



## Electronic Contracts in Ontario

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Business people have grown used to sending and receiving information by email, through web portals or other electronic means. Indeed, many are used to doing their banking electronically, and making contracts to purchase consumer goods, software and music on line.

Some businesses, however, don't have a clear understanding of how the Ontario law influences the entering into of more significant or ongoing business agreements by electronic means. In the face of uncertainty, some just stick to what they know works... an original, paper document, signed with a pen, and delivered so they can hold it in their hands.

Increasingly, progressive businesses would like to avoid the expense of paper contracting and storing paper copies of their contracts. However, they are not sure they can move to a fully electronic method of making and storing their contracts. This article addresses some of the fundamentals of electronic contracting for Ontario businesses.

### Ontario Legislation

Ontario's *Electronic Commerce Act* (the "OECA") allows for any business or person to contract in electronic form. As is the case with customary contracts, a person entering into an electronic contract must do so voluntarily. The OECA contemplates that electronic contracts can be made by giving express consent, or an electronic contract can be inferred from the conduct of the parties, considering the commitments made in their exchange of communications.

### Permitted Electronic Offer and Acceptance

Moving away from the need for a pen and paper, the OECA recognizes the formation of contracts by the making of an offer by electronic means and the acceptance by electronic means, for example, by touching or clicking on an appropriate icon or other place on a computer screen, or by speaking.

Contracts that are open to acceptance by clicking, typing or some other electronic acknowledgement inherently have a heightened risk of mistaken acceptance, especially for those persons who are less technologically adept. The OECA recognizes this heightened risk by providing an error correction mechanism, which allows a party mistakenly binding himself or herself to a contract to back out of the contract and reclaim any money or value paid.

### **Electronic Delivery and Availability for Future Reference**

Any legal requirement that a document be in writing is satisfied if it is in an electronic form that meets the requirements of the OECA. In place of the conventional physical contract requirements for an effective electronic contract the OECA requires that:

- A copy of the contract must be provided to the other party so that it is available to each party to use the contract for later review, recognizing that merely making a document accessible electronically (for example on a website) is not sufficient to meet this requirement.
- A copy of the contract must be available for each party to retain, recognizing that the OECA treats the sending of a copy of the contract by email or displaying the contract to the other party in the course of a transaction being conducted electronically as generally satisfying the requirement that the contract be provided to the other party for proper storage, review and reference.
- The copy of the contract must not have digital locks, restricted digital rights or other restrictions placed on it, and must otherwise be configured in a way that does not hinder printing or storage by the recipient of the contract.
- The copy of the contract must be organized in the same or substantially the same way as any specified non-electronic form in which that information is required to be provided, for example by regulation.
- The copy of the contract must have some means of protection against later alteration (except those alterations arising in the ordinary course of communication, storage or display), so that there is a reasonable assurance of the integrity and completeness of the document, from the time of its creation to the time of any later reference.

### **Electronic Signatures**

The OECA allows for the use of an electronic signature, or electronic information that a person creates or adopts to sign a document and that is in, attached to or associated with the document.

Except for special requirements imposed by regulations applying to special documents or forms, an electronic signature must be reliable for the purpose of identifying the contracting parties at the time of the creation of the contract and the association or link of that electronic signature with the relevant contract.

## Retention of Contracts in Electronic Form

The OECA also addresses the requirements for the retention in electronic form of a contract or document, depending on whether it was originally made in physical, written form, or whether it was “born digital”, where its original form was electronic.

A document or contract originally made in physical, written form, will be properly retained if:

- the document is retained in the same format as the one in which the written document was created, sent or received (for example by an accurate and complete electronic scan) or in a format that accurately represents the same information; and
- the information in the contract or document is retained in a form that will be accessible and useable for later reference by any party or person entitled to have access to the original written document or contract.

A document or contract originally made in electronic form will be properly retained, if;

- the electronic document or contract is retained in the format in which it was created, sent or received, or in a form that accurately represents the same information;
- the information in the electronic document or contract that is retained will be accessible so it is useable for later reference by any party or person entitled to have access to it or require its production; and
- importantly, where the electronic document or contract was sent or received, information recording its origin, date and time of receipt or sending is also retained.

Our lawyers frequently assist clients with contracts to be used in electronic form, to be used on the web or in other circumstances where electronic exchange of documents makes business sense. Please contact one of our lawyers to discuss how we can help you.

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**Nothing in this article should be relied on as legal advice. Readers are urged to seek professional legal advice on the particular issues which concern them. Members of our firm would be pleased to assist readers with specific legal issues.**

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