Virtual signing and witnessing of wills and powers of attorney in B.C., Alberta, Ontario and Québec

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With the coronavirus spreading worldwide, estate planning has been on many Canadians' minds. As a result of the pandemic, federal, provincial and municipal governments across Canada have recommended, and in some places mandated, that Canadians self-isolate or quarantine themselves from others to prevent the spread of the virus.

Shopping, conferences and meetings have moved online, and commercial transactions and agreements are frequently signed digitally. That has led many to wonder whether it is possible to sign or witness a will or power of attorney using technology. For Canadians, virtual or electronic signatures have historically not been legally recognized when it comes to estate planning documents.

Recently, both Québec and Ontario have introduced emergency rules that allow for the virtual witnessing of wills and powers of attorney in certain circumstances. As of the date of this posting, British Columbia and Alberta have not introduced similar emergency legislation. Regardless of the province, great care must be taken to ensure any estate planning documents executed are valid and in accordance with provincial law. Furthermore, a lawyer who meets remotely with a client needs to be additionally sensitive to any signs of fraud or undue influence.

Ontario

Ontario has long had strict requirements relating to the execution of wills and powers of attorney, which were recently varied temporarily by a government order (see below for update). Subject to some exceptions for active service members of the Canadian Forces, or other naval, land or air forces and sailors, Ontario's *Succession Law Reform Act*, R.S.O. 1990 (SLRA) specifies that a will is not valid unless:

- the testator (*i.e.*, the person signing the will) signs the will (or where that person is unable to, by directing another person to do so)

- there are at least two witnesses present at the same time when the signature is made
- the two witnesses subscribe the will "in the presence of the testator"

Under Ontario's legislation, a court does not have the ability to validate a will that fails to meet these requirements.

The only formal execution exception for most Ontarians is a "holograph will," defined as a will that is "wholly" handwritten and signed by the testator, and does not require witnesses.

Similarly, Ontario's *Substitute Decision Act*, 1992, S.O. (SDA) specifies that a continuing power of attorney for property and a power of attorney for personal care must be executed "in the presence of two witnesses." Unlike for wills in Ontario, a non-complying power of attorney can be declared effective "if the court is satisfied it is in the interests of the grantor or his or her dependants to do so."

The words "sign" and "signature" are not defined in the SLRA or SDA. However, Ontario's *Electronic Commerce Act*, 2000, S.O. (ECA), which allows for the electronic signature of many commercial documents in the province, specifically excludes wills, codicils, and powers of attorney for property and personal care. The clear implication is that an electronic signature would not be valid for these documents.

Emergency order

On April 7, 2020, in consultation with members of the legal profession, the Ontario government announced that it had made an order under the *Emergency Management and Civil Protection Act*. The order directs that for the duration of the emergency declaration in Ontario, any requirement that a testator or witness be present for the signing of a will or power of attorney may be satisfied with the use of "audio-visual communication technology." One of the witnesses must be a licensed lawyer in the province. The technology must allow for the ability to "see, hear and communicate" with each other in "real time."

Just over two weeks later on April 22, 2020, the Ontario government revoked and released a new order that allows for signatures to be made on "complete, identical copies" of the will or power of attorney "in counterpart." Under the earlier order, the will or power of attorney needed to be signed and then sent from the testator or grantor to one witness, then forwarded on to the second witness, a potentially cumbersome process. Citing feedback from the legal profession, the government is now allowing all three signatories to sign separate copies, and which together are considered to make up a single document.

This is a significant and unprecedented change to the rules on the execution of estate planning documents. With the door now open to remote signing and witnessing, extra care will need to be exercised to ensure that any executed documents are valid and not subject to legal challenge. Where possible, consideration should be given to re-signing any wills or powers of attorney under normal conditions, when it is safe to do so.

Alberta

Like Ontario, Alberta's *Wills and Succession Act*, SA 2010, c W-12.2 (WSA) sets out the requirements for a will to be valid, subject to certain limited exceptions – for instance, "military wills" for active service members of the Canadian Forces:

- the testator must sign the will (or direct another individual to sign on the testator's behalf in the testator's presence)
- the testator must make or acknowledge his or her signature in the presence of 2 witnesses who are both present at the same time
- each witness must sign the will in the testator's presence

The WSA also recognizes holograph wills (like Ontario, a testamentary document wholly written and signed by the testator in his or her own writing), without the presence or signature of a witness or any other formality.

Unlike Ontario, Alberta legislation allows for some relief from the strict formal validity requirements. The Court may validate a will that fails to meet the formality requirements if the Court is satisfied, based on "clear and convincing evidence" that the document "sets out the testamentary intentions of the testator and was intended by the testator to be his or her will." Although the impact of the coronavirus pandemic in relation to the making and validity of wills remains to be seen, in theory, the dispensing and rectifying powers set out at sections 37 through 39 of the WSA could be used to correct signing deficiencies, particularly in light of the public health orders and directions of all levels of government to self-isolate or maintain social distancing.

Under the *Powers of Attorney Act*, RSA 2000, c P-20, and the *Personal Directives Act*, RSA 2000, c P-6, both documents must be signed and dated by both the grantor and a witness in each other's presence. There are no exceptions to these formalities for an enduring power of attorney or personal directive.

Much like the legislation in place in Ontario, Alberta's *Electronic Transactions Act*, SA 2001, c E-5.5, which allows the use of electronic signatures for the execution of several types of documents, specifically excludes wills, codicils, enduring powers of attorney and personal directives.

Emergency order

On May 15, 2020, in consultation with members of the legal profession, the Alberta government made an order under the authority of the *Public Health Act* allowing for the remote execution of wills, powers of attorney, and personal directives. The order directs that for the duration of the emergency declaration in Alberta, any requirement that a testator or witness be present for the signing of a will, power of attorney, or personal directive may be satisfied with the use of an "electronic method of communication in which they are able to see, hear and communicate with each other in real time." This exception may only apply where a lawyer is providing the testator, maker or donor, with legal advice and services respecting the making, signing and witnessing of the will, enduring power of attorney or personal directive.

The order is in effect until 60 days after the current state of emergency (as may be extended) lapses, or when the order is terminated by the Minister.

With the door now open to remote signing and witnessing, extra care will need to be exercised to ensure that any executed documents are valid and not subject to legal challenge. Where possible, consideration should be given to re-signing any wills, powers of attorney, or personal directives, under normal conditions, when it is safe to do so.

British Columbia

The *Wills, Estates and Succession Act*, SBC 2009, c 13 (WESA), like Ontario and Alberta, specifies that to be valid, a will must be:

- in writing
- signed at its end by the will-maker (or the signature at the end must be acknowledged by the will-maker as his or hers), in the presence of 2 or more witnesses present at the same time
- signed by 2 or more of the witnesses in the presence of the will-maker

Likewise, the *Power of Attorney Act*, RSBC 1996, c 370 (POAA) requires that an enduring power of attorney be in writing and signed and dated in the presence of two witnesses (or one witness, where the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia).

Neither WESA nor the POAA provides for the electronic signing of wills or enduring powers of attorney. Like Ontario and Alberta, the *Electronic Transactions Act*, SBC 2001, c 10 governs the use of electronic records, but specifically excludes from its application wills and powers of attorney (to the extent that they concern the financial affairs or personal care of an individual).

Unlike some other provinces, B.C. law does not provide for the use of holograph wills.

Nonetheless, like in Alberta, there are ways that a will, which would otherwise be invalid under WESA, can be deemed to be valid. First, a will can be made valid with a court order under WESA if the court determines that an otherwise invalid will represents the testamentary intentions of the deceased, and the circumstances require it. Second, a will may be valid if made in accordance with the laws of another jurisdiction in certain instances; for example, a will is valid if made in accordance with the law of the place where the will is made.

Care should be taken in attempting to execute a will, and related estate documents, in an otherwise “non-compliant” fashion, such as by electronic signature, to keep in mind the potential necessity of convincing a Court that the document represents the testator’s fixed and final testamentary intentions.

Emergency orders

On May 19, 2020, the BC Government made two new orders under the *Emergency Program Act*, one providing for the electronic witnessing of wills and another for the electronic witnessing of enduring powers of attorney and representation agreements.

A will executed in compliance with the *Electronic Witnessing of Wills (COVID-19) Order* will now be considered to have satisfied the formal requirements under WESA for the making of a will. The Order requires (among other conditions) that the will-maker and witnesses be "electronically present" before each other, one of the witnesses must be a lawyer or notary public, and that the will must include a statement that it was signed and witnessed in accordance with the Order.

An enduring power of attorney (EPOA) or representation agreement executed in compliance with the *Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order* will be deemed to be valid under provincial legislation. The Order contains similar requirements for a witness to be "electronically present" at the time of the execution of the document. Only one witness is needed for EPOAs and representation agreements, but the witness must be a lawyer or notary public.

The orders are effective from May 19, 2020 until the last day on which the current state of emergency (as may be extended) expires or is cancelled.

With the door now open to remote signing and witnessing, extra care will need to be taken to ensure that "remote" wills, EPOAs and representation agreements comply with the new orders. Where any wills, EPOAs or representation agreements have previously been made in a "non-compliant" fashion before these orders came into effect (as discussed above), consideration should be given to re-making these documents in compliance with the new orders to avoid the need to seek a court order validating the document.

Québec

According to the *Civil Code of Québec*, there are only three possible ways of executing a Will:

- the notarial Will (executed before a Québec notary, in the presence of one witness)
- the holograph Will (completely handwritten and signed)
- the Will made in the presence of two witnesses (can be prepared by a lawyer)

The witnesses to both the notarial Will and the Will made in the presence of two witnesses must be an adult of full age and must not benefit under the Will. The witnesses must sign the Will after the testator has signed and confirm that the Will and the signature belong to the testator.

Generally, this would require that all parties be physically together.

The holograph Will remains the simplest form of a will and does not require the presence of a third party; however, it is not the most reliable type of will as it can be lost, destroyed or damaged and can create problems of interpretation. Furthermore, like the Will made in the presence of two witnesses, it must be probated once the testator has passed away, which can delay the settlement of the estate.

On March 27, 2020, the Québec Minister of Health and Social Services passed *Ministerial Order 2020-010* pursuant to Québec's *Public Health Act*, which authorizes Québec notaries to remotely close notarial acts *en minute*, which include notarized Wills, using technological means. They must follow strict and specific criteria, which include:

- the officiating notary must be able to see and hear the testator and witness
- the testator and witness must be able to see and hear the officiating notary and each other
- the testator and witness and the officiating notary must be able to see the Will
- the testator and witness, other than the notary, must affix their signature using technological means enabling them to be identified and confirming their consent
- the notary must affix his or her digital official signature

In Québec and in the notarial community, these measures are unprecedented and as such the Board of Directors of the *Ordre des notaires du Québec* have established strict guidelines for the use of technological means to execute notarial deeds, as provided for in section 98 of the *Notaries Act (chapter N-3)*.These measures came into effect on April 1, 2020. Québec notaries may now execute Wills and other notarial deeds, such as Powers of Attorney and Protection Mandates (sometimes called living wills).

Conclusion

The question of whether digitally signing wills should be legally acceptable has been discussed by both practitioners and laypeople for years. The issue has taken on much greater urgency the last few weeks. For Canadians, particularly those who are medically vulnerable or self-isolating, the inability to meet with witnesses may stymie their ability to undertake testamentary planning. With Ontario and Quebec opening the door to virtual witnessing, there are new opportunities available. As always, care should be taken when executing a will or power of attorney.

If you need any assistance with the creation of wills, powers of attorney or personal directives, please feel free to reach out to one of the lawyers listed below.

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