ELECTRONIC WILLS

Peter Lown presented a paper on Electronic Wills prepared by the Alberta Law Reform Institute. He noted that in the paper there was a clear conclusion against proceeding with an Electronic Wills project. The Alberta Law Reform Institute had consulted technical experts to seek further advice with respect to the technical aspects of this issue. He also advised that there had been a recent case in Saskatchewan (*Walmsley Estate*) which dealt with the dispensing powers of the courts, and that Manitoba and Queensland are considering additional dispensing powers, but were not actually looking at electronic wills.

The Conference was provided with three recommendations:

1. That the ULCC do not proceed with a project for the recognition of wills in electronic form.
2. That the ULCC amend the *Uniform Wills Act* to give the courts power to recognize a will, amendment of a will, or revival of a will in electronic form if there is clear and convincing evidence that the electronic record represents the testamentary wishes of a testator.
3. That the ULCC do not proceed with a project for the recognition of powers of attorney in electronic form.

Upon reviewing the policy objectives for the project outlined in the paper he also noted that the *Uniform Electronic Commerce Act* does not accommodate the concept of electronic wills. In part, this is because it is based on communication, as opposed to certainty, and the need for instant communication, rather than a product that can last for a long time. Since reliability, rather than communication, is the key for wills, these policy objectives do not mesh well.

With respect to the reasoning in the paper, he noted:

1. That the practical advantage of recognizing electronic wills is very small, literally just the cost of printing the paper.
2. Authentication issues create major problems in this field, not only is the technology doubtful, it is expensive to create a secure system, or a system that can properly track the original process to detect tampering.
3. Durability of records is a great problem. Experts consulted suggested it was "reckless foolishness" to expect to store a record electronically for any extended period of time and, further, to expect to be able to recover it, given the constant changes in this field.

Authentication is also an issue where there has been a passage of a significant amount of time making proof impracticable, even with good PKI technology. However, those who choose to use an electronic will may be accommodated within the dispensing power. Recommendation #2 provides that the Act be amended to recognize this discretion.

It was noted that the Hague Convention Abolishing the Requirement of Legalisation For Foreign Public Documents was considering the effect of electronic documents and that our "providing flexibility" recommendation would be useful in accommodating this international law development.

An issue was raised regarding recommendation #3 and powers of attorney. Since a power of attorney is simply an agency agreement, it may be preferable to allow any agency agreement to be executed electronically in the same way that any other contract could be electronic, if the parties agreed.

It was pointed out that there are some formality issues with respect to enduring powers of attorney. It was also understood that perhaps what would be more clear is that it be noted that this recommendation was only with respect to an individual's power of attorney and not corporate powers of attorney. Further, the recommendation is only with respect to enduring powers of attorney, which share the same concern as wills with respect to longevity, authentication and storage.

It was noted that Quebec has a general intent provision which would accommodate this recommendation, furthermore, the recent *Information and Technology Act*, Bill 161, because of the definition of "document", would in fact recognize wills in an electronic format. They also have apparently less formality with respect to authentication, and do not view that as a problem.

A debate ensued with respect to recommendation #2 and whether the proposed amendment should occur as an express amendment or proceed simply as a change to the commentary. The general agreement was that given the nature of the area being addressed, it was preferable to make an amendment to avoid any doubts. It was suggested that the report be circulated to CBA Wills and Estates sections to raise the ULCC profile, as it is a good study.

RESOLVED

1. That the report on Electronic Wills be received.
2. That a draft Act and commentaries be prepared for consideration of the Conference to amend the existing provisions in the *Uniform Wills Act* that give courts the power to dispense with strict compliance with the formalities, to recognize electronic wills in appropriate cases.
3. That the report appear in the 2001 proceedings. [*See Appendix E, p. 176*.]