

Electronic signatures: a guide for Alberta businesses

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Electronic signatures or e-signatures have been in use in Canada for over two decades. Their use and acceptance have become more necessary and more widely accepted because of the COVID-19 pandemic, as people have to rely on the use of e-signatures in situations where they would have previously provided their signatures in-person.

Currently, in Alberta most commercial agreements can be signed electronically except those expressly excluded by the parties, including, but not limited to: (i) sales agreements; (ii) service agreements; (iii) user manuals; (iv) purchase orders; (v) lease agreements; and (vi) employment contracts. The use of electronic signatures is optional and parties to a transaction would usually obtain consent from one another to use electronic signatures. It is recommended that the consent be a written authorization and in the case of contracts, the consent should be a clause in the contract if a contract is intended to be signed electronically. In some situations, consent to the use of electronic signatures may be inferred from a person's conduct if there is ground to believe that the consent is genuine and relevant to the information or record.

What is an electronic signature?

An electronic signature is defined in the Alberta Electronic Transactions Act (**ETA**) as an "electronic information that a person creates or adopts in order to sign a record and that is attached to or associated with the record." In practice, this means that an electronic signature can take a variety of forms, including: (i) scanned copies of physically signed documents; (ii) scanned or electronic signatures applied or pasted to an electronic document; (iii) a typed name or signature block; (iv) an electronic image of a handwritten signature; (v) an electronic drawing of the signature created using a stylus or finger on a touchscreen; and (vi) clicking an electronic confirmation or acknowledgement on a website.

The Alberta Electronic Transactions Act

Electronic signature laws are regulated at the provincial level, although federal law may apply in certain circumstances and with respect to specific transactions (e.g. the Canada Business Corporations Act, the Bank Act, the Insurance Companies Act and the Trust and Loan Companies Act). In Alberta, the ETA and the subsequent regulations set out how electronic signatures are recognised in the province.

Most documents are capable of being signed electronically, with the ETA applying to all documents and records, except those documents and records: (i) expressly excluded in the ETA; (ii) excluded by parties to a transaction; or (iii) excluded by any other legislation.

Requirements of a valid electronic signature under the ETA

The ETA does not prescribe any preferred technology or preferred form of an electronic signature in commercial transactions, but it does set out the qualities of a valid electronic signature and what needs to be in place for an electronic signature to be regarded as being functionally equal to a manual signature.

An electronic signature functions like a handwritten signature if the electronic signature can reliably: (i) identify the person signing; and (ii) link the person, through the signature, to the document to show the person's acceptance of and intention to be bound by its contents.

Thus, reliability of an electronic signature is important to give it the functional equivalency of a handwritten signature. In addition, a legal requirement that documents be in writing is satisfied if the

electronic form can be retained by the other person and is accessible to use for future reference. Typical electronic signature solutions use common authentication methods to verify signer identity, such as an email address, corporate ID or phone PIN. Multifactor authentication is used when increased security is needed. The best e-signature solutions demonstrate proof of signing using a secure process that includes an audit trail along with the final document.

Documents expressly excluded from the scope of the ETA

The ETA states that its provisions do not apply to the following documents:

- Wills and codicils;
- Trusts created by wills or codicils;
- Records that create or transfer interests in land, including interests in mines and minerals;
- Negotiable instruments;
- Guarantees under the Guarantees Acknowledgment Act;
- Enduring powers of attorney under the Powers of Attorney Act; and
- Personal directives under the Personal Directives Act.

These documents require original wet ink signature before they can be regarded as being validly signed.

Securities

The Alberta Securities Commission, which is the regulatory agency responsible for administering the provinces securities laws, requires typed signatures on documents within electronic filings which are required to be filed on the System for Electronic Document Analysis and Retrieval (SEDAR). If the filing is meant to be signed or certified then it shall be signed by means of electronic entry.

Some documents, like the annual information form, prospectus, issuer bid circular and takeover bid circular, which contain a certificate signed by a person or company, are permitted to be filed in electronic format but require that a manually signed certificate of authentication on SEDAR Form 6 be delivered to the SEDAR office. Due to the pandemic, these documents can now be signed electronically as well (in a handwritten electronic signature and not type fonts) and provided to SEDAR via email (rather than being sent by courier to the SEDAR office).

On April 27, 2020 as a response to the Covid-19 pandemic, the Alberta Securities Commission released a blanket exemption order which serves an explicit consent to the use of electronic signatures in place of manual signatures for documents that are required to be filed with the commission or with the executive director. This order will be in force until April 30, 2021.

Real estate agreements

The ETA expressly prohibits the use of electronic signatures for records that create or transfer an interest in land. Electronic signatures cannot be used for documents that need to be registered with Alberta's Land Titles office to be effective against third parties. These documents must be signed manually. However, parties to a real estate transaction can consent to the use of electronic signatures to sign leases, agreements of purchase and sale and documents which evidence their intention to enter an agreement and are not intended to be registered at the Land Titles office.

Lending and financing transactions

Generally, the parties to an agreement can consent to the use of electronic signatures and this applies equally to agreements such as loan agreements or forbearance agreements. While that is the

case, the ETA prevents electronic signatures from being used on promissory notes and negotiable instruments and powers of attorney. Personal guarantees governed by the Guarantees Acknowledgement Act (Alberta), which are any guarantee given by a person, not a corporation, to answer for an act or obligation of another, but does not include a bill of exchange, cheque or promissory note, a partnership agreement, a bond or recognizance given to the crown or to a court or pursuant to a statute, or a guarantee given on the sale of an interest in land or an interest in goods or chattels, cannot be signed electronically.

Canada Revenue Agency (CRA) documentation

When someone, other than the required filer, is going to transmit tax returns electronically to the CRA, an authorized signing officer of a corporation needs to complete and sign a T183CORP form or, in the case of individuals, a T183 form, before the tax return is transmitted to the CRA. On March 28, 2020 in response to COVID-19, the CRA announced that electronic signatures will be temporarily recognized as meeting the above signature requirements of the Income Tax Act authorizing the filing of tax documentation. The aim of the measure is to reduce the necessity for taxpayers and tax preparers to meet in-person.

Alberta Courts decisions on electronic signature

In the *Thompson Brothers v Alberta* 2012 Alberta Court of Appeal case, the Court noted that civil court rules generally do not contemplate original signatures on submissions by counsel to the court; hence, electronic signatures of counsel are acceptable. An exception to this is the requirement of rule 13.19(1) (f), which requires original signatures on affidavits. In the *1353141 Alberta Ltd v. Roswell Group* 2019 Alberta Court of Queen's Bench case, the Court held that a signature requirement is met if it identifies the person who is signing and establishes the signatory's approval, ruling that a block signature established approval of the email contents. As a caveat, the Court stated that the circumstances of each case will determine whether or not an electronic signature satisfies the signature requirement in electronic form.

These cases indicate that the Alberta Courts have generally accepted the use of electronic signatures and are willing to look at the circumstances of each matter on a case-by-case basis to determine if there is an intention to sign a document electronically.

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