

Electronic Wills and Powers of Attorney 2002



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CIVIL LAW SECTION

RECOGNITION OF WILLS AND POWERS OF ATTORNEY IN ELECTRONIC FORMAT

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Background

[1] At the 2000 Annual Meeting, the Alberta Commissioners presented a report on an amendment to s. 19.1 of the *Uniform Wills Act* relating to Substantial Compliance with Formalities. Arising out of that debate there were some questions as to whether it was appropriate to recognize electronic wills, and in particular, whether the formalities of the *Wills Act* should be amended to incorporate such wills.

[2] At the 2000 Annual Meeting, the Alberta Commissioners presented a report on the topic of Recognition of Wills and Powers of Attorney in Electronic Form, and presented three recommendations to the conference. These recommendations (Nos. 1 and 3) were to the effect that the Conference should not undertake a project on the recognition of electronic wills or powers of attorney; and that the phenomenon and incidence of electronic wills should be accommodated within the substantial compliance provisions of s. 19.1 of the *Uniform Wills Act*.

[3] The purpose of this report is to suggest the wording of the amendment to s. 19 which, if accepted, would allow the courts to accommodate electronic wills within the parameters of the substantial compliance provisions.

Option 1 : Amend s. 19.1(3) to add a reference to s. 3.

[4] This would allow the court to dispense with the requirement of writing altogether, provided the other evidentiary standards of the section are met. It would have the effect of opening up the possibility of oral wills or circumstances where there is nothing in any tangible format.

[5] This is not a viable option in that it goes far beyond incorporating electronic writing and is inconsistent with the underlying policy of the amendments to s. 19.

Option 2(a)

[6] Add a further subsection immediately after subsection (3) stating that:

For the purposes of this section only, writing includes:

Data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or computer system or other similar device.

[This is taken from s. 1(b) of the *Uniform Electronic Evidence Act*.]

Option 2(b)

[7] Add a further subsection immediately after subsection (3) stating that:

For the purposes of this section only, writing includes:

Data that is created, recorded, transmitted, or stored in digital form or in other intangible form by electronic, magnetic, or optical means, or by any other means that has capabilities for creation, recording, transmission, or storage similar to those means.

[This is taken from s. 1 of the *Uniform Electronic Commerce Act*.]

Recommendation

[8] It is our recommendation that the draft entitled "Option 2(a)" be chosen. It is taken from the *Uniform Electronic Evidence Act*. It has the effect of opening up writing to include other forms of tangible capture of the data, which include electronic data. It does not do away with the requirement of writing altogether, but it does require some reliable form of data capture.

[9] We are of the opinion that this draft appropriately captures the spirit and intent of the recommendations passed at last year's conference.

[10] It is important to understand how this definition operates. We are creating an exception to the formal requirements, provable by evidence which includes electronically created and stored data. We are not, however, creating a blanket provision that replaces the requirement of writing with a general redefinition of reliable means of electronic creation and storage of data.

