

Electronic Signatures in Commercial Transactions

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With all but essential workers now working from home, more than ever, parties are turning to technology to assist with closing transactions and planning to increase their usage of electronic signature (eSignature) platforms, such as DocuSign.

What is an eSignature?

An eSignature is the electronic equivalent of a hand-written signature. Whether a signature is paper-based or electronic, the underlying purpose of the signature is the same - a signature links a person to a document (or transaction) and typically provides evidence of that person's intent to approve or to be legally bound by its contents¹ and of the signatory's identity². Electronic signatures vary greatly and will depend on the technology utilized but they are in, attached to, or otherwise associated with the document being signed.

Can You Use an eSignature for Non-Real Estate Matters?

Every Canadian province has its own legislation outlining the requirements for doing business electronically and using eSignatures. In Ontario, British Columbia and Alberta, barring a few important exceptions, eSignatures may be utilized for closing transactions to create binding obligations. Please note that eSignatures may **not** be used for³:

- wills, codicils and trusts created by wills or codicils
- powers of attorney regarding an individual's financial affairs or personal care
- negotiable instruments (such as certificated securities and negotiable promissory notes)
- beneficiary designations (such as for life insurance)
- certain real estate matters (see below)
- documents that are from time to time prescribed or that belong to a prescribed class

Instead, the above items require a traditional "wet ink" signature.

Some parties embrace, and expressly permit, the use of eSignatures; however, they are not always acceptable to counterparties who may insist upon original "wet ink" signatures (such as for "know your client" checks).

Can You Use an eSignature for Real Estate Matters in Ontario, Alberta and British Columbia?

Parties may use eSignatures to sign leases, agreements of purchase and sale, and other documents that create or transfer an interest in land⁴. In all three jurisdictions, eSignatures are commonly used in residential and commercial real estate transactions. Parties will sometimes expressly agree to execute documents electronically and also request that wet ink signatures are provided on a post-closing basis.

However, as set out below, there are some restrictions with using eSignatures for documents that are to be registered with the relevant Land Title or Registry Office:

- **Ontario** — eSignatures may be used for all documents that are registered at the Ontario Land Registry Office, which is fully electronic. Registrations transferring land or giving a security interest are electronically signed by a lawyer or law clerk based on an acknowledgement and direction, which must be signed by the client and which authorizes the lawyer or law firm to register the documents.
- **Alberta** — subject to limited exceptions, eSignatures may **not** be used for documents that are to be registered with the Alberta Land Titles Office (ALTO)⁵. All documents being registered with the ALTO must be signed in wet ink, witnessed, and provided with all applicable affidavits in their prescribed forms⁶. Originally executed ALTO documents must be kept on hand by the registering party.
- **British Columbia** — eSignatures may **not** be used for documents that are to be registered with the BC Land Title Office (BCLTO)⁷. All documents being registered with the BCLTO must be signed in wet ink and witnessed. The originally executed BCLTO document must be held on hand by the registering party provided that, in certain instances, the originally executed document may be delivered post-registration.

Conclusion

Although electronic signature technologies or other software that include an electronic signature component vary in complexity, technical requirements and levels of security, parties are free to use eSignatures so long as the legal requirements for formation of a contract are met, the parties have not agreed to prohibit the use of eSignatures, and the agreement does not fall under one of the exceptions noted above.

¹ <https://www.canada.ca/en/government/system/digital-government/online-security-privacy/government-canada-guidance-using-electronic-signatures.html>

² *Ibid.*

³ See Section 31(1), *Electronic Commerce Act*, Ontario

⁴ For example, see *Electronic Commerce Act*, 2000, S.O. 2000, c. 17, s. 11(3).

⁵ The Alberta *Electronic Transactions Act* does not apply to documents that create or transfer interests in land and that require registration to be effective against third parties (see *Electronic Transactions Act*, SA 2001, c E-5.5, Section 7.1(e)). Excluding those which are expressly listed under Section 159, *Land Titles Act*, RSA 2000, c L-4

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6 *Land Titles Act*, RSA 2000, c L-4, Section 155

7 The British Columbia *Electronic Transactions Act* does not apply to documents that create or transfer interests in land and that require registration to be effective against third parties. See *Electronic Transactions Act*, SBC 2001, c 10, Section 2(4)

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.