



## Ensuring authenticity in e-contracts

by Robert C. Worthington

For centuries, the world has done well with paper-based commerce. Now, we are faced with the reality of pure e-commerce (no paper created ever!). Will the world cope and, as critically, will the law be able to cope with this e-revolution?

Short answer, probably... but in the near term, there will be some potholes in the road ahead. While business can leap forward in a nano-second, the law tends to move slowly and much more carefully. But the law has coped with techno-revolutions before and, unlike some dot-coms, the law is still standing. It managed to handle the switch from parchment to paper and it will handle the switch from paper to electronics; not seamlessly nor quickly, but probably better than you or I will.

In the next few columns, we're going to take a detailed look at how the law in Canada is coping and where we think the biggest risks are for anyone venturing beyond the four corners of the paper-based world.

On the surface, there doesn't seem to be much difference between paper and electronic transactions, but drill down a layer or two and you will find some significant differences – in reliability, authenticity and integrity. These differences can and do increase the potential legal risks.

Take, for example, a paper-based, originally signed contract that you now must prove is an accurate, authentic description of what two parties agreed upon. It is a relatively simple matter to demonstrate that what you have was agreed to (the original signatures), hasn't been altered or changed since signing (no tell-tale white-out or suspicious smudges), and is an original (no signs of photocopying or alteration). Sure, it could be forged, but that's hard to do, easy to detect, and relatively unlikely.

On the other hand, take that same contract in electronic form. Are those typed signatures? Has the document been altered, forged, changed or corrupted since it was agreed to, either intentionally or by error? When printed out, is it accurate; is it an original or a copy? And, most critically, how can you tell?

The fact is e-documents of any kind are more easily forged, corrupted, altered and changeable than paper documents. It takes real skill to forge paper; it takes ten seconds and a For Dummies manual to change an e-document. And, given that the computer overwrites any changes we make, who's to know what we did? Therein lies the real risk of e-documents... for ourselves, our organizations and any Court trying to figure out authenticity, reliability and certainty.

In Canada, and elsewhere in the developed world, we now have legislation governing e-commerce (something for later columns), but most of this legislation enables e-commerce to be legally binding; it does not change many legal rules nor does it tell us what is required for a virtual deal to be enforceable in a courtroom. The Ontario E-Commerce Act, section 11(3), tells us that an e-signature is valid but "only if in light of all the circumstances, including any relevant agreement, the purpose for which the document was created and the time the

electronic signature was made, (a) the electronic signature is reliable for the purpose of identifying the person."

To steal from Saturday Night Live, "well, isn't that special?!!" An e-signature is reliable if it is reliable. Kind of begs the question, doesn't it? But that's the problem we face. E-signatures and documents are legally binding only if a court says they are and we don't yet know in detail what a court will demand as proof. We have some idea from the legislation (e-commerce must be consented to, expressly or impliedly to be valid) and we know what the courts want for paper contracts – six essential elements, no duress, fraud or misrepresentation, true agreement to known terms, etc. – but certainty? Not yet, and it may be years before it's all sorted out in Canada. For the rest of the e-world, even longer before we're sure.

Next column, we'll look at the cases we have so far, but for those who want safety, keep printing out those virtual deals as soon as you get them. The trees won't like it but if you don't, you may find that all you get is a virtual remedy from the judge and it's hard to spend a pixel." *MM*

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