdiction] law for one or more copies of a document to be submitted to a single addressee at the same time is satisfied by the submission of a single version of an electronic document.

ULC Comment: With electronic documents, copies are hard to distinguish from originals. In addition, electronic documents are usually very easy to reproduce. Requirements of statutes and regulations for people to submit certain numbers of copies of documents are hard to read in the electronic context, therefore. Must one send in several diskettes, or send the same e-mail message several times, or attach the same document several times to the same e-mail? This section resolves those issues by requiring the person receiving the information to make the copies.

Other requirements continue to apply

15. Nothing in this Part limits the operation of any requirement under [enacting jurisdiction] law for information to be posted or displayed in specified manner or for any information or document to be transmitted by a specified method.

ULC Comment: Sometimes particular forms of display are required, or particular forms of communication. The electronic document must also follow the other form rules. Sometimes such rules may mean that a paper document must be used. However, the words "in writing" or "signed" themselves do not constitute a "specified manner" or "specified method" for these purposes, or the point of much the Act would be undermined. If the rules say that regular mail must be used to deliver information, the parties to the communication may agree on other means, if the source of those rules allows such variation, expressly or by implication.

Discussion 14: *We agree with the substance of this section.*

Recommendation 14: *Adopt s.14 substantially as is.*

Discussion 15: *This section seems superfluous. As was apparent in our discussion of s.5, when the Uniform Act says that “Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form,” the word “solely” is important. Unless electronic equivalents are created, the Uniform Act does not alter anyone’s obligations under any Act. If, therefore, an Act requires a particular method of posting or display or transmission, electronic activities that meet that requirement are acceptable, while those that do not are not. We see no need to restate this in s.15. Some people might say that s.15 adds clarity in relation to requirements for posting, display or transmission. The other side of this coin, however, is that it may add confusion in relation to other kinds of requirement that other Acts may make but that s.15 does not mention. Our current view is that s.5, standing alone, is at least as clear as it becomes when s.15 is added.*

*We note that the **ULC Comment** refers to requirements that information be sent by regular mail. The Uniform Act does not establish electronic equivalents to requirements that information be sent by mail or by registered mail. This is something we will discuss later as a possible **Additional Topic** for the Act to deal with.*

Recommendation 15: *Delete s.15 as unnecessary.*

16. (1) If a provision of [enacting jurisdiction] law requires a person to communicate information, the minister of the Crown responsible for the provision may prescribe electronic means to be used for the communication of the information and the use of those means satisfies that requirement.

(2) If a statute of [enacting jurisdiction] sets out a form, the [authority 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 set out in the statute.

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

(4) 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.

ULC Comment: Much information must be submitted to government or to private persons on specific forms, set out in statute or more commonly prescribed in regulations. Rather than require governments to amend all the authorizing texts, this section allows them to provide electronic equivalents to the forms designed for and often presumed to be paper. The first subsection applies where information is to be provided but without a specified form, to allow the government to create a form. Subsection (2) deals with forms in statutes and subsection (3) with forms in regulations. Subsection (2) does not specify how the electronic equivalent of a statutory form should be created. Subsection (3) says that a form authorized to be made by regulation must be given its electronic equivalent by regulation. Enacting jurisdictions may choose whether they wish to allow for administrative forms, especially where a paper-based form is already prescribed.

Discussion 16: *We see s.16 as serving much the same function as s.10(2), though in a different context. Since the Uniform Act operates largely by consent, it is possible that different people will consent to different things and that the result will be inconsistencies of practice. S.16 provides a mechanism by which the responsible authorities can encourage standard practices. Under s.16(1), approved means of electronic communication could be established. Under s.16(2) and (3) approved electronic versions of non-electronic forms could be put in place.*

We see some advantage in including provisions of this sort in the Act. We believe, however, that they should be in the form of regulation-making powers. S.16 uses the looser words “prescribe” and “make,” but (a) these words confuse the question of whether what is “prescribed” or “made” under s.16 is or is not, technically speaking, a “regulation” (see the definition in s.1 of the Regulations Act), and (b) if what is done under s.16 is to have the legal force the section describes, it should be done by a legislative process (regulation-making) rather than by administrative action.

We note, incidentally, that in theory there should be a difference between electronic processes or forms established under s.16(1) and (2) and those established under s.16(3). Anything done under the Electronic Transactions Act is subject to the consent principle, which means that establishing an electronic process or form under s.16(1) or (2) would not make the form mandatory, nor would it preclude the consensual use of other electronic processes or forms. S.16(3), by contrast, expands or clarifies what can be done under other Acts, and whatever is done under another Act brings s.2(5) into play. In accordance with s.2(5), an electronic form or process established under another Act would be the only electronic form or process available.

Recommendation 16: *Adopt the substance of s.16, but in the form of regulation-making powers.*

Collection, storage, etc.

17. (1) In the absence of an express provision in any [enacting jurisdiction] law that electronic means may not be used or that they must be used in specified ways, a minister of the Crown in right of [enacting jurisdiction] or an entity referred to in subparagraphs 1(c)(ii) [or (iii)] may use electronic means to create, collect, receive, store, transfer, distribute, publish or otherwise deal with documents or information.

(2) For the purpose of subsection (1), the use of words and expressions like "in writing" and "signature" and other similar words and expressions does not by itself constitute an express provision that electronic means may not be used.

ULC Comment: This section gives governments the right to use electronic communications internally and externally, and to convert incoming messages to electronic form. Unlike the following sections on communications from the public to the government, it does not require any opting in, but applies directly when the Act comes into force. This general permission yields to any direction by the legislature that electronic documents not be used. However, the mere use of terms such as "writing" or "signed" is not considered such a direction, since most of them date from a time when paper was presumed, not chosen expressly over electronic media.

Electronic payments

18. (1) A payment that is authorized or required to be made to the Government under [enacting jurisdiction] law may be made in electronic form in any manner specified by [the Receiver General] for the [enacting jurisdiction].

(2) A payment that is authorized or required to be made by the Government may be made in electronic form in any manner specified by the [Receiver General] for the [enacting jurisdiction].

ULC Comment: To ensure the integrity of public accounts and accountability for public finances, payments to and by government are often subject to detailed statutory rules. This section allows the Receiver General or equivalent authority in the enacting jurisdiction to provide for electronic media of payment, for incoming or for outgoing payments, or both. The usual rules about authority and record-keeping would continue to apply to such payments.

Discussion 17: *We see no need for this section. The general permission to “use electronic means” simply states what is surely the case already. The restriction on this where express provisions already exist merely restates the effect of s.2(5).*

Recommendation 17: *Delete s.17 as unnecessary.*

Discussion 18: *Again, we see no need for this provision. S.18(1) merely states what we take to be the case already. So does s.18(2), unless it were interpreted as allowing the government to impose its own preferred method of payment on outside parties, which outside parties would probably view as unacceptable.*

Recommendation 18: *Delete s.18 as unnecessary.*

PART 2

COMMUNICATION OF ELECTRONIC DOCUMENTS

ULC Comment: This Part gives general guidance to points of law that may be in doubt in a world of electronic communications. Unlike the provisions of Part 1, this Part does not deal with specific requirements of the law. It applies to common law rules of contracts, and supplements them with a few rules that appear useful to resolve common difficulties in using such communications. Government communications are included in this Part.

Definition of "electronic agent"

19. In this Part, "electronic agent" means a computer program or any electronic means used to initiate an action or to respond to an electronic document or action in whole or in part without review by a natural person at the time of the response or action.

ULC Comment: Computer transactions are largely automated transactions. The novelty of electronic commerce is less the automation than the electronic communications used to establish relationships that require legal effect. The forms of automation are changing, too. Businesses and individuals use "electronic agents", which are software programs, sometimes embedded in hardware, that can seek out information and respond to it or to incoming messages. This part deals with some of the legal effects of using such tools.

The use of the term "electronic agent" is widespread. The law of agency however plays no part in this discussion. An electronic agent is a tool, not an agent in law.

Formation and operation of contracts

20. (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed
(a) by means of an electronic document; or
(b) by an action in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract shall not be denied legal effect or enforceability solely by reason that an electronic document was used in its formation.

ULC Comment: The Act does not purport to change the general law of contracts. This section ensures that electronic communications are capable of conveying the kinds of intention that are necessary to support contractual relations. In particular, actions that do not involve detailed language, such as clicking on icons on computer screens, are expressly made acceptable for contract purposes.

Discussion 19: *This definition ties in with s.21 and s.22, below. The wording of s.19 could perhaps be improved. In particular, it is unclear whether “in whole or in part” is to be read with “without review” or with “initiate . . . or . . . respond.” However, we would not suggest any change in substance.*

Recommendation 19: *Adopt s.19 substantially as is.*

Discussion 20: *We doubt that this section says anything that is not the law already. We doubt, also, that there is any real uncertainty that the section may help to resolve. Unless someone can identify some specific legal purpose that the section accomplishes, we would be inclined to delete it.*

Recommendation 20: *Delete s.20 as unnecessary.*

Involvement of electronic agents

21. A contract may be formed by the interaction of an electronic agent and a natural person or by the interaction of electronic agents.

ULC Comment: The law has been unclear whether automated means of communication such as electronic agents could convey the intention needed to form a contract where no human being reviewed the communication before the contract was made. This section makes it clear that this can be done, both where a natural person communicates with an electronic agent and where a communication has an electronic agent at both ends.

Errors when dealing with electronic agents

22. An electronic document made by a natural person with the electronic agent of another person has no legal effect and is not enforceable if the natural person made a material error in the document and

- (a) the electronic agent did not provide the natural person with an opportunity to prevent or correct the error;**
- (b) the natural person notifies the other person of the error as soon as practicable when the natural person learns of it and indicates that he or she made an error in the electronic document;**
- (c) the natural person takes reasonable steps, including steps that conform to the other person's instructions to return the consideration received, if any, as a result of the error or, if instructed to do so, to destroy the consideration; and**
- (d) the natural person has not used or received any material benefit or value from the consideration, if any, received from the other person.**

ULC Comment: The law has rules about the effect of mistakes. Particular concerns have been expressed about computer communications, however, for two reasons. First, it is easy to hit a key when typing quickly, or click a mouse on the wrong spot on a screen, and by doing so send a command with legal consequences ("the single keystroke error"). Second, much electronic commerce is done by electronic agents, as noted in the comment to the previous section. The electronic agents may not be programmed to respond to a subsequent message saying "I didn't mean that."

This section supplements the general law of mistake where an electronic document is created or sent in error by a natural person to an electronic agent. The person who sends it must give notice of the error as soon as practicable, respond to instructions, and not benefit from the mistake.

In addition, the section applies only if the legal entity to which the message was sent did not provide a method of preventing or correcting the error. The Act does not tell people how to do this, but one may imagine a message on a screen saying "You have ordered X at \$Y. Is this correct?" If the person confirms the first order, this section would not apply. This provision gives online merchants a way of giving themselves a good deal of security against allegations of mistake, and encourages good business practices in everybody's interests.

Discussion 21: *We find this section acceptable. We believe that it simply confirms existing law, but in this case, unlike s.20, there is room for uncertainty, and the section serves a purpose.*

Recommendation 21: *Adopt s.21 substantially as is.*

Discussion 22: *This section was not part of the UN Model Law, but it appears in all of the provincial Bills, including Quebec's. We believe it should appear in New Brunswick's, too.*

*We do, however, have a number of difficulties with the wording of the section. First and foremost, we think the Act should make it more obvious that s.22 is additional to any other remedies that may exist for material error. The **ULC Comment** makes that point, but we think there is a real danger that the ULC text of s.22, standing alone, might be read as an exhaustive statement of the individual's rights in cases of material error when dealing with "electronic agents." This would not be acceptable, since any right that s.22 creates is eliminated if the electronic agent provides no more than an "opportunity to prevent or correct the error." This should not be the case in relation to rights that exist independently of s.22.*

Second, we think the organization of the ideas in the section could be improved. In essence, s.22 gives an individual the right to cancel a transaction on the ground of "material error in an electronic document" when no "opportunity to prevent or correct the error" has been provided. The ULC text talks of an electronic document having "no legal effect" and being "not enforceable" when a number of disparate elements coexist, some of them pre-dating the error (no "opportunity to prevent") and others being subsequent actions that the individual or the other person are supposed to take. We think a better formulation of the section should be possible.

*We are aware that reformulating the section may produce some dissimilarities with the law in other provinces. However the reformulation would not affect the underlying purpose of s.22, which is to ensure that unless electronic agents give individuals an opportunity to prevent or correct material errors, the individual who makes such an error can cancel the transaction. We would not anticipate altering the scope of s.22 by, for example, defining "individual" to mean something more like "consumer" or defining "material error" in a way that ties it more closely to the particular kinds of error that the **ULC Comment** identifies as being particularly easy to make in electronic transactions.*

Recommendation 22: *Reformulate s.22 as a statutory right to cancel a transaction for material error when no "opportunity to correct or prevent" has been given. Make it clear that this is additional to any other protection or remedy (if any) that the individual may have as a result of the error.*

23. (1) Unless the originator and the addressee agree otherwise, an electronic document is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, when it becomes capable of being retrieved and processed by the addressee.

- (2) An electronic document is presumed to be received by the addressee,**
- (a) when it enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and it is capable of being retrieved and processed by the addressee; or**
 - (b) if the addressee has not designated or does not use an information system for the purpose of receiving documents of the type sent, when the addressee becomes aware of the electronic document in the addressee's information system and the electronic document is capable of being of being retrieved and processed by the addressee.**

(3) Unless the originator and the addressee agree otherwise, an electronic document is deemed to be sent from the originator's place of business and is deemed to be received at the addressee's place of business.

- (4) For the purposes of subsection (3)**
- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction to which the electronic document relates or, if there is no underlying transaction, the principal place of business of the originator or the addressee; and**
 - (b) if the originator or the addressee does not have a place of business, the references to "place of business" in subsection (3) are to be read as references to "habitual residence".**

ULC Comment: Computer communications usually depend on intermediaries, whether privately contracted services like value-added networks (VANs) or public Internet service providers (ISPs) or others. On the Internet, messages travel in packets through unpredictable combinations of computers on their way to their destination. This complicates deciding when messages are sent and received, and where. The law often makes it important to know these things.

This section provides that a message is sent when it leaves the control of the sender. This means effectively that the sender cannot recall it any more, whether from the original system or from some other system acting as dispatch agent or computing service. If the sender and the addressee are in the same system - say a big system like sympatico.ca or aol.com - then the message is sent when the addressee could retrieve and process it.

The section provides a presumption, not a rule, on when a message is received. Current practices of storing and checking messages suggested that it was premature to create any rule about receipt. The UN Model Law deems a message to be received when it enters an information system within the control of the addressee, or where it is accessible to the addressee. However, people may not check their e-mail regularly, especially if they have several addresses. The section says that if they designate an address, or use it for a purpose, then they will have a duty to check that address for messages.

If the addressee does not designate or use an address for the purpose for which someone wants to send a message, then the message is not presumed to be received until the addressee has notice of it, and is able to retrieve it and process it. The section does not require actual retrieval and

processing, in order to prevent people from preventing receipt by refusing to open messages that they could open if they chose to. However, the consent principle of section 6 continues to operate, so someone who is told that an electronic message is available on his or her system may still be able to decline to deal electronically at all and insist that a writing requirement be satisfied on paper.

Subsection (2) does not say "unless otherwise agreed", as do subsections (1) and (3). This is in part because it is a presumption. Where a presumption applies rather than a rule, the parties may be able to agree to the existence of facts that qualify for the presumption, thus in effect altering the burden of proof. If the addressee designates a system by agreement or by conduct, that will lead to a presumption of receipt. If the sender can show that the message entered the designated system and was retrievable, the addressee may have trouble rebutting the presumption. Parties may also agree on what the addressee is capable of processing. Allowing for an agreement to make receipt easier to show, e.g. by agreeing that a message is received when sent, was not thought appropriate for electronic communications at this time.

It may be that ISPs will not have the logs or other evidence of the time at which messages were received in their systems. Senders who really need to know for sure that their messages have been received will want to get evidence of actual receipt, such as acknowledgements from the addressees.

The section does follow the Model Law in providing that messages are presumed to be sent from and received at the principal place of business of the sender or recipient. Computer servers are often in different places, and people may access messages from different places. Unless the parties agree otherwise, these variations should not affect the legal rights arising from the communications.

Discussion 23: *We are not at all sure that s.23 should be enacted, even though it has appeared with very little change in all of the ULC-based Bills so far. It is based on the UN Model Law, though the Uniform Act introduced some significant changes. Even with those changes, we think s.23 remains problematic.*

*S.23(1) establishes a rule for "sending" that, though apparently straightforward and precise (a message is sent when it is beyond the sender's control) seems likely to prove difficult in practice. Under this rule, a sender seems unlikely to know when, strictly speaking, or even whether, a message is "sent," since this depends on what enters a system that is outside the sender's control. According to the **ULC Comment**, furthermore, some Internet Service Providers, the likely providers of the intermediary systems, may not keep the necessary information either. Troublesome also are the closing words of s.23(1), which seem to suggest that if both the sender and the addressee use a system like aol.com (to use the example in the **ULC Comment**), and for some reason a message never becomes "capable of being retrieved" by the addressee, the sender cannot say that the message was ever sent. This seems wrong.*

The problem that we see with s.23(2) is that it does not actually seem to accomplish anything. It is very different from, say, s.23 of the Interpretation Act, under which a sender's action in properly addressing, prepaying and posting a letter raises a rebuttable presumption that the letter is delivered in the ordinary course of post. S.23(2) of the Uniform Act, by contrast, only

applies once an electronic document has actually reached the addressee's system. Its effect is to differentiate between several points of time at which "receipt" might reasonably be said to occur. Obvious alternatives are (i) when the document enters the addressee's system, (ii) when the addressee becomes aware of the document, and (iii) when the addressee opens the document and becomes aware of the contents. S.23(2) (which departs from the UN Model Law) selects option (i) for "designated" or "used" systems, and option (ii) for other cases. However, it only creates a rebuttable presumption that this is the time of receipt, which means that in any case in which time of receipt is actually an issue, all options, including option (iii), are open for argument. That result, we suggest, is as it should be: the recipient of a document should not be prevented by law from arguing in a particular case that he or she only received information when he or she actually became aware of what the information was. On the other hand, permitting that argument to be made undermines the only real purpose that s.23(2) seems to have: that of selecting, from among different reasonable interpretations, exactly what "receipt" means in an electronic environment.

As to s.23(3) and s.23(4), which operate together, our concern is that the provisions may create a greater difficulty than the one they aim to solve. The main purpose of the section, especially as described in the Guide to Enactment of the UN Model Law, is to ensure that the location of the information systems through which parties communicate is irrelevant to the transactions they conclude. This rule on the place of sending and receipt is partially related to the provisions on the time of sending and receipt. It is designed in part to avoid the argument that if the time of sending or receipt is the time when a message enters a particular system, then the place of sending or receipt must be the place where that system is physically located.

The downside of this, however, is that these subsections (a) disregard the realities of where people actually are when they send and receive electronic messages, and (b) can apparently produce different places of sending and receipt for (i) an electronic message, and (ii) the same message or a companion message delivered non-electronically by the same sender to the same recipient at the same time. Both of these seem undesirable.

Our current view on s.23(3) and (4) is that there may be no real problem for these subsections to address. As long as the Act does not impose an unrealistic view of what "sending" or "receiving" an electronic message involves, there seems to be little danger that the physical location of communications systems will determine where a message is sent or received. In the absence of such a danger, we see little reason to create, for electronic communications alone, a special rule which has the effect that all business communications are deemed to be sent from a place of business and that all personal communications are deemed to be sent from a person's residence.

Overall, we are inclined to delete the whole of s.23. We have considered alternatives – fine-tuning some of the wording or adjusting some of the concepts – but we suspect that it would just complicate matters if we produced a New Brunswick reworking of what the Uniform Act has already revised significantly from the text of the UN Model Law. We believe that, generally speaking, when and where a message is sent and received should not be hard to work out, even without a statutory rule, and in those unusual cases in which reasonable arguments can be made for different conclusions, and where the answers really matter, we doubt that a statutory rule can be both clear enough and subtle enough to provide genuine assistance.

Recommendation 23: Delete s.23 as problematic.

PART 3

CARRIAGE OF GOODS

Comment: This part addresses a particular sector of economic activity, the carriage of goods. It was the only one on which the UN Model Law chose to provide rules, though the UN left open the potential for future additions. The carriage of goods is frequently international, so harmonization of the law across borders may be very useful. The main point of this part is to provide an electronic equivalent of certain shipping documents (a term used regardless of the means of shipment), such as bills of lading. Sometimes these documents are negotiable, which means that the documents themselves carry the value of the goods they list. As a result, they must be unique. Creating a unique electronic document is challenging. Section 25 says what the electronic document must do to serve the function of the shipping document on paper. The operation of the Part is explained in paragraphs 113 to 122 of the Guide to Enactment of the Model Law.

Actions related to contracts of carriage of goods

24. This Part applies to any action in connection with a contract of carriage of goods, including, but not limited to,

- (a) furnishing the marks, number, quantity or weight of goods;**
- (b) stating or declaring the nature or value of goods;**
- (c) issuing a receipt for goods;**
- (d) confirming that goods have been loaded;**
- (e) giving instructions to a carrier of goods;**
- (f) claiming delivery of goods;**
- (g) authorizing release of goods;**
- (h) giving notice of loss of, or damage to, goods;**
- (i) undertaking to deliver goods to a named person or a person authorized to claim delivery;**
- (j) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;**
- (k) notifying a person of terms and conditions of a contract of carriage of goods;**
- (l) giving a notice or statement in connection with the performance of a contract of carriage of goods; and**
- (m) acquiring or transferring rights and obligations under a contract of carriage of goods.**

ULC Comment: This section lists the types of activity that may be affected by the rules in this Part.

Discussion 24: *This section simply outlines, as illustrations rather than an exhaustive list, the kinds of transactions that this Part deals with as coming within the scope of a “contract of carriage of goods.” The practical impact of the definition is set out in s.25.*

Recommendation 24: *See Recommendation 25.*

25. (1) Subject to subsection (2), a requirement under [enacting jurisdiction] law that an action referred to in any of paragraphs 24(a) to (m) be carried out in writing or by using a paper document is satisfied if the action is carried out by using one or more electronic documents.

(2) If a right is to be granted to or an obligation is to be acquired by one person and no other person and a provision of [enacting jurisdiction] law requires that, in order to do so, the right or obligation must be conveyed to that person by the transfer or use of a document in writing, that requirement is satisfied if the right or obligation is conveyed through the use of one or more electronic documents created by a method that gives reliable assurance that the right or obligation has become the right or obligation of that person and no other person.

(3) For the purposes of subsection (2), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.

(4) If one or more electronic documents are used to accomplish an action referred to in paragraph 24(j) or (m), no document in writing used to effect the action is valid unless the use of electronic documents has been terminated and replaced by the use of documents in writing. A document in writing issued in these circumstances must contain a statement of the termination, and the replacement of the electronic documents by documents in writing does not affect the rights or obligations of the parties involved.

(5) If a rule of [enacting jurisdiction] law is compulsorily applicable to a contract of carriage of goods that is set out in, or is evidenced by, a document in writing, that rule shall not be inapplicable to a contract of carriage of goods that is evidenced by one or more electronic documents by reason of the fact that the contract is evidenced by electronic documents instead of by a document in writing.

ULC Comment: This section permits the use of electronic documents for the carriage of goods, if the documents comply with this section. Subsection (2) is the electronic functional equivalent of a unique document. If rights are to be given to one particular person, then the electronic document must be in a form that gives reliable assurance that the rights or obligations represented by the document are those of that person and no other. The Act does not say how this might be done. As elsewhere, it provides the legal consequences for doing it.

Subsection (4) guards against the risk that no two media can simultaneously be used for the same purpose. While it may happen that someone who starts dealing with electronic documents may have to switch to paper at some point, this section sets out rules to ensure that everyone will know which version of a document is effective.

Subsection (5) ensures that other rules about documents for the carriage of goods, such as the Hamburg Rules applicable under the *Carriage of Goods by Water Act*, apply to electronic documents though the terms of these rules seem to contemplate paper. Not only are electronic documents permissible in general, but their use does not take the documents out of the scope of such compulsory rules.

Discussion 25: *This is another section that we are inclined to delete, despite the fact that it follows the UN Model Law closely and that all the ULC-based Bills (though not, we understand, their counterparts in other countries) have adopted it. If s.25 is deleted, s.24 would be too.*

S.25(1), as far as we can see, simply confirms the effect of s.7 and other earlier sections of the Act. Admittedly it uses different words when it speaks of an “action . . . carried out” in writing or using a paper document,” but we believe the effect is the same.

The real substance of s.25 comes in s.25(2), (3) and (4). As discussed in the Guide to Enactment of the UN Model Law, the main concern of these subsections is with documents such as bills of lading, under which carriers transport goods and transfer ownership of the goods to purchasers. The subsections permit electronic documents to be used, but only where those documents provide a genuine assurance that they do indeed carry with them the right to transfer ownership of the property.

Our problems with these subsections result largely from the way in which they are expressed.

First, we are not sure what “provision of [New Brunswick] law,” if any, they apply to. They only apply if, in relation to a contract of carriage of goods, “a right is to be granted to or an obligation is to be acquired by one person and no other person and a provision of [New Brunswick] law requires that, in order to do so, the right or obligation must be conveyed to that person by the transfer or use of a document in writing.” Can people with expertise in the field identify what this would apply to? Legislation such as the Factors and Agents Act, which deals with bills of lading and other “documents of title” does not appear to create a “requirement” of the kind the Uniform Act describes. Nor does the Personal Property Security Act, though it has several provisions dealing with the treatment of documents of title in secured transactions. Unless some other Act or common law rule does create such a “requirement,” s.25(2) would have no effect. If, furthermore, a true “requirement” can be identified, the best way forward might well be to amend that “requirement” specifically rather than to rely on a general statement such as the one in s.25(2).

A second problem relates to some changes that the closing words of s.25(2) made to the corresponding provision of the UN Model Law (Article 17(3)). The Model Law, as we read it, focused on the idea that the document under which a right or obligation was to be transferred must be unique. The Uniform Act speaks instead of the effect of the transfer under the document. In either version we find the language hard to follow, but the Uniform Act’s modifications seem to us to make the effect of the section even more uncertain.

Overall, therefore, we hesitate to enact s.24 and s.25. We are not sure whether they would have any effect at all, and if they would have effect, we are not sure what that effect would or should be.

We do not think that deleting s.24 and s.25 would hinder attempts to develop electronic bills of lading or similar documents in relation to the carriage of goods. Especially if (as recommended in relation to s.2) “documents of title” are not excluded from the Act, electronic bills of lading can evolve through the development of commercial practice. Any legal obstacle that s.25 might remove would also be removed by s.7, since any requirement of law that information be in writing in order to perform a particular legal function (s.25) is still a requirement that it be in writing (s.7). We have heard it said, also, that the ease of electronic communications may in due course make traditional documents of title less and less relevant, as distant buyers can communicate immediately and directly with distant sellers.

Recommendation 25: *Delete s.24 and s.25 unless both the need for them and their effects can be more precisely identified.*

Additional Topics

During our work on the *Uniform Act* we have come across several additional topics that we think a New Brunswick Act should deal with.

1. *Certified Copies*

Several New Brunswick Acts provide for “certified copies” of documents to be prepared. Certified copies normally have special evidentiary value.

Manitoba’s Act includes a provision saying that where information exists in electronic form, and a person is permitted or required by law to provide a certified copy of that information, that person can provide a printout of the information and certify it as a reproduction of the information. The certified printout has the same evidentiary value as a certified copy.

We think that a provision of this sort would be useful.

Additional Topic 1: Include a provision permitting certified printouts of electronic information to be made.

2. *Mail and Registered Mail*

A number of Acts refer to information being sent by mail or by registered mail. (Some Acts also refer to certified mail, a service that we understand to have been discontinued.) The *Uniform Act* contains no electronic equivalent to mailing. A requirement that information be sent by mail could therefore not be met electronically. A person could do things such as mailing a diskette, but sending the same information by e-mail would not qualify as sending it by either “ordinary mail” or “registered mail.”

We suggest that this should be changed. In relation to ordinary mail, we see no real difference between postal delivery of information and electronic delivery of the same information. As long as the information is provided to the recipient, we would think that a requirement for mailing the information should be considered to be satisfied.

Registered mail is different, since requirements to use registered mail are normally created where legislators consider that proof of delivery is important. New Brunswick has expanded its definition of registered mail to include delivery by “prepaid courier” (s.22(e.1) of the *Interpretation Act*), another delivery mechanism that provides independent evidence of delivery.

Within the general framework of the *Uniform Act*, we suggest that the electronic equivalent to registered mail should be a process involving (a) a request by the sender for the recipient to acknowledge receipt, and (b) an actual acknowledgment of receipt by the recipient. The requirement for an actual acknowledgment probably goes beyond existing procedures for registered mail, which provide no more than evidence of delivery to the right address, but (1) it would avoid possible disagreements about whether a message that appeared to have been delivered had ever in fact been received, and (2)

under the consent principle (see s.6), the unwilling recipient of an electronic equivalent would normally be able to insist on 'the real thing' anyway. Requiring an actual acknowledgment would mean that e-mail could only serve as registered mail between willing parties, but the same is true of many other provisions of the Act.

We should add that we would not intend that this requirement for an acknowledgment would be satisfied by automated messages such as "this document was delivered at" or "was read on" a particular date and time. To avoid this we would suggest that the acknowledgment of receipt should include an electronic signature.

Additional Topic 2: Add (i) that providing information electronically satisfies a requirement or permission to use ordinary mail, and (ii) that a requirement or permission to use registered mail is satisfied electronically if the sender requests an acknowledgment of receipt including a signature and the recipient provides one.

3. Consumer Issues

The *Uniform Act* applies to consumer transactions as well as to commercial transactions. We have heard a small number of suggestions for amendments to protect consumers. These include: (a) that consumers without the ability to receive electronic communications should never be required by contract to do so, (b) that consumers should be entitled to receive paper copies of electronic records on request, (c) that consumers who refuse to receive contractual documents and statutory notices electronically should not be penalized for doing so. There is also, as the **ULC Comment** notes (p.7, above) a federal/provincial/territorial working group that has been looking at consumer protection issues. The group has developed a set of *Principles of Consumer Protection in Electronic Commerce*. These are available from Industry Canada (<http://strategis.ic.gc.ca/SSG/ca01185e.html>).

The *Uniform Act* is not, in our view, the right place to get into consumer protection issues in any detail. It could, however, include regulation-making provisions under which *Consumer Contract Regulations* could be made if needed. Regulations would be a suitable means for establishing most of the consumer protection suggestions that we have heard.

One of them, though, may well belong in the Act. This is suggestion (a) above, that people without the ability to receive electronic communications should not be obliged by contract to do so. This is a natural extension to the consent principle in s.6 of the Act. S.6 says that no one is obliged to use or receive electronic documents without his or her consent, but it leaves open the possibility that consent might be obtained in things such as standard form documentation that a person had no real alternative to accepting. To reinforce the consent principle we would suggest that the New Brunswick Act might say something like this. "A term of a contract requiring a person to receive information electronically is not enforceable unless, at the time of the contract, that person (a) was able to receive that information electronically, or (b) freely undertook to become able to do so."

A provision in these terms would be a general provision applying to all contracts, not just consumer contracts. If, though, we were persuaded that such a provision should be restricted to consumers, dealing with the matter by regulations, rather than in the Act, might be acceptable.

Additional Topic 3: Add regulation-making powers for consumer transactions. Reinforce s.6 with a provision that a term of a contract requiring a person to receive information electronically is not enforceable unless, at the time of the contract, that person (a) was able to receive that information electronically, or (b) freely undertook to become able to do so.

4. Regulations

Several sections of the *Uniform Act* contemplate that regulation-making powers will be provided. They are these: making exclusions from the Act (s.2); establishing the authenticity of electronic signatures (s.10); prescribing electronic means of communication and electronic forms (s.16). All of these seem desirable.

In addition, as just noted, we believe it would be useful to permit regulations to be made applying special rules to consumer transactions.

Apart from these, the main function that we think regulations could serve under the Act would be to give more substance to some of the flexible terminology that many of the sections use. Expressions like “accessible so as to be usable for subsequent reference” (s.7) and “reliable assurance of integrity” (s.11) tend to raise questions about “how accessible is accessible?” or “how reliable is reliable?” A regulation-making power that permitted such things to be clarified might be useful.

Several of the ULC-based Bills have provided that regulations can be made “defining, enlarging or restricting the meaning of a word or expression that the Act uses but does not define.” This captures part of the clarifying function that we refer to above, though we should add that we see “defining” or “explaining,” rather than “altering,” as being the essence of what such regulations would do.

Another part of that clarifying function may be to establish acceptable technology standards or other methods of satisfying particular requirements of the Act. If, for example, an industry standard were developed for demonstrating a “reliable assurance” of the “integrity” of information (s.11), it might sometimes be helpful to be able to give it legal force. Regulations could do this. The legal effect of the regulations might vary in different contexts. In some cases they might validate one method of meeting the requirement of the Act, but without excluding others. In other cases, they might set out the *only* way of meeting the requirement of the Act. In either case, though, regulations would have to respect the consent principle in s.6. They could not make the electronic method so authoritative that people would not have the option of proceeding non-electronically.

At present we do not have any specific suggestions for things that may need to be clarified by regulation; only experience will determine what these may be. Even at this early stage, however, it seems likely that having the power to make such regulations would be useful. We suggest that it should be built in from the start.

Additional Topic 4: Add regulation-making powers under which the flexible standards in the Act can be made more specific, and approved electronic means of doing anything referred to in the Act can be established.

5. *Coming into force*

We suggest that the Act should include a proclamation provision. Without one, it would come into force as soon as the legislation was passed. With one, people would have some time to get ready. The delay would also provide an opportunity to prepare regulations, if needed, on any of the subjects listed under the previous topic.

Additional Topic 5: Include a provision that the Act comes into force on a day to be fixed by proclamation.

Conclusion

The first of the *Discussion* sections of this paper mentioned that the *Uniform Act* was not intended as a complete “how to” manual for electronic transactions. Instead, it sets out some broad principles and provides answers to some problems, but it leaves the rest of the law unchanged. The description since then has shown what electronic transactions legislation based on the *Uniform Act* will or will not do.

Such legislation will work best in relation to bilateral transactions between parties who agree to communicate electronically. In that setting it should be relatively easy to identify who has consented to what and what the legal effect was. In other contexts the legislation may be of less assistance. In multilateral transactions, for example, there may be the complication that people will not necessarily consent to the same thing. In transactions that are unilateral or that have legal effects on uninvolved third parties there may be doubt about whether the intended effect of an electronic document could be undermined if somebody refused to “accept” it at a later date. Prudence may therefore dictate that a person should proceed non-electronically even if, in theory, proceeding electronically would be possible.

Enacting an Electronic Transactions Act would certainly not mean that “everything can be done electronically now.” What the Act would do is remove some of the major barriers to electronic transactions that have already been identified both nationally and internationally. New Brunswick’s Act, we believe, should stick closely to the model of the *Uniform Act*. However, where improvements can be made, we believe we should make them. The challenge, of course, is to determine what is, and what is not, an “improvement.” Comments relating to the recommendations in this paper will be extremely helpful as the content of the Bill that will be presented to the Legislative Assembly is finalized.

As noted in the Introduction to this paper, comments should be sent to the Legislative Services Branch, Department of Justice, P.O. Box 6000, Fredericton, New Brunswick, Canada E3B 5H1, and marked for the attention of Tim Rattenbury (tel. (506) 453-2569; fax (506) 457-7899; e-mail Tim.Rattenbury@gnb.ca). There is also an electronic Response Form available on the internet (<http://www.gov.nb.ca/justice/>). Responses must be received no later than February 14th, 2001.

Appendix: List of Recommendations

Recommendation 1.1: *Shorten s.1(a) to something like “‘electronic’ includes digital and optical.”*

Recommendation 1.2: *Adopt s.1(b) substantially as is.*

Recommendation 1.3: *No recommendation at present in relation to “Government.”*

Recommendation 2: *Do not exclude the documents mentioned in s.2(3) and (4). If there are to be exclusions, deal with them all by regulation rather than partly in the Act and partly by regulation. Suggestions for exclusions would be welcome.*

Recommendation 3: *Adopt s.3 substantially as is.*

Recommendation 4: *Adopt s.4 substantially as is.*

Recommendation 5: *Adopt s.5 substantially as is.*

Recommendation 6.1: *Revise s.6 to make it clear that consent must apply to the kind of communication received and to any electronic equivalent it embodies.*

Recommendation 6.2: *No recommendation at present in relation to “Government.”*

Recommendation 7: *Adopt s.7 substantially as is.*

Recommendation 8: *Adopt the non-government part of s.8 substantially as is. No recommendation at present in relation to “Government.”*

Recommendation 9: *Adopt the non-government part of s.9 substantially as is. No recommendation at present in relation to “Government”.*

Recommendation 10.1: *Adopt s.10(1) substantially as is. Add that where an electronic document expressly purports to be signed by a person, the document contains a signature.*

Recommendation 10.2: *See Additional Topic 4 in relation to s.10(2). No recommendation at present in relation to “Government.”*

Recommendation 11: *Adopt the substance of s.11(1) and (2) with some clarification. Delete s.11(3). No recommendation at present in relation to “Government.”*

Recommendation 12: *Adopt s.12 substantially as is.*

Recommendation 13: *Adopt the substance of s.13, with some clarification.*

Recommendation 14: *Adopt s.14 substantially as is.*

Recommendation 15: *Delete s.15 as unnecessary.*

Recommendation 16: *Adopt the substance of s.16, but in the form of regulation-making powers.*

Recommendation 17: *Delete s.17 as unnecessary.*

Recommendation 18: *Delete s.18 as unnecessary.*

Recommendation 19: *Adopt s.19 substantially as is.*

Recommendation 20: *Delete s.20 as unnecessary.*

Recommendation 21: *Adopt s.21 substantially as is.*

Recommendation 22: *Reformulate s.22 as a statutory right to cancel a transaction for material error when no “opportunity to correct or prevent” has been given. Make it clear that this is additional to any other protection or remedy (if any) that the individual may have as a result of the error.*

Recommendation 23: *Delete s.23 as problematic.*

Recommendation 24: *See Recommendation 25.*

Recommendation 25: *Delete s.24 and s.25 unless both the need for them and their effects can be more precisely identified.*

Additional Topic 1: *Include a provision permitting certified print-outs of electronic information to be made.*

Additional Topic 2: *Add (i) that providing information electronically satisfies a requirement or permission to use ordinary mail, and (ii) that a requirement or permission to use registered mail is satisfied electronically if the sender requests an acknowledgment of receipt including a signature and the recipient provides one.*

Additional Topic 3: *Add regulation-making powers for consumer transactions. Reinforce s.6 with a provision that a term of a contract requiring a person to receive information electronically is not enforceable unless, at the time of the contract, that person (a) was able to receive that information electronically, or (b) freely undertook to become able to do so.*

Additional Topic 4: *Add regulation-making powers under which the flexible standards in the Act can be made more specific, and approved electronic means of doing anything referred to in the Act can be established.*

Additional Topic 5: *Include a provision that the Act comes into force on a day to be fixed by proclamation.*