

Electronic Signatures: Is Your Municipality Ready to Embrace A New Approach?



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By Marny Paul

As a result of the COVID-19 pandemic and the increased number of people working from home, organizations have become tasked with developing ways to continue to efficiently carry on business despite the technological restraints caused by physical distancing requirements. Use of electronic signatures is one tool that many businesses, governments and regulators in Alberta are relying on to speed up signature and approval processes, expedite workflow and improve customer service. In response, Municipalities in Alberta are seeking information and advice regarding the validity and reliability of electronic signatures and the best approach to practically and securely incorporate the use of electronic signatures within their operations.

Fortunately, the statutory framework in Alberta and Canada is flexible and permissive in facilitating the use of electronic signatures. While it is often a common misconception that a reference in legislation to “in writing” or a “signature” refers only to pen on paper, the truth is the law does not require paper as often as people may think. People use paper because it’s what they know and because it appears prudent to get things in writing; however, the common argument that electronic signatures are not as certain as “wet-ink” and paper signatures begins to fade once one understands the legal status of signatures in Alberta and the technology available for ease of tracking and verification.

While certain government agencies and professional associations have implemented temporary policies to allow for a more flexible approach to the use of electronic signatures, many in the business community predict that the current pandemic may act as a catalyst to creating more permanent policies regarding the use of technology to sign documents and approvals. As a result, now might be the right time for Municipalities to explore whether expanding internal processes to include the use and acceptance of electronic signatures is an appropriate approach for carrying out certain municipal operations going forward.

What is an electronic signature?

Various legal definitions exist for electronic signatures, but the term most generally refers to the acknowledgement or adoption of an electronic message, transaction or document. In Alberta, the *Electronic Transactions Act* (the “ETA”) defines an electronic signature as “electronic information that a person creates or adopts in order to sign a record and that is in, attached to or associated with the record.” With respect to public bodies such as Municipalities, Section 20 of the ETA provides that if a public body has the power to create, collect, receive, or otherwise deal with information and records, it has the power to do so electronically, including accepting and utilizing electronic signatures. Similar statutes to the ETA exist in most, if not all, Canadian provinces and territories.

Practically speaking, an electronic signature can take a variety of forms, including:

- scanned copies of physically-signed documents;
- scanned or electronic signatures applied or pasted to an electronic document;
- a typed name or signature block;
- signature created using a stylus or finger on a touchscreen; and
- clicking an electronic confirmation or acknowledgement on a website.



Under the ETA, the documents that cannot be signed electronically include:

- wills and codicils;
- personal directives under the *Personal Directives Act*;
- records that create or transfer interests in land, including interests in mines and minerals;
- guarantees under the *Guarantees Acknowledgment Act*;
- negotiable instruments (examples include: promissory notes, bills of exchange banknotes, demand drafts, and cheques); and
- certain health records.

What is the purpose of a signature?

Whether a signature is paper-based or electronic, the fundamental purpose of the signature is the same: to link a person to a document (or transaction) and provide evidence of that person's intent to approve or to be legally bound by its contents. A signature's primary function is to provide evidence of the signatory's:

- identity;
- intent to sign the record and/or complete the transaction; and
- agreement to be bound by the contents of the record and/or transaction.

Although traditionally, "wet-ink" signatures were presumed under the best evidence rule to be the primary evidence of a party's acceptance of an agreement or document, the intent of Alberta's ETA is to give electronic communications the same legal status as paper documents. A record to which the ETA applies must not be denied legal effect or enforceability solely by reason that it is in electronic form.

In addition to the language of the ETA, longstanding common law principles accept a flexible definition of what form of signature will be accepted as proof of a party's acceptance and intention to be bound. Crosses, initials, pseudonyms, printed names, and rubber stamps have all been held to be analogous to a handwritten signature. Case law has also established that the sufficiency of a particular form of electronic signature is to be determined on a case-by-case basis. Finally, Canadian evidence statutes also generally permit reliance on electronically signed documents in legal proceedings, provided standard requirements regarding authenticity and integrity of the document are met.

Key considerations

Although electronic signatures can facilitate faster execution and delivery of contracts, consents and other electronic records, there are a wide range of matters for a Municipality to consider before accepting electronic signatures within its operational framework. These considerations include:

- Does the *Municipal Government Act* (the "MGA") or other applicable legislation such as the *Freedom of Information and Protection of Privacy Act* and *Land Titles Act* impose limitations on the execution of documents and instruments in a way that will limit the ability to use electronic signatures?
- What is the cost of setting up the infrastructure around an electronic signature process and the workload associated with implementing the proposed electronic signature process?
- Will implementing an electronic signature process reduce or eliminate delays of service and improve workflow?
- What is the risk of someone disputing the signature?



The other matter to consider is how expansive the acceptance of electronic signatures will be. The most common policies generally address contract execution as well as the electronic submission of documents and requests to a Municipality, including permit applications, information requests and tenders. As electronic signatures become more common, Municipalities may question whether the permissive nature of the current legislation and case law would also allow for the use of electronic signatures on internal documents such as bylaws, resolutions and Council minutes under Section 213 of the MGA.

The MGA does not currently prohibit or regulate the use of electronic signatures for authorization of municipal documents under Section 213 and Section 213(5) specifically provides that a signature may be “printed, lithographed, or otherwise reproduced if so authorized by Council.” Given the potential implications of electronic signatures for authorization of municipal documents, should your Municipality wish to create a policy to allow for the electronic signing of bylaws or other documents under Section 213 of the MGA, we recommend seeking further legal advice.

Develop a policy

Once a Municipality has decided the level to which it wants to expand its acceptance of electronic signatures, developing a strong electronic signature policy will be the first step in establishing the guidelines and the appropriate level of flexibility for the solution while also maintaining effective internal controls and approval processes. Key elements to address within an electronic signature policy will generally include:

- The circumstances under which electronic signatures may be used and the exceptions (if any).
- The manner in which an electronic signature must be provided. For example, is a full digital signature solution warranted?
- The security protocols to be put in place.
- Who has the authority and discretion to make decisions regarding the acceptance of electronic signatures.
- The minimum standards to ensure validity and enforceability.
- Record retention requirements.

The main takeaway is that the policies and processes adopted can be tailored to each Municipality’s needs. Once established, the use of electronic and digital signatures has the potential to make administration and operational processes more efficient and accessible for residents, expedite workflow processes for staff and contribute towards a common municipal goal of becoming more environmentally friendly. Developing a policy will also ensure that decisions and actions are being undertaken by administration and staff in a consistent manner throughout the organization.

Before moving forward with the use of electronic documents and signatures, it is recommended that Municipalities first consult their legal counsel and technology experts in order to fully understand not only the available options, but also the exceptions and special requirements to consider.

Conclusion

Although COVID-19 may be seen as the main reason why governments and organizations are shifting away from more traditional exchanges of executed documents, the reality is that municipal staff may prefer relying on digital programs in order to carry out municipal operations and residents may find it easier and faster to connect with government through broader online services. This, together with the potential administrative



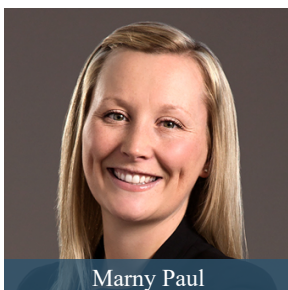
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and cost benefits that can be achieved, further accelerates the need to become more familiar with electronic signatures and the options for electronic contracting within a Municipality's operational framework.

If your Municipality would like specific advice regarding the use of electronic signatures and electronic records and/or identifying best practices and appropriate policies and procedures to meet your organization's needs, the team at Brownlee LLP would be pleased to assist.

Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information related to Municipal regulations, please contact:



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