

Rise of The Machines: Electronic Signatures and Paperless Closings

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Once upon a time, not so long ago, attorneys and their clients typically closed transactions by gathering in conference rooms to eat turkey sandwiches, hash out final deal terms, and sign multiple copies of closing documents neatly arranged in manila folders. While turkey sandwiches remain popular, the in-person closing and the exchange of original, signed documents, has become increasingly rare. Electronic signatures have been legally recognized for several years, but their widespread use—often to the complete exclusion of ink signatures—has only more recently become common practice.

The Law of Electronic Signatures

The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) was enacted in 2000. Forty-seven states and the District of Columbia have also adopted statutes based on the Uniform Electronic Transactions Act (UETA), and the remaining three states have adopted similar laws. E-SIGN, like UETA, is an overlay statute (that is, one that is superimposed on existing federal and state laws) giving legal force and effect to electronic signatures and electronic records. The key elements of E-SIGN and UETA are that:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

- A contract may not be denied legal effect solely because an electronic record was used in its formation.
- If a law requires a record to be in writing, an electronic record satisfies the law.
- If a law requires a signature, an electronic signature satisfies the law.
- In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Together, these provisions are intended to create equivalency between electronic and manual signatures. Certain exceptions apply including under the UCC (although in many cases the UCC defers to other state law) and for wills and trusts. Additional exceptions apply, including any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; or any notice of cancellation of utility services (including water, heat, and power).

It is important to note that the definition of an electronic signature under E-SIGN and UETA is deliberately broad and goes far beyond the garden-variety electronic signature consisting of a manually signed page in PDF format transmitted by email. The definition includes sounds, symbols, processes, and other manifestations of

intent (think: click-through screens, check-the-box web pages, the entry of unique passwords or personal identification numbers, retinal scanners, fingerprints, etc.). Even a simple email transmission with no attachment can constitute an electronic signature under some circumstances.

UETA and E-SIGN also provide that documents can be notarized electronically if a notary applies an electronic signature meeting the requirements described above, and that the other required information, such as the information normally included in the notarial seal and the expiration date, are “attached to or logically associated with the signature or record.”

In Canada, the federal government and the provinces have also enacted legislation governing electronic signatures that appear to be similar in scope and effect to E-SIGN and UETA, as summarized above. All 11 jurisdictions permit electronic signatures, but each jurisdiction imposes certain requirements and restrictions pertaining to their use and acceptability.

At the federal level, the *Personal Information Protection and Electronic Documents Act (PIPEDA)* regulates electronic signatures for matters falling under federal authority. *PIPEDA* creates two standards for electronic

signatures depending on the nature of the matter—referred to as “electronic signatures” and “secure electronic signatures.” An “electronic signature” is broadly defined, while a “secure electronic signature” has a more stringent definition set out in *PIPEDA* and the *Secure Electronic Signature Regulations*, which establish minimum requirements to satisfy the definition. Under *PIPEDA*, secure electronic signatures are required for matters such as statements made under oath, documents signed under seal, documents required to be in their original form, and witnessed signatures.

At the provincial level, the provinces have enacted legislation regulating electronic signatures for matters falling under provincial authority. While each province’s legislation is substantially similar, there are some important differences. Notably, Ontario, Québec, New Brunswick, Manitoba, Newfoundland and Labrador, and Prince Edward Island allow electronic signatures for transferring interests in land, while British Columbia, Alberta, Saskatchewan, and Nova Scotia do not. Some provinces have also enacted similar restrictions on the use of electronic signatures for 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, documents of title, and matters pertaining to substitute decision-making.

Practical Issues Relating to Electronic Signatures

The use and acceptance of electronic signatures is not mandatory. Some

parties (including many banks) may still insist on receiving original signed documents before closing. Generally, electronic signatures will be binding only when the parties have agreed to their use, although courts will consider context and course of dealing when determining the intent of the parties. Accordingly, parties wishing to enter into binding agreements electronically should make their intent to do so clear by adding language to that effect to their contracts. On the other hand, a party who does not wish to be bound by an electronic signature should add appropriate disclaimers to emails or other transmissions to reduce the risk of inadvertently entering into a contract.

General principles of contract law and evidence still apply in the electronic context, and many of the issues are the same whether dealing with electronic or manual signatures. Assent can be indicated by putting pen to paper, or by clicking “send.” The authenticity and origin of an electronic signature can be challenged (perhaps more easily than a signature that is manually applied in a conference room full of witnesses), but document forgery is also a potential problem when dealing with manual signatures. Electronic files can be deleted or corrupted, but paper documents are also subject to mishandling, loss, or damage. A number of companies, such as DocuSign, eSign-Systems, and Hellosign, assist with electronic signatures on documents, including e-delivery, e-signatures and e-retention solutions.

The speed and convenience of conducting business using electronic signatures,

the ease of electronic document storage, and the general trends toward improved technology and greater reliance on technology all point to greater reliance on electronic signatures in the future. ♦

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