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Electronic Signatures: A Guide for Ontario Businesses

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As we approach the one-year mark for the many Canadians working remotely, executing commercial agreements through electronic means has become "the new normal." This bulletin provides a brief overview of the current framework in Ontario governing electronic documents and electronic execution of such documents, including a review of statutory changes made in response to the COVID-19 restrictions put in place in March 2020.

What Is an Electronic Signature?

An electronic signature is defined in the *Ontario Electronic Commerce Act* (ECA) 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." Unless otherwise required by a specific law or agreement, generally, an electronic signature can satisfy any legal requirement for a signature. The ECA does not specify any particular test of reliability for such a signature.

The federal *Personal Information Protection and Electronic Documents Act* similarly 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." Because the majority of contracts and documents that our clients enter into are between consenting commercial parties, these documents will usually be governed by provincial legislation, unless the contract or document is entered into with a Canadian federal governmental body.

The term "electronic signature" is intended to be a technology-neutral term that refers to the many ways in which a person may indicate an association with an electronic document, such as,

- a name typed at the end of an email message;
- a digitized form of handwritten signature;
- an electronic drawing of a signature;
- a unique password, code or personal identification number; or
- a digital signature created through the use of public key cryptography.

These existing forms of electronic signature, if used appropriately, may satisfy the basic legal requirement of a signature linking an electronic document to the signatory.

Requirement of Consent

Under section 3(1) of the ECA, no person can be required to accept a document in electronic form without that person's consent, which can be inferred on an objectively reasonable basis from the conduct of the parties. As a matter of best practice, parties should include a provision in the document that allows for electronic execution if that is the intention, along with a counterparts clause allowing for individually executed parts to form one complete document. An exception to the general rule of implied consent is that of a public body, because the consent of a public body is given only by an explicit communication.

Use and Acceptance of Electronic Signatures

Generally speaking, electronic signatures can be used in most cases where a signature is required or expected as a matter of practice. However, certain types of documents and contracts are specifically excluded in the ECA – namely,

- wills and codicils;
- trusts created by wills and codicils;
- powers of attorney to the extent that they are in respect of an individual's financial affairs or personal care;
- negotiable instruments (such as promissory notes, cheques or pledge bonds); and
- documents of title, except anything done in connection with a contract for the carriage of goods.

The exclusion from the ECA does not mean that electronic signatures are not acceptable; rather, it indicates that the specific legislation or common law principles governing the requirements for these types of documents should be consulted. Companies should also look to their bylaws and resolutions to determine whether there are any specific restrictions or requirements relating to electronic execution of documents. Further, federally incorporated corporations should consult the *Canada Business Corporations Act* for guidance, as it contains specific provisions relating to the use of electronic documents and signatures.

Capital Markets

Generally, documents in lending or secured transactions fall under the ECA and can be executed electronically. As noted above, negotiable instruments are excluded. Some lenders require original documents with "wet ink" signatures on certain documents such as share certificates and security transfer powers. As a result, it is important to have a system to allow for physical execution while remote-working procedures remain in place.

Securities

Due to COVID-19 restrictions, the System for Electronic Document Analysis and Retrieval (SEDAR) is currently accepting copies of Form 6 solely via email, and will follow up to collect hard copies once everyone returns to working in-office. The copies may be signed electronically, but not with typed font. Otherwise, documents required to be filed with the Ontario Securities Commission, SEDAR and the System for Electronic Disclosure for Insiders (SEDI) are generally allowed to be signed and filed electronically.

Canada Revenue Agency

As a general rule, tax forms submitted to the Canada Revenue Agency (CRA), including those that are electronically filed, must be signed by hand. In response to the COVID-19 pandemic, the CRA has relaxed this requirement in respect of certain tax forms.

On March 28, 2020, the CRA announced that it would temporarily permit taxpayers to sign authorization forms T183 and T183CORP electronically when the electronic signature meets certain requirements. These forms must be retained by both the tax preparer and the taxpayer for at least six years when a tax preparer has electronically filed the tax return on the taxpayer's behalf. This measure has been extended through the 2020 tax filing season, and the CRA has held public consultations to determine whether to make this measure permanent.

The CRA has also announced that it will accept electronic signatures on forms T2200 and T2200S, which are used to determine an employee's eligibility to deduct home office expenses. This measure applies only for the 2020 tax year.

Real Estate

Since 2015, electronic documents that create or transfer interests in land and require registration to be effective against third parties may be used in real estate transactions in Ontario; those documents may be executed electronically as well. Note that transactions outside Ontario may still require original signatures.

Digital Signature Software

Third-party software (such as DocuSign and Adobe Digital Signatures) allows for verification using passwords or PIN numbers and uses data encryption technologies. As a matter of best practice, we recommend using one of these platforms because they are more secure and less time-consuming than other options such as scans of manual signatures.

Validity of Original Documents

In order for an electronic signature to be valid, the electronic document it is attached to must also be valid. The ECA prescribes acceptable instances in which an electronic document may be used in place of an original document. In certain circumstances, it is legally required that an original document be provided, retained or examined. This requirement is satisfied by the provision, retention or examination of an electronic document

- if there is reliable assurance that the information from the original document has remained complete and unaltered, determined in light of all the circumstances; and
- in a case in which the original document is to be provided to a person, the electronic document is understandable by, available to and capable of being retained by the person.

Ontario Statutory Developments

Bill 190

Bill 190, *COVID-19 Response and Reforms to Modernize Ontario Act* received royal assent on May 12, 2020. This bill enacted the *Alternative Filing Methods for Business Act*, which allows for electronic execution and filing of certain documents via email or fax.

This new regime applies to statutes such as the *Business Corporations Act, Business Names Act, Corporations Act, Co-operative Corporations Act, Corporations Information Acts, Extra-Provincial Corporations Act and Limited Partnerships Act*. These provisions apply to documents such as articles, notices, declarations, applications and supporting documents. The full name of the signatory must be set out on the signature line, and it must indicate that it has been signed by electronic signature (i.e., "John Doe by electronic signature") unless it is a scan of an original signature. A record of the properly executed document must be kept by the entity executing such document.

Bill 190 also amended the Notaries Act to provide that despite any requirement in law for a notary public to exercise his or her powers in a person's physical presence, the notary may do so, in accordance with the regulations, without being in the person's physical presence. The Lieutenant Governor in Council has not yet made regulations allowing for this; thus, physical presence is currently still a requirement for a notary to witness or certify, and attest, the execution of a document, or certify and attest a true copy of a document.

Oaths and Declarations

On August 1, 2020, the *Commissioners for Taking Affidavits Act* was amended to allow for remote administering of an oath or declaration. The regulations require that the person administering the oath or declaration and the deponent or declarant can see, hear and communicate with each other in real time and that the deponent's or declarant's identity is confirmed. Practically, this involves the use of video conferencing software. The deponent or declarant will likely be required to show some form of government identification. Lastly, the person administering the oath or declaration will need to keep a record of the transaction, which should include a copy of the identification provided. As a matter of best practice, this record should be provided to the deponent or declarant for his or her own record-keeping.

To protect against the risks of undue influence, duress or incapacity, the person administering the oath or declaration should ensure that the deponent or declarant is alone during the transaction, fully understands the contents of the document and has ample opportunity to ask questions. In addition, a receiving party is not obliged to accept a document that has been commissioned remotely. Accordingly, prior to engaging in remote commissioning, one must determine whether the receiving party is able and willing to accept remotely commissioned documents.

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