

Legal framework for electronic signatures

Context

Over the last 25 years, the increased use of information technology has fostered the development of e-commerce, led to significant changes in business practices and processes, and in many cases has allowed documents to evolve from paper to a digital form.

In order to overcome various legal obstacles and facilitate this transition to digital, industrialized nations have enacted laws recognizing the legal validity of electronic documents. In Canada, the Uniform Law Conference of Canada endorsed the *Uniform Electronic Commerce Act*, developed in 1996 by the United Nations Commission on International Trade Law (UNCITRAL) and recommended that its provisions be adopted by Canadian provinces.

The statutes adopted in this regard by each of the provinces at the outset of the millennium recognize the legal validity of electronic documents and impose requirements for their validity, their admissibility as evidence and, in the case of signed agreements, their enforceability against the parties that executed them.

Despite this statutory framework, governments, businesses and individuals are still reticent to incorporate electronic signatures into their business activities and processes. In addition to the challenges associated with managing changes in business processes developed in a paper-based paradigm and not yet updated to reflect today's digital reality, this reticence can be attributed to unfamiliarity with the legal framework (due in part to the scant case law on the subject) and a lack of understanding of the parameters of the technological solutions that must be established in order to meet the statutory requirements.

In that regard, the application of the statutory provisions to the technological processes of the various electronic-signature solutions (of varying reliability) available on the market may present difficulties for those in the legal profession who are not overly familiar with information technologies.

The brief analysis that follows centers on the two primary legal concerns for organizations who are considering the use of an e-signature solution, namely (i) the legal requirements for the validity of a document bearing an electronic signature, and (ii) the conditions for the admissibility into evidence and enforceability of documents signed electronically, and the requirements that should be met by e-signature solution used for this purpose.

Analysis

The applicable Canadian statutes are based on the principle of technological neutrality, and provide that in most cases, reference to a written instrument does not presuppose the use of any specific medium, thus leaving it up to the parties to choose whether to use paper-based or electronic documents. Consequently, the legal effect of a document will not be negated by the fact that it is in electronic form or was signed electronically.

With rare exceptions¹, electronic signatures are thus recognized as a valid means of expressing consent and concluding agreements, to the extent that the integrity of the signed document can be established. In Canada there can therefore no longer be any doubt that a document in electronic form, signed via an e-signature solution, is legally valid.

¹ In rare instances, the law requires that a document or signature be in a specified form. It must thus be determined beforehand whether there are any specific statutory or regulatory provisions regarding the form that the documents to be used in any given situation must be in.



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The admissibility into evidence and enforceability of an electronic document depends on the ability to demonstrate the origin and integrity of the document. The degree of certainty provided by the functionalities of the electronic-signature process is thus determinative, and organizations must carefully consider these when choosing a solution.

The concept of the integrity of a document involves the ability to confirm the absence of any modifications to it or to detect any modifications made to the document since it was finalized or signed.

From a legal standpoint, a signature is a permanent feature of a document associated with a specific person and indicative of his or her intention (e.g. consent). An electronic signature is obviously a signature applied to an electronic document.² In the context of concluding an agreement, the signature performs a dual role: confirmation of the identity of the parties, and of their respective intention to give full effect to the signed document.

Under the Canadian statutes, a document bearing an electronic signature that allows the origin and integrity of the document to be established on the sole basis of the document itself constitutes evidence that is admissible in court. It is thus critical to ensure that the e-signature solution used allows the integrity of the document to be preserved and proof of this to be established.

E-signature solutions such as *ConsignO Cloud* allow the origin and integrity of a document to be established and for it to be enforced against the parties, by demonstrating its nexus with the parties and that no modifications were made to it since it was executed.

In order to establish that documents signed with a given e-signature solution are admissible into evidence and enforceable, organizations will need to rely on the representations and explanations of their solution suppliers concerning the functionalities and creation parameters of user accounts, of user authentication, access, activity and session logs, documentation of the steps inherent in the solution, and the conditions for the preservation of the documents in question.

Conclusion

Unless there are rules specific to a given area of law, an electronic document will have the same legal effect as a paper-based one. A document signed electronically that allows its origin and integrity to be established will be enforceable against the parties that executed it.³ Any organization that seeks to reduce its risks regarding the integrity of its documents is thus well-advised to use an e-signature solution that maximizes the organization's comfort level regarding the origin and integrity of its documents.



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² In addition to establishing the link between the signor and the party's intention, electronic signatures can also constitute evidence of circumstantial details such as the date and time when the document was signed by a party.

³ If a document's integrity cannot prima facie be established, external corroborative evidence will be required in order for it to have its intended legal effect; otherwise it may at best, depending on the circumstances, be admitted into evidence as a commencement of proof.



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Jean-François De Rico specialises in IT law et also practices in the areas of intellectual property and commercial litigation. In the area of information technology, he advises organizations on governance and regulatory compliance, on the negotiating and drafting of contracts, the protection of personal information and the management of intellectual property rights. He also provides advice on the development of software applications, the provision of cloud services, the outsourcing of IT services, the supply and procurement of IT equipment and the implementation of E-business processes. He has been included in both the *Best Lawyers® in Canada* listing and the *Canadian Legal Lexpert® Directory* since 2016, for Information Technology Law.

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