

Potential amendments to *The Wills Act, 1996*

Consultation Document

1. Introduction

COVID-19 lockdowns disrupted face to face interactions in all aspects of daily life. This led the Ministry of Justice to review several statutes that required in person attendance for the completion of documents, including *The Wills Act, 1996* (Act).

The Ministry of Justice is considering amendments to the Act and consulting interested parties and organizations. The amendments may include provisions respecting electronic wills including requirements for a valid electronic will, revocation of a valid electronic will, location of execution of an electronic will, and the use of an electronic signature. We would appreciate your feedback and comments on the topics discussed below.

2. Background

Remote Witnessing

In March 2020, temporary regulations for use during the COVID-19 pandemic were passed to allow for the remote commissioning and remote witnessing of certain documents, including wills, by lawyers. These amendments were introduced in response to the need for persons to complete necessary testamentary documents during the pandemic when they were unable to attend in person. In August 2020 these provisions were made permanent and no longer tied to the status of the pandemic.

In Spring 2022, Bills 54 and 55 were passed in the Legislative Assembly. The Bills amend *The Health Care Directives and Substitute Health Care Decision Makers Act*, *The Powers of Attorney Act, 2002*, and *The Wills Act, 1996* to allow lawyers to remotely witness documents by electronic means. The amendment Acts also amend *The Electronic Information and Documents Act, 2000* to allow lawyers to remotely commission documents. The amendments do not go so far as to permit for the use of an electronic signature or the creation of an electronic will or other electronic documents. Instead, the amendments continue to rely on a wet ink requirement and an original paper copy of the final document.

Electronic Documents in Saskatchewan

Saskatchewan was one of the first jurisdictions to enact legislation respecting electronic commerce through *The Electronic Information and Documents Act, 2000*. *The Electronic Information and Documents Act, 2000* provides for the legal recognition of documents in electronic format where legislation asks for documents to be provided “in writing”. This Act of general application has facilitated translation from paper to the broad usage of electronic documents in the private and public sector without requiring each individual Act or regulation to be amended to allow for electronic

documents. However, the Act exempts certain documents from its application, such as wills, to ensure that paper only requirements are not overridden by the electronic document provisions.

Substantial Compliance

Section 37 of the Act sets out the rule with respect to substantial compliance. The provision permits the court to probate a will that does not meet formal requirements imposed by the Act. In October 2004 the Law Reform Commission of Saskatchewan (LRC) released a *Report on Electronic Wills*. Nearly 20 years ago, the LRC recognized that electronic records were replacing printed documents in most facets of everyday life and that full recognition of electronic wills would be necessary and appropriate. However, the LRC did not go so far as to recommend recognition, recommending instead the extension of the “substantial compliance” rule as a first response.

To date there are no reported cases in Saskatchewan where an individual has attempted to probate an electronic will using this provision. Even if the provision has been used to probate an electronic will, as the LRC states “legislation is necessary to ensure that electronic wills meeting defined formal legal requirements would be uniformly and routinely accepted” by the court without further application.

Other Jurisdictions

In August 2020, the Uniform Law Conference of Canada (ULCC) adopted amendments to *The Uniform Wills Act* regarding electronic wills. Prior to 2020, the ULCC maintained the policy that an electronic version of a will could only be validated by a court. The new policy accepts that “electronic documents, including wills, are part of the mainstream, and sets out the formal requirements for an electronic will to be valid without a further court application. The ULCC Report *Draft Amendments to the Uniform Wills Act (2015) Regarding Electronic Wills (2020 Amendments)* can be found at the following link:

<https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Wills-Act>

Similarly, in August 2020 British Columbia was the first Canadian jurisdiction to pass legislation respecting the creation and revocation of electronic wills and the use of electronic signatures on electronic wills. The electronic wills provisions came into force on December 1, 2021. The Bill and Act with amendments incorporated can be found at the following links:

<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/5th-session/bills/third-reading/gov21-3>

https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/09013_01

To support the probate of electronic wills, British Columbia revised its *Supreme Court Civil Rules* to incorporate provisions respecting electronic wills. Any changes to Part 16 of Saskatchewan’s *Queen’s Bench Rules* would need to be determined by the Court of Queen’s Bench.

3. Topics for discussion

(a) Elements of a valid electronic will

Section 7 of the Act sets out the criteria for a valid will. A valid will must be in writing and signed by the testator or another person in the testator's presence and at the testator's direction. It must be apparent on the face of the will that the testator intended to give effect to the testator's signature. The testator's signature must be made or acknowledged by the testator in the presence of two or more witnesses and at least two witnesses in the presence of the testator must attest and sign the will or acknowledge their signatures on the will.

British Columbia's *Wills, Estates and Succession Act* does not include a stand alone electronic wills section. Instead, the Act provides in sections 35.2, 35.3 and 37 that:

- The requirement that a will be in writing is satisfied if the will is in electronic form;
- A reference to a signature includes an electronic signature – for the both the testator and witnesses;
- An electronic will is signed if the electronic signature is in, attached to, or associated with the will;
- the requirement that a person take an action in the presence of another person is satisfied if the persons are in each other's electronic presence.

The ULCC similarly sets out that an electronic will must be in electronic form, and signed by the testator with an electronic signature.

Question 1: What elements should be met for an electronic will to be valid in Saskatchewan?

(b) Alteration and Revocation of an electronic will

Once a valid electronic will is in place, provisions in the Act should provide how that electronic will may be altered or revoked.

British Columbia's Act provides at section 54.1 that an electronic will cannot be altered and that a testator seeking to make an alteration to an existing electronic will, must make a new will. With respect to revocation, section 55.1 provides that an electronic will is revoked only in one or more of the following circumstances:

- The testator, or a person at the direction of the testator in the testator's presence, deletes one or more electronic versions of the will or part of the will with the intention of revoking it;
- The testator, or a person at the direction of the testator in the testator's presence, burns, tears or destroys all of part of a paper copy of the will in some manner in the presence of a witness with the intention of revoking it;
- By making another will in accordance with the Act – paper or electronic;

- By making a written declaration that revokes all or part of a will – which may be in electronic form and signed with an electronic signature;
- By any other act of the testator if the court determines the intent of the testator was to revoke.

The ULCC does not expressly provide for alteration of an electronic will. The comment to section 6 provides that “alterations must follow the form of the will being altered [and] this section does not allow for a mix and match scenario of conventional, electronic, holograph or military wills.”

With respect to revocation, the ULCC commentary explains that the revocation provisions for electronic wills do not parallel those for paper wills. The latter have had the benefit of centuries to establish practices and procedures for the safeguarding of “original” paper wills. The ULCC notes that “as the use of electronic wills grows, so too will practices develop that create a virtual original – one version stored in a particular location with copies clearly marked as copies provided to the necessary parties.” The ULCC revocation provisions largely mirrors the BC approach providing that an electronic will or part of an electronic will is revoked in one or more of the following circumstances:

- By another will;
- By a written declaration by the testator that revokes all or part of a will;
- By the testator, or a person in the testator’s presence and at the testator’s direction, deleting one or more electronic versions of the will or part of the will with the intention of revocation;
- By the testator or a person in the testator’s presence and at the testator’s direction, burns, tears or destroys all or part of a paper copy of the will in the presence of a witness with the intention of revoking the will or part of the will.

The Uniform Act offers an additional section “for certainty” that includes the following:

- A new will may be electronic or not;
- A written declaration may be electronic or not;
- An inadvertent deletion of one or more electronic versions of an electronic will is not evidence of an intention to revoke;
- An action required to be taken before a witness can be done in each other’s virtual presence;
- A will is not revoked by presuming an intention to revoke based on a change in circumstances.

Question 2: How should an electronic will be altered?

Question 3: How should an electronic will be revoked?

(c) Location of Execution of an electronic will

An electronic will may be executed with the testator and both witnesses in the same room in front of the same computer screen, but may also be executed with the testator in one location and the two witnesses each in another. In the latter scenario, a dispute over the validity of the will may result in

further disputes over jurisdiction. While the British Columbia Act is silent on this front, the Uniform Act includes a provision that states:

3.1(6) If an electronic will is signed by the testator and witnesses while any one of them is virtually present, the place of making the will is the location of the testator.

Question 4: Where should an electronic will be considered to be executed?

(d) Witnesses

The remote witnessing and commissioning provisions in the Regulations, being moved to the Acts by Bills 53 and 54 are limited to use by lawyers. The provisions in Bills 53 and 54 confirm lawyers may commission documents or remotely witness documents including wills, powers of attorney, and health care directives by electronic means. Limiting the remote witnessing of documents to lawyers ensures additional safeguards are in place. Lawyers must abide by any rules established by the Law Society of Saskatchewan. Lawyers who fail to comply with the Bill requirements or any remote witnessing rules established by the Law Society of Saskatchewan may be subject to oversight and discipline by the Law Society of Saskatchewan. Non-lawyer witnesses are not subject to this same governance or oversight by a centralized body who can verify compliance.

The ULCC and British Columbia Acts do not require that a valid electronic will be witnessed by a lawyer.

Question 5: What concerns might arise by extending witnessing of electronic wills to persons other than lawyers?

(e) Signing in counterpart

The provisions in Bill 54 confirm that a paper will may be signed in the electronic presence of a lawyer and one other witness, carrying forward the provisions from *The Wills Regulations*. The intention is that one copy of the will with all signatures in “wet ink” is required. The new provisions do not expressly contemplate signing multiple copies of a will in counterpart. A will is made in counterpart where the testator and both witnesses each sign a separate copy of the will in their separate locations. The final testamentary document is then made up of the three separate copies of the will.

British Columbia’s Act contemplates signing in counterpart at subsection 35.2(3), which provides that if the testator and witnesses are in each other’s electronic presence, the will may be completed by signing complete and identical copies of the will in counterpart. British Columbia’s *Supreme Court Civil Rules* at 25-3(3)(a)(ii) provides that where a will was signed in counterpart, a person applying for an estate grant must file the “originals of each of the signed and witnessed counterparts.” Similarly, the ULCC Act includes section 3.2 which addresses signing in counterpart. However, the ULCC recommends in the commentary that jurisdictions “consider how to reduce the “bulk” of hard copy documentation in the probate process,” suggesting that with the introduction of electronic wills, signing hard copies in counterpart may be a less favourable option.

Question 6: What, if any, benefit would the introduction of signing in counterpart provisions have in Saskatchewan?

(f) Powers of Attorney and Health Care directives

The amendments being considered by the Ministry respecting electronic signatures do not extend to electronic powers of attorney or electronic health care directives. Neither powers of attorney nor health care directives have an equivalent of “probate” involving oversight by the court. British Columbia did not extend electronic signatures or provide for electronic powers of attorney or health care directives at this time. In its Report the ULCC recommends extending the electronic provisions to powers of attorney and health care directives noting the concepts surrounding electronic wills are equally applicable to those other areas.

Question 7: Are there any additional concerns that may arise for electronic powers of attorney or electronic health care directives?

Thank you in advance for your contributions.

Please be aware that your responses will form part of the public record and may be used in the ongoing development of any legislation.