

Electronic Signatures in the COVID-Age

April 9, 2020

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There has been a marked increase in the use of electronic signatures in corporate, commercial and consumer transactions in recent years. This trend has accelerated with much of the world currently sequestered and working from home, with the prospect of such restrictions remaining in place for at least the near term. As a result, people are now even more actively looking at ways to continue carrying on business despite the technological and other constraints they now face working remotely. This includes looking to electronic methods to sign and exchange contracts and documents in lieu of signing on paper. Many people are also seeking more information about the validity and reliability of electronic signatures and how to practically and securely execute documents and agreements without a physically-signed “wet ink” page.

Helpfully, the statutory framework in Canada is broadly permissive in facilitating the use of electronic signatures. As a result, electronic signatures can generally be used in a variety of documents and records, including contracts and other commercial documents. Courts across Canada have generally been supportive of the use of electronic signatures. With limited exceptions, electronic signatures (in a variety of forms) have been found to have the same validity as “wet ink” signatures. Given the current crisis, many governments, regulators and courts have urgently adapted their practices and indicated their intention to provide more flexibility in their approach to the use of electronic signatures. While a number of these measures have been implemented only on a temporary basis (for example, the changes in Ontario to the swearing of affidavits and the execution of wills and powers of attorney), the hope is that the crisis will act as a catalyst in creating more permanent advances in the use of technology to execute documents more generally, including documents that have traditionally been viewed as incapable of electronic execution.

Set out below are some [key considerations](#) that can help guide a business in determining the best policy for both electronic creation and execution of documents, including the use of electronic signatures. Having a clear policy on the use of electronic signatures is critical to mitigating potential risks of using electronic signatures and ensuring that the electronic signature will serve as an effective replacement for a “wet ink” signature, both at the time of signing and in future, if a dispute arises.

More detailed information relating to electronic signatures is available by following these links to our discussion of:

- [key electronic signature considerations](#)
- [what constitutes an electronic signature](#)
- [why signatures are important](#)
- [where electronic signatures can \(and cannot\) be used](#), including:
 - general considerations
 - in respect of contractual arrangements or negotiable instruments (including promissory notes);
 - additional considerations in the corporate law context
 - developments relating to affidavits and attestations
 - other electronic signature considerations
- [electronic signature considerations in Quebec](#)

Conclusion

The COVID-19 pandemic is causing many people to urgently consider ways and means to continue carrying on business. Moving away from “wet ink” execution of documents and instruments to a more adaptable environment is an important measure as millions of people are suddenly found working from home, where traditional concepts of document execution and delivery are more challenged. Osler would be happy to provide specific advice regarding the use of electronic signature or electronic records for particular types of documents and to assist in identifying best practices and appropriate policies and procedures for your organization.

Key electronic signature considerations

Although electronic signatures can facilitate faster execution and delivery of contracts, consents and other electronic records, and can help the world in reducing paper usage, the use of electronic signatures do raise some important governance considerations for corporations and other businesses. Key considerations for businesses considering adopting the use of electronic signatures include:

- Do the organization’s governing documents (articles, bylaws, trust indenture, partnership agreement, etc.) impose limitations on the execution of documents and instruments in a way that will limit the ability to use electronic signatures?
- How will the use of electronic signatures fit within the organization’s overall approach to authorized signatories and its signing policy?
- Will all signatories be permitted to initiate and execute documents using electronic signatures?
- Do the jurisdictions involved impose any relevant limitations on the validity or enforceability of electronic signatures?
- What types of documents are proposed to be electronically signed? Do applicable laws permit the use of electronic signatures on those documents?
- What form of electronic signature should be adopted? Is a full digital signature solution warranted?
- If using a full digital signature solution, which provider will the company partner with?
- How much is the organization prepared to spend to implement an electronic signature solution?
- What security protocols will be put in place?
- Will customers, suppliers, regulators and other counterparties accept the use of electronic signatures?
- What policies will be required to ensure that the electronically signed documents are retained so that they can be accessed in future and relied upon in court, if necessary?

What is an electronic signature?

“Electronic signature” is a generic term for electronic information that a person has adopted, imposed or effected in order to sign or mark a document or record and attach the person’s signature or confirmation to the document or record.

The Province of Ontario’s *Electronic Commerce Act* (the “**ECA**”) defines an electronic signature as “electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document”. Similar statutes to the ECA exist in most, if not all, Canadian provinces and territories. While generic definitions are relatively similar across Canada, certain provinces have slightly narrower definitions of electronic signatures that could be interpreted as limiting the definition to “digital signatures” (discussed below). The federal *Personal Information Protection and Electronic Documents Act* (Canada) (“**PIPEDA**”) also has a similar definition, but as noted below, PIPEDA’s application to documents that are within federal jurisdiction is narrow^[1].

In practice, this means that an electronic signature can take a variety of forms, including:

- scanned copies of physically-signed documents;
- scanned or electronic signatures applied or pasted to an electronic document;
- a typed name or signature block;
- a signature created using a stylus or finger on a touchscreen; and
- clicking an electronic confirmation or acknowledgement on a website.

In Canada, there are very few statutory requirements or guidelines that apply to ensure the validity of an electronic signature. Most provincial electronic commerce statutes apply to facilitate the use of electronic signatures only where there is a “legal requirement” (e.g. a statutory provision) that a particular document be signed. Even where such a legal requirement exists, there is little statutory guidance regarding the criteria that should be satisfied in order to create a valid, enforceable electronic signature. In the case of “prescribed records” under the ECA (of which there are currently none), the ECA provides that (a) the electronic signature should be reliable for the purpose of identifying the person signing; and (b) the association of the electronic signature with the relevant record should be reliable for the purpose for which the record was created. Even where not directly applicable, these broad criteria should be satisfied as a matter of best practices. The ECA provides no further guidance.

As a result, in many cases, the use of electronic signatures, including their validity and enforceability, is a matter of best practices. In an electronic age with easy-to-use technology that facilitates copying and pasting, a common fear is that an electronic signature can be copied and applied to other documents, or that an electronic document can be modified after being signed. (Similar concerns exist in the paper world – although arguably to a lesser degree). In order to address this concern, a variety of technologies have been developed to provide more certainty and reliability to electronic execution of instruments. More secure types of electronic signatures are referred to by a variety of names, among others “e-signatures”, “digital signatures” and “secure electronic signatures”. These types of electronic signatures use algorithms and encryption in order to determine the authenticity of the applicable signature and the digital document to which the signature was applied.^[2]

Digital signatures are marketed by a variety of different providers and include products like DocuSign, Adobe Digital Signatures and PandaDoc. These products generally provide a unique login and identification to each user (seeking to provide certainty of identity) and embed information regarding the signature and document into the software, creating an audit record and security associated with both the signature and the document signed which is encrypted.

[1] PIPEDA defines an electronic signature as “a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to or associated with an electronic document.”

[2] For example, PIPEDA requires signatures to satisfy the following criteria in order to be considered “secure electronic signatures”: (a) the electronic signature must be unique to the person signing; (b) the signature must be created and be under the full control of the person making the signature; (c) specific technology or processes must have the capability to be used to identify the person; and (d) there must be an audit trail, meaning the electronic signature must be linked with an electronic document in a way that allows the examiner to determine whether the e-document has been changed since the signature was attached to it. Although these requirements are more prescriptive than those contained in provincial legislation, and can be referred to as useful guides to best practices, PIPEDA itself only applies to a narrow range of documents. However, similar language finds its way into other federal statutes – such as the *Canada Business Corporations Act*.

Why are signatures important?

Certain laws require documents to be *signed*. Even where there is no such legal requirement, signatures have formed an essential component of legal relations between parties for centuries. Although a signature (or even a written document) is not necessary to create a contract (in most cases), a signature can serve to confirm both the identity of the signatory and the agreement by the signatory to be bound by the obligations in the document (such as agreeing to contractual obligations or providing a consent). A signed document provides valuable evidence should a disagreement arise about the nature of the agreement or the intentions of the signatory.

In a digital environment, questions can be raised about the security of electronic signatures and the best manner for ensuring that the signature serves the purpose of confirming the identity of the signatory and the assent to the contents of the document signed. Digital signatures, with clear identification of the signatory and a clear audit trail, likely provide a more supportable record than other types of electronic signature. Appropriately developed policies and procedures for creating and retaining electronic documents and signatures also assist in supporting the validity and enforceability of an electronically-signed document both when it is created and later in the event of a dispute.

Where can (and can't) electronic signatures be used?

In Canada, other than in fairly limited circumstances, electronic signatures are permitted for most documents and records where a “wet ink” original signature would be accepted. In order to assess whether an electronic signature can be used, it is important to consider both the applicable legislative framework and common law considerations. Set out below are certain general considerations relating to the use of electronic signatures, and specific information regarding the use of electronic signatures for certain types of documents and records.

General Considerations

Where there is no legal requirement for a particular document to be “in writing” or to be “signed”, there is no need to resort to provincial legislation to determine that the electronic document or signature is valid and enforceable. Courts have generally indicated a willingness to conclude that the electronic document or signature is valid if it satisfies requirements under the general law for an enforceable document and/or signature.

Where there are provincial legal requirements for a document to be signed, most provinces exempt certain types of documents from the application of their general electronic commerce legislation. Although these exceptions vary by jurisdiction, they generally include certain types of documents where additional formalities are required. In Ontario, the ECA provides that electronic signatures are expressly not available for:

- wills and codicils^[3];
- trusts created by wills or codicils;
- powers of attorney, to the extent that they are in respect of an individual’s financial affairs or personal care; or
- negotiable instruments (which can include cheques, promissory notes and bills of exchange).

The exclusion of these documents from the ECA does not necessarily mean that electronic signatures are prohibited on those documents. It does mean, however, that it is necessary to look to the specific legislative environment that applies to those documents to determine whether an electronic signature is acceptable and if so, under what circumstances.

[3] Note, however, that some governments are taking actions to permit technological substitutes in the face of the COVID-19 pandemic. For example, on April 7, 2020, the Ontario government has issued [a regulation](#) under the *Emergency Management and Civil Protection Act* confirming that, for the duration of the emergency, statutory requirements for the execution of wills and powers of attorney requiring witnesses to be present in person may be satisfied by means of “audio-visual communication technology” (i.e. a virtual meeting) provided that at least one person who is providing services as a witness is a licensee under the *Law Society Act*.

Contractual Arrangements

In Canada, contractual relationships are generally governed by provincial law. Electronic signatures will generally be acceptable for many most contractual arrangements, including corporate/commercial agreements and many consumer contracts. As a general matter, most such documents are not subject to any legal requirement to be signed and therefore, are not subject to specific statutory requirements. The common law has evolved over the past decade to recognize the growing use of electronic signatures. In any event, as discussed above, most, if not all, provinces have statutes of general application facilitating electronic contracting and the use of electronic signatures where a signature is legally required, with certain exceptions.

PIPEDA contains a section addressing the use of electronic documents and signatures in relation to documents or other records within Canadian federal jurisdiction. However, PIPEDA is not drafted as a law of general application, subject to certain specific exemptions, as the provincial electronic commerce statutes are. Instead, PIPEDA's provisions facilitating the use of electronic documents and signatures apply only to records or documents created under those federal statutes specifically listed in the Schedules. To date, very few federal statutes have been included in those Schedules. It remains to be seen whether, in the era of COVID 19 and remote work environments, the federal government will take further steps to expand the application of PIPEDA to documents to which other federal statutes apply.

Unless and until such steps are taken, it is necessary to look to the variety of federal statutes that have been specifically amended to recognize electronic signatures in certain circumstances (such as the *Canada Business Corporations Act*, the *Bank Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*). The result is that there are gaps at the federal level in which no legislative mechanism applies to facilitate the use of electronic documents or signatures – for example, assignments of copyright under the *Copyright Act*.

Outside of Canada, care should be taken when considering the use of electronic signatures. While many countries have adopted laws relating to the use of electronic signatures, adoption is not universal and requirements differ from country to country. While many jurisdictions recognize and permit electronic signatures, applicable requirements should be investigated prior to use. Consideration may also need to be given to conflicts of laws issues.

Corporate Law Considerations

Where applicable corporate law requires the signature or execution of a document (for example, a written resolution of the board of directors or the shareholders or a form of proxy), the applicable corporate statute should also be consulted. Since the signatures and documents to be executed under the corporate statutes relate to the governance of the entity in question, these statutes generally impose their own requirements with respect to signatures and the execution of documents. These requirements can be more restrictive regarding the use electronic signatures than the ECA and its equivalent in the other provinces.

For example, there are detailed provisions in the *Canada Business Corporations Act* (the “**CBCA**”) regarding the use of electronic signatures and records. Several of these provisions are similar in wording to the equivalent provisions in PIPEDA. The CBCA requires that the electronic signature result from the application by “a person of a technology or process” that permits the following requirements to be proven: that the signature is unique to the person, that the technology or process was used to incorporate, attach or associate the signature to the document, and that the technology or process can be used to identify the person using it.

While a scanned copy of a physical signature has long been accepted to satisfy these requirements as a matter of practice, the ability of any particular “technology or process” to satisfy these requirements, or those under other applicable corporate law, should be considered to ensure the validity of the signature in question (and the corporate actions that may be taken in reliance on it) for purposes of corporate law. Most digital signature technology platforms contain features that can be activated for these purposes.

Promissory Notes and other negotiable instruments

As was noted above, the ECA, and other jurisdictions, expressly exclude negotiable instruments from the types of documents for which electronic signatures are expressly authorized. Cheques, bills of exchange and promissory notes are generally governed by the *Bills of Exchange Act* (Canada). On one hand, the *Bills of Exchange Act* expressly contemplates that an instrument or writing is not required by be signed by a person's own hand (and that it is sufficient if the signature is written thereon by another person or under the person's authority). On the other hand, there is some uncertainty as to whether negotiable instruments can be valid and enforceable if executed with digital signatures (though it is possible that other types of electronic signature, such as image signatures attached to a document could be valid). As such, "wet ink" signatures are likely the safest method of execution for negotiable instruments for the time being. It remains to be seen whether the COVID-19 era will spark more rapid evolution of the law in this area.

Affidavits and Attestations

Court documents represent a category in which specific rules regarding the use of electronic signatures are likely to apply. Such rules will no doubt vary across jurisdictions and depending on the type of document at issue. One major category of such documents to emerge as a subject of urgent discussion in the wake of the COVID-19 lockdowns is affidavits and attestations, which have historically required specific formalities in order to be validly executed.

Commissioning of affidavits has traditionally required that the oath or confirmation be attested in person. However, as a result of the COVID-19 pandemic, certain courts (such as the [Superior Court of Justice \(Commercial List\)](#) and the [Superior Court of Justice \(Civil and Family\)](#)) have expressly acknowledged that affidavits may be sworn virtually in accordance with the Law Society of Ontario's [Corporate Statement regarding COVID-19](#), which [states that](#):

However, as a result of COVID-19, until further notice:

- The Law Society will interpret the requirement in section 9 of the Commissioners for Taking Affidavits Act that "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public" as not requiring the lawyer or paralegal to be in the physical presence of the client.
- Rather, alternative means of commissioning such as commissioning via video conference will be permitted.
- If lawyers and paralegals choose to use virtual commissioning, they should attempt to manage some of the risks associated with this practice as outlined below.

Managing the Risk of Virtual Commissioning:

If a lawyer or paralegal chooses to use virtual commissioning, the lawyer or paralegal should be alert to the risks of doing so, which may include the following issues:

- Fraud
- Identity theft
- Undue influence
- Duress
- Capacity
- Client left without copies of the documents executed remotely
- Client feels that they did not have an adequate opportunity to ask questions or request clarifying information about the documents they are executing.

This is an express exception in the circumstances to the Law Society's general advice that in-person commissioning continues to represent a best practice. A number of courts and law societies across Canada have also implemented measures to facilitate virtual commissioning of affidavits. However, the specific rules may differ across the country by jurisdiction and by court. Parties who need to create and rely on sworn documents should expressly review their particular circumstances before tendering a virtually-sworn affidavit.

Other Electronic Signature Considerations

Apart from the above specific documents and situations, parties seeking to use electronic signatures should consider the following:

- Irrespective of whether electronic signatures are available, certain parties may insist on wet ink signatures on commercial agreements. Common examples are banks and financial institutions (particularly for loan agreements), though this expectation may soften in light of current circumstances. It is recommended that parties discuss the potential use of electronic signatures to avoid any misunderstandings.
- Documents required to be filed with a government regulator may need to be a “wet-ink” original. For example:
 - Many corporate registries across the country that still require paper forms (some are exclusively electronic) have temporarily permitted the filing of PDF documents. However, certain governmental offices (the Ontario Ministry of Consumer and Business Services, in particular) still require certain corporate filings to be in “wet-ink” original.
 - Certain intellectual property assignment documents are still required to be filed in original.
- In Ontario, real estate transactions may generally use electronic signatures (a fairly recent change to the ECA). Land registry offices outside of Ontario may still require “wet-ink” originals.
- Parties in secured lending transactions may still require originally executed “wet ink” signatures on securities transfer powers and other similar documents in order to ensure they have sufficient control to perfect a security interest in the underlying collateral.
- Transactions with consumers are generally subject to enhanced obligations (particularly in the context of certain borrowing transactions) and may require express consent to the use of electronic signatures.
 - We note that it may be prudent to include language in all agreements that are to be electronically signed indicating the parties’ consent to use electronic signatures and to obtain delivery of the document electronically.

Most provincial evidence legislation, as well as the *Canada Evidence Act*, contains provisions providing for electronic records to be admitted as evidence in court proceedings. When creating and retaining electronically signed records, it is important to be mindful of the standards in these provisions for supporting the future admissibility of the record in a court proceeding.

Electronic signature considerations in Quebec

Overview to framework

In Quebec, the Act to Establish a Legal Framework for Information Technology (the “AELFIT”) and the Civil Code of Québec (the “CCQ”) define broadly what constitutes a signature to a document^[4]. Pursuant to the AELFIT, in the context of a technology-based document, a person’s signature may be affixed to the document by means of any process that allows for the affixing by a person, to a writing, of his name or of a mark distinctive to him which he regularly uses to signify his consent.

In Quebec, in order to attribute rights and obligations under a technology-based document to a person, the integrity of the document must be ensured and a link must be established between the person and the technology-based document. The ability to demonstrate the maintenance of the integrity of the document (such as by means of the document’s metadata) and the preservation of the link between the signature and the document are essential to ensure the validity of an electronic signature. There are no specific means or processes prescribed by law pursuant to which such link must be established.

E-signature usage

In Quebec, the CCQ or other laws may impose the use of a specific medium (e.g. a paper-based document) or other formalities (e.g. a notarial deed executed with and in the presence of a Quebec notary) in the case of certain documents as a condition to their validity, including (i) a movable or immovable hypothec granted in favour of a hypothecary representative must be in notarial form, (ii) an immovable hypothec must be in notarial form, (iii) a gift (other than a gift of movable property which is accompanied delivery and immediate possession of the property), (iv) a trust established by way of a gift that is subject to notarial form, and (v) wills.

As a result of the COVID-19 pandemic, the Quebec Government has temporarily authorized the remote execution of notarial acts by electronic means in accordance with the process and procedures established in collaboration with the Board of Notaries. This includes executing the notarial act electronically provided the notary is able to see and hear the parties and to verify their identities, each party is able to see and hear the notary, and each party is able to see the document.

[4] A signature is the affixing by a person, to a writing, of his name or a mark distinctive to him which he regularly uses to signify his consent.

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