

SUGGESTED PROTOCOLS FOR VIRTUAL CLOSINGS

(Virtual Closings are closings where the parties do not meet in person)

The Solicitors' Legal Opinions Committee was constituted for the purpose of reviewing materials previously published with respect to solicitors' opinions and preparing guides for the assistance of the profession in British Columbia. The Committee adopted these Suggested Protocols on July 15, 2014. The members of the Committee at this time are:

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15 July 2014

Background to the Protocols

UK Experience with Virtual Closings

The decision of the English High Court in *R (on the application of Mercury Tax Group Ltd. and another) v. HMRC & Others* [2008] EWHC 2721 led to a period of uncertainty in UK corporate practice regarding execution formalities and the correct procedures to be followed when transaction documents are executed at a virtual signing or closing. In this case, the court stated that, in relation to deeds, “*the signature and the attestation must form part of the same physical document*”, leading to a concern about whether valid execution could occur if signature pages were circulated and signed separately from the documents to which they relate. The Law Society Company Law Committee and The City of London Law Society Company Law and Finance

Law Subcommittee issued a Guidance note setting out a non-exhaustive range of options available to parties for “virtual” closings.

The protocols set out below are examples of Canadian versions of such protocols, but the examples should be viewed as non-exhaustive. Variations on the examples or other protocols or procedures may be just as effective.

Canadian Experience with Virtual Closings

In Canada, virtual closings occur frequently and yet there is relatively little jurisprudence dealing with the procedures for such closings. In particular, the circulation of signature pages separately from the execution document does not appear to have come before the courts. There is relatively clear Canadian jurisprudence that the courts will likely uphold the execution of an agreement by counterpart signatures, even in cases in which a counterpart clause is not provided in the document being executed.¹ Regardless of the existing case law, important practice issues may arise if parties do not carefully control document versions and establish protocols to deal with the manner in which counterpart signatures and separately circulated signature pages are to be handled.

The biggest risks are: (i) “mistake” (when signature pages are affixed to the wrong version of a document or some signature pages are missed); (ii) uncertainty (when there is no clarity regarding how execution and delivery is to take place and no physical closing in which such matters can be resolved) and (iii) unfounded opinions (when “execution and delivery” transaction opinions are given on the basis of a conventional expectation of physical delivery and original (ink) signatures, without consideration of the manner in which execution and delivery actually occurred on a specific transaction).

Practitioners ought not give “execution and delivery” opinions without fully considering whether: (i) counterpart signatures are authorized by the transaction documents and/or the Closing Arrangements (as defined below); (ii) verification of the counterpart signature has been made for the “authorized signatory”; and (iii) “delivery” has occurred, pursuant to the Closing Arrangements of the transaction, and in full contemplation of the details of the specific transaction.

Virtual Closings Not Always Appropriate

Virtual closings are common in large commercial transactions and financing transactions. There are circumstances in which the protocols set out below for virtual executions/closings should not

¹ A few Canadian cases have considered the “counterpart execution clause” and have accepted its validity and binding effect. In *Carson v. Minister of National Revenue* (1987), [1987] T.C.J. No. 944, the court, in considering the tax question of “true commercial purpose”, did not take issue with any part of the counterparts clause executed by the partners to a partnership agreement. Similarly, the Nova Scotia Supreme Court, Trial Division had no issue with respect to a counterparts clause contained in a guarantee: *Fund v. Jeanrie* (1992), 113 N.S.R. (2d) 45 (S.C.). In *Thompson v. Playfair* (1912), 6 D.L.R. 263 (Ont. C.A.), the court held that two documents may be read together, and constitute a sufficient memorandum in writing to satisfy the applicable *Statute of Frauds*.

be utilized because, for example:

- (a) the relevant statutory formalities require execution of original documents by signature before a witness;
- (b) the *Electronic Transactions Act* [S.B.C. 2001] ch 10 does not permit the procedures contemplated by these protocols²; or
- (c) documents are executed in accordance with statutory procedures and protocols based on standardized undertakings, prior to electronic filing (for example, land title documents in a real estate transaction).³

Closing Rooms

The protocols can be applied in the context of a physical closing room or a virtual closing room. A virtual closing room requires a secure data site on the web. Documents are posted to the website in the same way they would be tabled in a physical closing room and reviewed by persons granted access to the data site.

The Closing Arrangements (as defined below) should specify the persons who have access to the data site and which of them are authorized to remove, replace, or alter documents that have been posted. We recommend that only one person be given that authority.

A log of all accesses to the data site, including by whom, when and what, if anything, was done by that person at the time should be maintained and available on the data site to everyone when they log on to the site. In addition, notes to the documents on the site, should reveal what documents have been added or removed and what alterations have been made to any other documents. As a convenience, the site can be programmed so that a person logging on can request only the information in the log and in the notes to the documents since that person last logged on to the site. Any person with access to the site should be able to leave comments or questions (e.g. a person accessing the site notes that document 48 is incomplete or the wrong version).

Some data sites provide automatic notice by email of any additions, removal or alteration of documents but that adds many more emails to inboxes that are already overflowing at the time of a closing. The release of documents from a virtual closing room is handled in the same way as for a physical closing room except that the documents are delivered electronically.

² The *Electronic Transactions Act* [S.B.C. 2001] Ch. 10 contemplates electronic signatures (information in an electronic form that a person has created or adopted in order to sign a record and that is in, attached to, or associated with a record). This Act does not apply to wills, trusts created by wills, powers of attorney (individual financial affairs or personal care), or documents creating or transferring interests in land. Where the Act does apply and electronic signatures are used, section 5 is relevant and provides: “A requirement under law that a record be in writing is satisfied if the record is in (a) electronic form, and (b) accessible in a manner usable for subsequent reference.”¹

³ Note Part 5 of the *Land Title Act*, dealing with attestation and Proof of Execution of Instruments, and Part 10.1 of the *Land Title Act*, dealing with electronic filing in the land title registry. The British Columbia real estate bar has developed practice standards and a method of closing pursuant to undertakings that is, in essence, another form of “virtual closing protocol” specific to this area of practice.

The Closing Arrangements should provide for dispersal of the originals of the documents after closing.

OPTION 1 (Execution of Settled Documents)

1. Before the date upon which a transaction is intended to close and documents are to be “executed” and “delivered”, the proposed arrangements for the virtual closing are set out in writing (“**Closing Arrangements**”). These arrangements can be set out in the closing agenda, or in a separate closing protocol agreement or other agreement, which agenda or agreement should be authorized and agreed to by or on behalf of all parties. The Closing Arrangements should describe the manner and conditions of “delivery” of each execution copy of the closing documents in order to provide contractual certainty and to support the transaction opinions on “delivery” and should deal with the manner in which the document is to be dated (and the date inserted). The Closing Arrangements should also identify (a) for each closing document, the lawyer having conduct of the settlement of that document, and (b) the lawyer who will coordinate the closing.
2. When the documents are finalized, the final execution copy of each closing document is e-mailed as a PDF attachment by the lawyer responsible for finalizing that document, either to (a) all parties to the document and their respective lawyers; or (b) just those parties’ lawyers (each of whom then arranges for execution of the document by, his or her client). A separate copy of the signature page(s) alone may also be attached in PDF format. The final execution copy should be clearly marked as “Execution Copy”. [*Note: All changes from the previous draft(s) should be clearly identified by the lawyer(s) having conduct of the document by providing a black-lined version comparing the execution copy to the most recently circulated draft, so no confusion arises regarding the final agreed form of the document.*]
3. Each party prints and signs the signature page. [*Note: It is best practice for the party’s lawyer to take steps to satisfy himself/herself that the signature on the signature page is authentic.*]
4. Each party (through its lawyer if the party so chooses or if the distribution e-mail in paragraph 2 above was only circulated to its lawyer) then returns a PDF copy of the signed signature page by “reply all” to the e-mail circulating the execution version of the document to be held by all parties receiving such e-mail in accordance with the Closing Arrangements. No signature page returned in such fashion will be considered delivered until all conditions for such delivery as set out in the Closing Arrangements are satisfied or waived by the party returning the signature page, and all signature pages returned in such fashion will be attached only to the execution copy circulated with the signature pages in accordance with paragraph 2 above.
5. The execution copy of each document should provide for execution in counterparts (if being signed by more than one party) and electronic delivery. Typical language is:

“This Agreement may be executed in any number of counterparts, each counterpart may be delivered originally or by electronic

transmission, and all such executed and delivered counterparts, taken together, will constitute one original agreement.”⁴

6. At or shortly after closing (or when otherwise required under the Closing Arrangements), the execution copy of the document, together with all PDF copies of the executed signature pages, should be circulated by the lawyer coordinating the closing. The document together with all executed signature pages may be circulated on its own or as part of all the closing documents circulated to all the parties as agreed in the Closing Arrangements.

OPTION 2 (Execution of Documents Yet to Be Finalized with Delivery of Signature Pages to the Client’s Own Lawyer)

1. Before closing, the Closing Arrangements are agreed in writing in the manner set out above under Option 1, paragraph 1.
2. Prior to closing, the lawyer who has conduct of a closing document to be executed circulates the signature pages of the document still being negotiated to the lawyer for each party. The signature pages should be clearly marked as being the signature pages of the particular document to be executed so that it is clear to the signatory what document is being executed. Frequently, where signature pages are circulated prior to the document being finalized, the signature pages will provide for a separate page for each party (or each signatory for a particular party) and will not be numbered so that, if pagination changes in the body of the document as a result of final negotiations, such changes do not affect the signature pages.
3. The signature page is executed by the signatories for each party and returned to the party’s lawyer. The executed signature page may be sent by e-mail as a PDF attachment or by courier, to be held by the party’s lawyer pending settlement of the execution copy of the document.
4. Once the document has been finalized, the lawyer coordinating the closing seeks approval of the final execution copy of each closing document from the lawyers representing the parties to the transaction. Unless otherwise agreed in the Closing Arrangements, this will be done by circulating (by e-mail) a PDF version of each document, clearly marked as “Execution Copy” and requesting approval in the manner outlined in the Closing Arrangements. [*Note: All changes from the previous drafts(s) should be clearly identified by the lawyer(s) having conduct of the document by providing a black-lined version comparing the execution copy to the most recently circulated draft, so no confusion arises regarding the final agreed form of the document.*]
5. Once the lawyer for a party approves the execution copy, each such lawyer forwards by e-mail to the party’s signatories the execution copy and a black-line to the version last circulated to the party, requesting authorization to release such signatories’ signature

⁴ Parties commonly rely on this clause to allow collating of the counterpart signature pages so that only one copy of the agreement with the counterpart signature pages is required. The absence of a counterparts clause in an agreement does not necessarily prevent parties from executing in counterpart; however, counterpart clauses are useful to include to avoid evidentiary issues.

page to the lawyer coordinating the closing. No signature page returned in such fashion will be considered delivered until all conditions for such delivery as set out in the Closing Arrangements are satisfied or waived by the party returning the signature page, and all signature pages returned in such fashion will be attached to the execution copy circulated in accordance with this paragraph 5.

6. The execution copy of each document should provide for execution in counterparts (if being signed by more than one party) and electronic delivery. Typical language is:

“This Agreement may be executed in any number of counterparts, each counterpart may be delivered originally or by electronic transmission, and all such executed and delivered counterparts, taken together, will constitute one original agreement.”

7. At or shortly after closing (or when otherwise required under the Closing Arrangements), the execution copy of the document, together with all PDF copies of the executed signature pages should be circulated by the lawyer coordinating the closing. The document together with all executed signature pages may be circulated on its own or as part of all the closing documents circulated to all the parties as agreed in the Closing Arrangements.

OPTION 3 (Execution of Documents Yet to Be Finalized with Delivery of Signature Pages to Lawyer Coordinating the Signing/Closing)

1. Before closing, the Closing Arrangements are agreed in writing in the manner set out above under Option 1, paragraph 1.
2. Prior to closing, the lawyer who has conduct of the closing document to be executed circulates the signature pages of the document still being negotiated to the lawyer for each party. The signature pages should be clearly marked as being the signature pages of the particular document to be executed so that it is clear to the signatory what document is being executed. Frequently, where signature pages are circulated prior to the document being finalized, the signature pages will provide for a separate page for each party (or each signatory for a particular party) and will not be numbered so that, if pagination changes in the body of the document as a result of final negotiations, such changes do not affect the signature pages.
3. The signature page is executed by the signatories for each party and returned to the lawyer coordinating the closing. The executed signature page may be sent by e-mail as a PDF attachment or by courier, to be held by the lawyer coordinating the physical closing pending settlement of the execution copy of the document.
4. Once the document has been finalized, the lawyer coordinating the closing seeks approval of the final execution copy of each closing document from the lawyers representing the parties to the transaction. Unless otherwise agreed in the Closing Arrangements, this will be done by circulating (by e-mail) a PDF version of each document, clearly marked as “Execution Copy” and requesting approval in the manner outlined in the Closing Arrangements. [*Note: All changes from the previous draft(s)*]

should be clearly identified by the lawyer(s) having conduct of the document by providing a black-lined version comparing the execution copy to the most recently circulated draft, so no confusion arises regarding the final agreed form of the document.]

5. Once the lawyer for a party approves the execution copy, he or she forwards by e-mail to the party's signatories the execution copy and a black-line to the version last circulated to the party, requesting authorization for the lawyer coordinating the closing to attach the party's signature pages delivered to the coordinating lawyer under paragraph 3) to the execution copy of the document. The party's lawyer will communicate that authorization to the lawyer coordinating the closing (unless the party has communicated it directly to that lawyer). No signature page attached to an execution copy in such fashion will be considered delivered until all conditions for such delivery as set out in the Closing Arrangements are satisfied or waived by the party returning the signature page, and all signature pages returned in such fashion will be attached to the execution copy circulated in accordance with this paragraph 5.
6. The execution copy of each document should provide for execution in counterparts (if being signed by more than one party) and electronic delivery. Typical language is:

“This Agreement may be executed in any number of counterparts, each counterpart may be delivered originally or by electronic transmission, and all such executed and delivered counterparts, taken together, will constitute one original agreement.”
7. At or shortly after closing (or when otherwise required under the Closing Arrangements), the execution copy of the document, together with all PDF copies of the executed signature pages should be circulated by the lawyer coordinating the closing. The document together with all executed signature pages may be circulated on its own or as part of all the closing documents circulated to all the parties as agreed in the Closing Arrangements.