

## Ontario Joins the 21st Century by Introducing Electronic Chattel Paper

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On May 29, 2019, Bill 100, *Protecting What Matters Most*, received royal assent. A copy of the bill can be found [here](#). Schedule 49 of Bill 100 amends the *Personal Property Security Act* (Ontario) (PPSA) to, among other things, incorporate the concept of electronic chattel paper and e-leasing. These amendments reflect the increasing prevalence of the use of electronic documentation in secured financing practices and follow similar laws that have been enacted in the United States nearly two decades ago and more recently in Saskatchewan six months ago.

Pursuant to the current PPSA, chattel paper is a tangible that is “writing that evidences both a monetary obligation and a security interest in or a lease of specific goods.” Chattel paper is personal property in its own right distinct from the collateral which is the subject matter of the underlying agreement/lease. Under the current PPSA, perfection of a security interest in chattel paper can be obtained by registering a financing statement under the PPSA or through possession of the chattel paper. When certain requirements are met, perfection by possession confers a super-priority and is often the preferred way to perfect one’s security interest in chattel paper.

The amendments to the PPSA included in Bill 100, *Protecting What Matters Most*, will incorporate the concept of electronic chattel paper which is “chattel paper created, recorded, transmitted or stored in digital form or other intangible form by electronic, magnetic or optical means.” The amendments, among other things, address perfection by control, conflict of laws issues and priority rules for purchasers in relation to electronic chattel paper.

### **Perfection by Control**

There are six requirements listed in section 1(3) of the PPSA that must be satisfied to perfect a security interest in electronic chattel paper by control, including; there must be a single authoritative record that is unique, identifiable, unalterable which identifies the secured party as the transferee of the record and is securely maintained by the secured party or its custodian with each copy being easily identified as a copy of the authoritative record. While there is little commentary on what this may include it is expected that procedures currently used in the United States can be replicated in Canada.

### **Conflict of Laws Issues**

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Pursuant to the current PPSA, the validity, perfection and effect of perfection or non-perfection of a possessory security interest in chattel paper is governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Pursuant to the amendments to the PPSA, the validity, perfection, the effect of perfection and non-perfection, and the priority of a security interest in electronic chattel paper and a non-possessory security interest in tangible chattel paper will be governed by the law of the jurisdiction where the *debtor is located* at the time the security interest attaches. Determining where a debtor is located for the purposes of the PPSA is outlined in Section 7(3).

## Priority Rules

The current PPSA outlines specific priority rules when purchasers of chattel paper take possession of chattel paper in the ordinary course of business and give new value for such chattel paper.

The amendments to the PPSA provide that purchasers of electronic chattel paper have priority over any security interest in it, including a prior security interest, if the purchaser, in the ordinary course of the purchaser's business and for new value, obtains control of the electronic chattel paper pursuant to subsection 1(3) of the PPSA and if such electronic chattel paper does not indicate that it has been assigned. The amendments also speak to the transition of chattel paper that originates as tangible chattel paper and is transferred to a purchaser as electronic chattel paper (i.e., the existence of both tangible chattel paper and electronic chattel paper). The rules are a bit convoluted but are best summarized as follows:

- If the original chattel paper is tangible and is transferred to a purchaser as an electronic chattel paper; and
- If the seller of the electronic chattel paper in paragraph 1 above also assigns the tangible chattel paper to another purchaser and this tangible chattel paper does not set out that it has been assigned,

then the purchaser of the tangible chattel paper in paragraph 2 above will have priority over the purchaser of the electronic chattel paper.

Therefore, to ensure priority when purchasing electronic chattel paper that originates as tangible chattel paper, purchasers must ensure that the tangible chattel paper clearly identifies such purchaser as the assignee. This will not eliminate potential fraud and double funding, but the current system also does not solve these issues.

## Electronic Documents & Signatures Generally

In light of the introduction of electronic chattel paper and e-leasing in Ontario it is worth discussing the

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formation of a contract by electronic communication generally. Under the federal *Personal Information Protection and Electronic Documents Act* (Canada) (PIPEDA) and provincial and territorial electronic commerce/documents legislation, electronic documents and signatures have the same legal effect as paper contracts and handwritten signatures.

Each party to a contract must consent to conduct a transaction electronically for the electronic commerce legislation to apply. This consent may be express or implied and accordingly, if parties do not want electronic communication to result in a contract, they should specifically indicate so in their agreement. Note that certain transactions are excluded from the application electronic commerce legislation including wills, trusts, powers of attorney, and negotiable instruments.

A legal requirement that a document be in writing is satisfied by a document that is in electronic form if it is accessible so as to be usable for subsequent reference and is capable of being retained. Additionally, electronic commerce legislation provides that a legal requirement for a document to be provided, retained or examined is satisfied if: (i) there is reliable assurance as to the integrity of the information in the electronic document from the time the document to be provided, retained or examined was first created in its final form, and (ii) where provided to a person, the electronic document is accessible by the person for subsequent reference and retention.

With the societal movement towards electronic-based documents, it is important to note that a signature can take a variety of different forms and can be any symbol made with the intent to authenticate a record or contract located in any part of the document. A valid signature can be any of the following:

- A traditional ink signature
- Initials
- Typed
- Printed
- Made with a rubber stamp
- Impressed onto paper
- Made with carbon paper
- Made by photographic process
- Scanned original signature
- Email

## **Key Takeaway**

In the nearly two decades since electronic chattel paper and e-leasing laws were enacted in the United States and six months since amendments were enacted in Saskatchewan, there have been no reported decisions directly analyzing the transition to electronic chattel paper. However, legal commentary on the matter has provided a number of methods that can be utilized to maintain electronic documents as

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authoritative and secure. Requiring the highest level of security within the document's ecosystem is crucial to maintaining authoritative control over the chattel paper. In this regard, many US companies have created and enforced overarching management processes with features such as multi-level authentication, e-vaulting, unique access codes, and electronic watermarks. These management processes can offer guidance and will be a helpful tool as Ontario makes its transition to electronic chattel paper and e-leasing.

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