

**REPORT ON ELECTRONIC WILLS**

**October, 2004**

## *Letter of Transmittal*

Dear Mr. Minister:

As computers and electronic records become more ubiquitous, electronic records are replacing printed documents in almost every facet of life. The growing importance of electronic documents in commerce is reflected by the adoption of the Saskatchewan *Electronic Information and Documents Act, 2000*. A significant exception to the scope of this legislation is wills and other testamentary documents. The exception was justified because the immediate need addressed by the legislation is the rapid growth of “ecommerce.”

There is however growing public interest in other types of electronic legal documents. At least one case has come before a Canadian court in which the status of an electronically created and stored will was at issue. More can be expected. As traditional distinctions between “paper” and “electronic” documents continue to be eroded by developing technology, it will almost certainly be necessary to give formal recognition to electronic wills.

As a first response to this issue, the Commission recommends extension of the “substantial compliance” rule in *The Wills Act* to expressly allow the court to admit to probate a will that fails to meet formal requirements because it is in electronic form if the court is satisfied that it embodies clear “testamentary intent.”

Full recognition of electronic wills to place them on the same footing as traditional wills “in writing” would require adoption of a set of “electronic formalities” in *The Wills Act*. While the Commission is of the opinion that full recognition will eventually be necessary and appropriate, and perhaps sooner rather than later, it recommends waiting until the need arises.

The Commission is pleased to submit this, its *Report on Electronic Wills*, for your consideration.

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### EXECUTIVE SUMMARY

An “electronic will” is a last will and testament created on a computer, authenticated with a digital identifier, and stored on electronic media. At present, the formalities required by law to create a valid will do not contemplate electronic wills. However, it can be expected that the courts in Saskatchewan will be required to rule on the validity of electronic wills. As traditional distinctions between “paper” and “electronic” documents continue to be eroded by developing technology, it will almost certainly be necessary to give formal recognition to electronic wills.

The simplest solution to this problem would be to extend the “substantial compliance” rule in *The Wills Act*, which admits a will that fails to meet formal requirements to probate if the court is satisfied on available evidence that the will shows clear “testamentary intent,” to expressly apply to electronic wills. The Commission is of the opinion that such a reform is now necessary.

Full recognition of electronic wills to place them on the same footing as traditional wills “in writing” would require adoption of a set of “electronic formalities” in *The Wills Act*. The Commission has concluded that it would be technically feasible to do so, but that there is not sufficient public interest in electronic wills at present to justify full recognition. While the Commission is of the opinion that full recognition will eventually be necessary and appropriate, and perhaps sooner rather than later, it recommends waiting until the need arises, and then adopting electronic formalities that reflect the technology then available.

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### Introduction

An “electronic will” is a last will and testament created on a computer, authenticated with a digital identifier, and stored on electronic media. The formalities required by law to create a valid will do not contemplate electronic wills. The Saskatchewan *Wills Act*, like legislation in almost all common law jurisdictions, provides that a will “is not valid unless it is in writing and signed by the testator or by another person in the testator's presence and by his or her direction.”<sup>1</sup> A will that does not meet the formal requirements of validity may nevertheless be accepted “as though it had been properly executed” if the court is satisfied by the available evidence that it embodies the “testamentary intention” of the deceased. But this “substantial compliance” rule can only be applied to a “document or writing.”<sup>2</sup>

Until recently, the requirement that all wills must be in writing presented few difficulties. It was regarded as a clear and unambiguous rule designed to avoid disputes about the status of wills, well understood and accepted by the public and legal profession. The increasing commercial and personal use of electronic documents, created and stored on computers, has brought the rule into question.

The growing importance of electronic documents in commerce is reflected by the adoption of the Saskatchewan *Electronic Information and Documents Act, 2000*.<sup>3</sup> The Saskatchewan legislation was modeled on Uniform Law Conference of Canada's *Uniform Electronic Commerce Act*.<sup>4</sup>

The *Uniform Act* is similar to the American *Electronic Signatures in Global and National Commerce Act* (ESIGN), adopted in 2000,<sup>5</sup> and European legislation modeled on UNCITRAL, developed by the United Nations Commission On International Trade Law. However, the Uniform and Saskatchewan Acts, like their

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<sup>1</sup> *The Wills Act*, S.S. 1996, c.W-14.1, s.7(1)(a). The Act also requires the signatures of two attesting witnesses (s. 7(1)(c)(d)), except in the case of a holograph will “wholly in the handwriting of the testator and signed by him or her.” (s. 8).

<sup>2</sup> *The Wills Act*, s.37. Traditionally, strict compliance with formalities was required in all cases. The substantial compliance exception was adopted by S.S.1989-90, c.66, s.9.

<sup>3</sup> S.S. 2000, c. E-7.22.

<sup>4</sup> *Proceedings of The Uniform Law Conference of Canada, 1999: Uniform Electronic Commerce Act* (annotated).

<sup>5</sup> 15 U.S.C. §§ 7001 et seq

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American and European counterparts, expressly omit wills and other testamentary documents from their scope.<sup>6</sup>

The Uniform Law Conference stated the need for legislation governing electronic documents succinctly:

Legal relationships have long been based on paper documentation. Many rules of law are expressed in language that suits documents on paper. Over the past generation, however, paper has been giving way to computer-generated communications. In the past decade, networked computers and particularly the Internet have accelerated the replacement of paper and spread it into new domains, notably to consumer and domestic transactions.

The most pressing problems have to do with what has come to be called “electronic commerce”. Consumer transactions, wholesale purchasing, and electronic transfers of funds have become commonplace. The most visible manifestation of electronic commerce is the phenomenal growth of sales and purchases on the Internet. The title of the Uniform Act indicates its focus. The legislation is primarily intended to provide mechanisms for validating electronic contracts. Other electronic documents with legal effect do not, as yet, require as immediate a response from law-makers, but it is almost certainly only a matter of time until the disintegration of distinctions between “paper” and “electronic” documents will make it difficult to sustain the exceptions now contained in ecommerce legislation.

Even before the public expectation that all electronic documents are equivalent to their paper counterparts has matured, the courts can be expected to be confronted with cases in which the deceased has attempted to make an “electronic will”, expecting it to be valid. Under the law as it now stands, the outcome in such cases is by no means certain. While most observers are of the opinion that the formal writing requirement demands a paper document, it is possible that the definitions of “writing” and “document” might be interpreted to include electronic documents. There is more likelihood that the courts would admit an electronic will to probate

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<sup>6</sup> The Saskatchewan *Electronic Information and Documents Act*, s. 4(1) provides that the substantive provisions of the *Act* “does not apply to:

- (a) wills;
- (b) directives within the meaning of *The Health Care Directives and Substitute Health Care Decision Makers Act*;
- (c) trusts created by wills
- (d) powers of attorney, to the extent that they concern the financial affairs or personal care of an individual
- (e) documents that create or transfer interests in land and that require registration to be effective against third parties; or
- (f) any other provisions, requirements, information or documents prescribed in the regulations.”

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under the substantial compliance provisions of *The Wills Act*, but even this is uncertain.<sup>7</sup>

In the United States, a few states have omitted the wills exception from state analogs to ESIGN, and Nevada has expressly provided for electronic wills.<sup>8</sup> The Uniform Law Conference recognized that the status of electronic wills must eventually be considered by law-makers.

Commenting on the exceptions in the *Uniform Electronic Commerce Act* for wills and similar documents, the Conference noted that:

[The *Act*] sets out a short list of exceptions, such as wills and land transfers. The principle of exclusion is not that such documents should not be created electronically. Rather, they seem to require more detailed rules, or more safeguards for their users, than can be established by a general purpose statute like this one.

The growing ecommerce industry is confident that the exceptions are temporary. Neil Iscoe of eCertain, a provider of electronic authentication and security services, argues that "these kinds of exclusions are put in place for consumer protection. Not everyone is comfortable with this yet, [but] they will eventually be removed as digital transactions become common practice."<sup>9</sup>

In fact, reappraisal of the status of electronic wills has been quick in coming. In 2001, the Uniform Law Conference received a paper entitled "Electronic Wills and Powers of Attorney: Has Their Day Come?"<sup>10</sup> In 2002, the Conference approved in principle amendment of the *Uniform Wills Act* to expressly extend the substantial compliance rule to encompass electronic wills.<sup>11</sup> The Alberta Law Reform Institute recommended against any recognition of electronic wills in its report *Wills: Non-compliance with formalities* in 2000<sup>12</sup>, but has since changed its position and will issue an addendum

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<sup>7</sup> These issues will be discussed below.

<sup>8</sup> NRS 133.085, 2001.

<sup>9</sup> Quoted in Andy Walker, "A paperless future: Signatures & paper", *Cyberwalker* (<http://www.cyberwalker.com/>).

<sup>10</sup> W.L. Hurlburt, "Electronic Wills and Powers of Attorney: Has Their Day Come?", *Proceedings of The Uniform Law Conference of Canada, 2001*.

<sup>11</sup> *Proceedings of The Uniform Law Conference of Canada, 2002*.

<sup>12</sup> Alberta Law Reform Institute, *Wills: Non-compliance with formalities*, June 2000 (Final Report no. 84).

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to its report recommending that the substantial compliance rule should apply to electronic wills.<sup>13</sup>

In the United States, review of the exceptions in E-SIGN was built into the statute. The *Act* requires the Department of Commerce “to review the operation of these exceptions to evaluate whether they continue to be necessary for consumer protection, and to make recommendations to Congress based on this evaluation.” This review was initiated in 2002<sup>14</sup>, and has attracted the participation of the American Bar Association and other interested groups. In the United Kingdom, the Law Commission established a working group in 2002 to consider whether electronic commerce legislation should be extended to wills.<sup>15</sup>

We believe that the time has come to ask the question whether electronic wills should be given some form of recognition in Saskatchewan. In our opinion, the question is not whether electronic wills ought to be recognized, so much as whether it is necessary, desirable, or feasible to do so now. As public acceptance of electronic documents grows, the law must ensure:

1. That artificial distinctions between electronic and paper documents do not remain part of the law of wills after they have been abandoned in other areas. Both public expectations and, sooner or later, the demands of efficiency and convenience, will require the law to adapt.
2. That electronic documents which clearly embody testamentary intent are not refused recognition. Even if strong arguments for recognition cannot yet be made on the grounds of efficiency and convenience, the courts will be required, likely sooner than later, to pass judgement on the validity of electronic wills whose makers assumed they would be valid.

In determining how, and when, the law should be reformed to achieve these goals, it is important to keep in mind that recognition could take either of two, or both, forms:

1. The formal requirements for validity of wills might be modified to recognize approved electronic formats, and perhaps more importantly, methods of creating and validating electronic signatures for use in this context. This would make it possible to admit electronic wills that met the electronic formal requirements to probate in the same way as wills that meet the current formal requirements.

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<sup>13</sup> Reported on the Alberta Institute web-site.

<sup>14</sup> See Federal Register, National Telecommunications and Information Administration, Docket No. 010222048-2229-04, “The Wills, Codicils, and Testamentary Trusts Exception to the Electronic Signatures in Global and National Commerce Act.”

<sup>15</sup> Law Reform Commission, *Wills and Equity Working Party on Electronic Wills*, 2002.

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The issues raised by this approach include an assessment of the current level of interest in using electronic wills as a standardized alternative to conventional wills, and the extent to which available technology (which has evolved to meet the needs of electronic commerce) can be adapted to create a set of electronic formalities for wills. The pace of technological change has important consequences in this regard. On one hand, it may be premature to attempt to construct a set of electronic formalities that assume current technology, which may be out-dated by the time there is significant demand for full recognition of electronic wills. On the other hand, computerization of all facets of life has proceeded faster than most observers, including many in the legal profession, thought possible only a few years ago. If interest in electronic wills grows as fast as electronic commerce grew in the last decade, full recognition of electronic wills may be something that cannot be long delayed.

2. The formal requirements for validity in *The Wills Act* might be left unchanged, but the substantial compliance rules in the *Act* amended to expressly allow the courts to accept electronic wills if satisfied that they embody testamentary intent. Even if electronic formal requirements are adopted, the substantial compliance provision might be necessary or desirable to ensure that testators who make electronic wills that fail to incorporate the formal electronic requirements would not have their testamentary intention defeated.

The immediate utility of the substantial compliance approach is perhaps less questionable than the utility of recognizing electronic formalities. Nevertheless, a threshold question is whether it is in fact required. It may be that the present law in Saskatchewan is sufficiently broad to allow the courts to apply the substantial compliance rule to electronic wills. Express recognition that the rule applies might unintentionally serve to encourage experimentation with electronic wills before a fully adequate legal regime has been developed.

Extension of the substantial compliance rule is attractive, at least as a first, and likely temporary, measure. The lead taken by the Uniform Law Conference suggests that amendment of substantial compliance legislation is likely to be the first response of law-makers to interest in electronic wills. We have concluded that this is the most satisfactory approach at present. However, we would be remiss if we left the impression that it is a full and permanent legal response to electronic wills. The need for more comprehensive reform may come sooner rather than later. For that reason, we have not rejected the option of giving formal recognition to electronic wills without serious consideration. If nothing else, we hope our review of the option will prove to be useful as a starting point for further reform in the future.<sup>16</sup>

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<sup>16</sup> The discussion here is confined to wills, codicils to wills, and trusts created by the terms of a will. A comprehensive approach to reform would require examination of such matters as electronic *inter vivos* trusts and electronic powers of attorney. Many of the issues in regard to formal recognition of electronic versions of these documents are similar, if not identical, to the issues surrounding formal recognition of electronic wills. However, since the substantial compliance rule in *The Wills Act* applies only to wills, codicils, and trusts created by will, it would be difficult to extend the Commission's recommendations to include other trusts and powers of attorney.

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### **The status of electronic wills under the present law**

The formal requirements set out in *The Wills Act* require the will to be “in writing.”<sup>17</sup> When writing requirements were first introduced into the law, “written” appears to have meant “written by hand,”<sup>18</sup> but the courts extended the meaning to include printing and other mechanical means of putting words on paper. Since the late 19<sup>th</sup> Century, an extended meaning of “writing” has been recognized by statute. The Saskatchewan *Interpretation Act*, like legislation in most other Commonwealth jurisdictions, provides that “writing or a similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form.”<sup>19</sup>

Although this definition was devised to ensure that printed documents are included within the meaning of “writing,” it may be broad enough to include electronic records. It does not confine “writing” to words on paper, and thus could easily encompass the magnetic and optical media used to store electronic information. Electronic media may record “words” in a mode that is rendered “visible” with a proper display device. The English Law Commission has suggested that the “natural meaning” of the definition of writing in the *Interpretation Act* would include “any updating of its construction to reflect technological developments,” and concluded that “it may be possible to satisfy the *Wills Act*” with an electronic form of will.<sup>20</sup>

Nevertheless, there appears to be a consensus among Canadian legislative drafters that “writing” does not extend to electronically stored or reproduced data.<sup>21</sup> This conclusion appears to rest in part on an argument that the scope of the definition of “writing” in *The Interpretation Act* is now constrained by *The Electronic Information and Documents Act*. That *Act* defines “electronic” to mean “created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or

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<sup>17</sup> *The Wills Act*, s.7(1)(a). See note 1.

<sup>18</sup> Thus, for example, Coke, referring to a bargain for sale, wrote that “it must be in writing, not by a print or stamp” (2 Coke Inst. 672).

<sup>19</sup> S.S. 1995, c. I-11.2, s. 27(1).

<sup>20</sup> Law Reform Commission, *Wills and Equity Working Party on Electronic Wills*, 2002

<sup>21</sup> The Alberta Law Reform Institute, *Wills: Non-compliance with formalities*, commenting on the identical definition in the Alberta *Interpretation Act*, observed that “this is very broad. [But] we are advised by Legislative Counsel that under Alberta drafting convention it does not include an electronic record. A similar opinion was provided by Saskatchewan legislative drafters.

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optical means or by any other similar means”<sup>22</sup>, and clarifies the application of writing requirements to electronic documents within the scope of the legislation:

5(1) If there is a conflict between this Part and the provisions of any other Act or regulation authorizing, prohibiting or regulating the use of information or documents in an electronic format, those other provisions prevail.

(2) For the purpose of subsection (1), the use of "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of information or documents in an electronic form.

(3) The provisions of this Part relating to the satisfaction of a requirement of any law apply whether or not the law creates an obligation or provides consequences for doing something or for not doing something.

Since the *Act* expressly excludes wills from its scope<sup>23</sup>, the drafters must have intended that the rule that “the use of "in writing" . . . does not by itself prohibit the use of information or documents in an electronic form” does not apply to wills. Whether this interpretation, which rests on the proposition that the construction of an Act can be affected by subsequent adoption of another Act that expressly states that it has no application to the subject matter of the first, is of course open to question.

There is also ambiguity about *The Wills Act* requirement that the testator and attesting witnesses sign the document. One of the principal purposes of *The Electronic Information and Documents Act* is to give effect to “electronic signatures.” Several methods of authenticating electronic documents by “electronic signature” are in current use.<sup>24</sup> The Act gives them effect<sup>25</sup>, and defines "electronic signature" to mean “information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document.”<sup>26</sup> Although *The Electronic Information and Documents Act* excludes wills, it can be argued that it does no more than give definitive effect to electronic authentication, leaving it open to the courts to conclude that “electronic signatures” may be signatures in other cases as well.

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<sup>22</sup> s. 3

<sup>23</sup> s. 4(1)

<sup>24</sup> See below.

<sup>25</sup> s. 5.

<sup>26</sup> s. 3(b)

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It has long been established law that a mark or sign may be substituted for a hand written signature. Thus, for example, it has been held that:

[W]hen there is a mark or sign made to a will, which mark or sign was intended by the testator to be, or to stand for, his name, then the court is not nice as to the kind of mark or sign employed. Whether the mark is made by a pen, or some other instrument cannot make any difference; and therefore a stamped impression of a testator's signature is sufficient.”<sup>27</sup>

Although this broad definition of signature was devised to accommodate illiterate testators, it would be difficult to distinguish “information in electronic form that a person has created or adopted in order to sign a document” from a mark or stamp “intended by the testator to be, or to stand for, his name.” The issue that has attracted the attention of the courts has not been the form of the signature, but whether it is genuine and intended to serve as a signature.

In sum, it appears possible that the courts could hold that an electronic will is valid if it is in an accessible and durable electronic format, and attested in a manner that the court finds to carry indicia of genuineness. Clearly, however, the arguments in favour of this conclusion are not strong enough to warrant making an electronic will on the assumption that it will be valid. In this respect, the current law may be in much the same state as the law governing electronic commerce before adoption of *The Electronic Information and Documents Act*. Arguments were made that the existing law was flexible enough to recognize electronic contracts, but the uncertainty was unacceptable to commerce. Legislation was necessary to ensure that electronic contracts meeting defined formal requirements would be uniformly and routinely accepted.

It is likely that courts in jurisdictions with substantial compliance provisions in their wills legislation will be inclined to avoid the issues discussed above if an electronic will can be given effect without passing on its formal validity. Under the Saskatchewan *Wills Act*, no signature is required to admit a will to probate under the

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<sup>27</sup> *Stroud's Judicial Dictionary*, “Signature”, citing *Jenkins v. Gaisford* 32 L.J.P.M. & A., 122.

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substantial compliance provision. The provision does, however require a “document or writing.”<sup>28</sup>

Though there is little authority on the issue, “document” may be a broader term than “writing”. W.H. Hurlburt suggests that

It is possible that a court might interpret the word “document” to include what is commonly called a “computer document”, that is, an electronic record, and admit an electronic record to probate under current dispensing powers that use the word “document.”<sup>29</sup>

The only reported decision in Canada on the application of a substantial compliance provision to an electronic will admitted the will for probate. *Rioux v. Columbe*<sup>30</sup> was decided under the Quebec substantial compliance provision, which applies to a “will” without any specific requirement that it be “in writing” or even “a document.” However, it should be noted that the purpose of substantial compliance legislation is to give effect to a clear intention to make a will, regardless of failure to meet formal requirements.<sup>31</sup> The court was satisfied on the facts of the case that the file the deceased placed on a computer diskette shortly before her death was intended to be her will. It seems likely that the courts will be inclined to give effect to the purposes of substantial compliance legislation in appropriate cases, regardless of the form of the will. A narrow interpretation of the minimal formalities required under the substantial compliance provisions would likely be regarded as defeating the purpose of the legislation.

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<sup>28</sup> The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

This section is based on s.19 of the *Uniform Wills Act*. Manitoba, New Brunswick and Saskatchewan have adopted legislation that applies to “a document” or a “writing on a document.” Prince Edward Island uses a similar phrase, but requires a signature. The Quebec dispensing power, which is not modeled on the Uniform Act, applies to a “will” without specifying the form in which the will must appear.

<sup>29</sup> “Electronic Wills and Powers of Attorney: Has Their Day Come?” (Uniform Law Conference of Canada, 2001). The Alberta Law Reform Institute reports that “We are advised by Legislative Counsel that the Alberta drafting convention is that “the word “document” may be on its way to including an electronic record, [even though] the word “writing” does not do so.” (*Wills: Non-compliance with formalities*).

<sup>30</sup> (1996) 19 ETR (2d) 201 (Que. S.C.).

<sup>31</sup> See below.

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An electronic will is much more likely to be admitted to probate under the substantial compliance rule than as a formally valid document. Nevertheless, the policy of the legislation is important. If it is desirable to apply substantial compliance to electronic wills, clarification of the law would be desirable.

### **Should electronic formal requirements for wills be adopted?**

#### **1. Introduction**

Most law reform agencies that have considered electronic wills have rejected formal recognition.<sup>32</sup> The background paper prepared for the Uniform Law Conference had no difficulty concluding that:

[T]he advantages of recognizing computer-generated electronic wills are small and are counterbalanced by significant disadvantages, so that there is no such compelling reason for recognition.<sup>33</sup>

The English Law Commission working group on electronic wills concluded that:

The working party did not wish to discourage future developments involving e-commerce in the area of wills and probate, but remained conscious of the significant difference between technological developments and the ability to actually translate the technological progress into practical reality. . . .

It is anticipated that very few clients at the present time would want to execute a will on line and therefore it is debatable whether it is justifiable at the present time to consider a complete change in the process of creating and executing wills when such a change is at present unwarranted.<sup>34</sup>

While these conclusions may be sound, at least for the present, the approach of critics of formal recognition often betrays a conservative approach to computer technology that has proved to be inappropriate. The Manitoba Law Reform Commission, for example, dealt with the topic only briefly in its report on wills and succession. The

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<sup>32</sup> See Manitoba Law Reform Commission, *Wills and Succession Legislation Report #108*, March 2003; Nova Scotia Law Reform Commission, *Reform of the Nova Scotia Wills Act*, 2003; Uniform Law Conference of Canada, "Electronic Wills and Powers of Attorney: Has Their Day Come?" (2001); Law Reform Commission, *Wills and Equity Working Party on Electronic Wills*, 2002.

<sup>33</sup> "Electronic Wills and Powers of Attorney: Has Their Day Come?"

<sup>34</sup> *Wills and Equity Working Party on Electronic Wills*.

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Chair of the Commission explained the approach taken in the report in these terms:

What we said in our discussion was this is probably something that should be looked at more carefully in a province with a bigger population base which might tend to have these problems, like Ontario or Quebec. . . . In our province, we didn't feel it was such a big problem and we didn't go into it.<sup>35</sup>

Law-makers hesitated before recognizing the need to establish a legal frame work for electronic commerce, and were then forced to rush to make up lost ground. The pace of technological change can be ignored only at peril. On the other hand, problems that seemed almost insurmountable when electronic transactions were first considered by law- makers have proved to be tractable in practice.

At present, much of the literature on electronic wills is a cataloging of hypothetical problems. In our opinion, a better orientation is to consider two questions:

1. Is the technology presently available to make it feasible to design a system for giving formal recognition to electronic wills?
2. Is there sufficient benefit in giving formal recognition to electronic wills, now or in the immediate future, to justify recognition?

We have concluded that the answer to the first question is at least a qualified yes. But while it would be rash to attempt anything more than a provisional prediction of the future of computer technology, we agree with the English Law Commission's conclusion that the utility of giving formal recognition to electronic wills does not at present justify "a complete change in the process of creating and executing wills." In our opinion, it would be desirable to wait until the need is clearer, and address it with the technological tools then available. However, by examining the feasibility of recognition using available technology, we hope to lay the foundation for formal recognition when the need arises.

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<sup>35</sup> D. Driver, "Manitoba Law Reform Commission calls for changes in law on wills, succession" *The Lawyers' Weekly*, (27 June 2003) 18.

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### 2. The feasibility of formal recognition

The requirements of writing and signature serve important purposes. Most discussions of formalities follow the analysis proposed by Lon Fuller, an American authority on contract law. Fuller identified four functions of formalities.<sup>36</sup> An acceptable set of electronic formalities must perform these functions in as satisfactory a manner as traditional formalities.

1. ***The channeling function.*** When formal requirements are met, the parties are assured of enforceability and legal effect. A will that has been properly executed and witnessed can usually be admitted to probate without further proof of authenticity. One of the primary purposes of *The Electronic Information and Documents Act* is to assure parties that electronic contracts will be enforceable. Even if the present formal requirements under *The Wills Act* can be satisfied electronically, without legislation clarifying the law and clearly setting out minimum formalities, the channeling function is not satisfied. However, this problem could be solved by adoption of any otherwise acceptable set of electronic formalities that are sufficiently clear to make compliance certain.

We agree with the Uniform Law Conference that:

[A] mere provision that a will shall not be denied legal effect solely by reason that it is in electronic form would be likely to create major difficulties of proof which would result in some valid wills being excluded and some unauthorized wills being probated.

The channeling function requires more certain guidance. The Conference was doubtful that a satisfactory set of electronic formalities would be practical:

The law might go further and prescribe certain actions that would either be accepted as proof of authenticity or at least give rise to a rebuttable presumption of authenticity. Such requirements would have to be carefully worked out in order to give the necessary assurance, and it is difficult to see how the resulting process could be made significantly less onerous than the printing out of a paper will and its execution under the present formalities.<sup>37</sup>

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<sup>36</sup> Lon Fuller, "Consideration and Form", (1949) Col. L. Rev., 799.

<sup>37</sup> "Electronic Wills and Powers of Attorney: Has Their Day Come?"

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However, much of the Conference's pessimism had to do with doubts that the "electronic signature" technology that has been developed to facilitate electronic commerce can be adapted for use in authenticating wills. The discussion below will suggest that this may not now be the case. Modification of formal requirements to accommodate electronic "writing" and "signatures" may no longer be as difficult and onerous in practice as the Conference suggested.

**2. *The evidentiary function.*** Fuller observed that "the most obvious function of a legal formality is, to use Austin's words, that of providing evidence of the existence and purport of the contract, in case of controversy." An electronic document, like words on paper, avoids the evidentiary uncertainties of oral agreements and declarations. However, doubts have been raised about the durability, accessibility, and security of electronic records.

The Uniform Law Conference observed that:

A formal will that is made on paper is durable for purposes measured by a human lifetime. It is not difficult to keep safe. . . . It is not likely to become illegible or unusable due to the lapse of time before it becomes effective. A question that should be answered before the law recognizes computer-generated wills in electronic form is whether such electronic records are as likely as paper wills to last in intelligible form for several decades.<sup>38</sup>

There are valid concerns about the durability of electronic media, but at least in part the concern reflects experience with computerized records before durability issues were fully recognized. While it remains true that none of the available electronic media have a life expectancy as long as a document printed in permanent ink on acid-free paper, electronic data storage media are increasingly durable. The life expectancy of metal-oxide coated archival quality CD-ROMs may be 100-200 years. Lower quality CD-ROMs are not as durable, but will last much longer than older media such as diskettes because they are laser written, not magnetically encoded. There is still a lack of definitive standards, but archivists and other record-keepers are working to establish standards, which in turn affects the quality of available media.<sup>39</sup>

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<sup>38</sup> "Electronic Wills and Powers of Attorney: Has Their Day Come?"

<sup>39</sup> See for example, the American Library Association Preservation Policy, 1991.

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In addition, it is increasingly recognized that the durability issue in a digital world is different than in a print world. One of the advantages of electronic media is reproducibility. Integrity of data can be maintained over the long-term by copying it to fresh media. Finally, it should be remembered that paper documents are vulnerable. They can be damaged by fire and water, and the inks used to create hardcopy in many law offices may have a shorter life expectancy than the electronic media from which they were printed.

The more pressing problem is accessibility. As one commentator has noted “In the early years of electronic record-keeping much attention was given to the durability of electronic media. While media durability is still an issue for archivists, the focus of preservation concern has shifted to the challenge of maintaining the capacity to read signals recorded on electronic media.”<sup>40</sup> The Law Commission observed that

Some old databases recorded in old computer formats (say 10 to 15 years ago!) are already obsolete and it is now impossible for the data to be retrieved. . . . An electronic will should have the capability to be stored for at least 75 to 80 years and be capable of being easily retrievable.<sup>41</sup>

An archivist states the problem in these terms:

As important as durability, however, is the stability of electronic records. Because these records are not eye-readable, they depend on specific hardware and software to translate them into human-readable form. At the present time, both are in a state of constant change. Even if magnetic or optical media could be shown to last for several hundred years, the hardware and software necessary to make them readable to humans is not likely to last for more than a decade or two.<sup>42</sup>

But this problem is increasingly tractable. The very fact that archivists and other institutional record keepers are now aware of problems that were ignored in the early years of computer record-keeping creates a climate in which accessibility issues will be addressed. The computer industry is now much more aware of the need for “backwards compatibility” than it was a decade ago. While CD-ROM technology has not yet been standardized, its wide-spread use by libraries and archives will likely ensure that the equipment needed to read “older” CDs will remain available.

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<sup>40</sup> Verne Harris, director of the South African History Archive, *Electronic Records Workshop* (Pretoria, 2002).

<sup>41</sup> *Wills and Equity Working Party on Electronic Wills*.

<sup>42</sup> David W. Carmicheal, *Retention of Electronic Records*, Westchester County Archives, 1995.

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The vulnerability of electronic records remains a serious enough concern to reduce the attractiveness of electronic wills. However, development of durability and access standards can be expected sooner rather than later. While electronic wills may be less practical for most testators at present, a properly stored and maintained electronic will is almost certainly durable enough to serve its purpose.

Security of computer records is a problem that affects all electronic records intended to have legal effect. Safeguards must be in place to ensure that a computer record has not been altered after it was created, or electronically forged. No system is completely secure, whether it is electronic or otherwise. A testator with a potential beneficiary who is either an accomplished forger or an expert computer hacker is at risk. Much of the concern has to do with authentication by signature. If an electronic document can be reliably associated with a unique electronic signature, it is as secure as a printed and signed document. This topic will be discussed below.

A principal focus of both electronic commerce legislation and the computer security industry has been development of mechanisms for "secure transactions". These mechanisms now appear to provide an adequate level of security for electronic commerce. However, they are geared to commercial transactions. In that setting, the contracting parties can agree upon the minimum level of security they require. As the Uniform Law Conference has observed, authentication of wills may require higher assurances of security than contracting parties would ordinarily demand. But on the other hand, some aspects of the security problem facing a testator are less difficult to deal with than ensuring that on-line transactions are secure. An electronic will will usually not be placed on line. Once it has been created, it will likely be stored on removable media such as a CD-ROM.

**3. *The cautionary function.*** Formalities are an indicia that a document is intended to create legally-binding obligations. In addition to identifying the maker of a document, a signature is a form of execution, an indication that the executed document is complete in the sense that it is intended to have legal effect. As the Law Reform Commission of Manitoba observed, "signature in our society is a sign of final authorization. Most people will not lightly sign a document entitled Last Will and Testament."<sup>43</sup>

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<sup>43</sup> Law Reform Commission of Manitoba, *Report on the Statute of Frauds*, 1980.

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Perhaps the greatest challenge facing acceptance of electronic documents for legal purposes has been development of an electronic equivalent to the signature. The problem has now largely been solved in the electronic commerce context. *The Electronic Information and Documents Act* defines "electronic signature" to mean "information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to, or associated with the document."<sup>44</sup> The Act does not dictate the form of the electronic signature, or the manner in which it is created.<sup>45</sup> Instead, it is intended that the parties to an electronic transaction will adopt one of the methods of authentication which have been devised in the last decade.

The most widely-used method involves public key cryptography. A document is encrypted using a mathematical algorithm called a "key". Public key cryptography uses two keys. One key is kept private and the other key is made public. If the public key is used to encrypt a message, the private key can decrypt the message.<sup>46</sup>

Public key cryptography is used to create electronic signatures, also called digital ID, certificates, or profiles:

A digital signature is much like a hand signature in that it provides proof that you are the originator of the message (Authentication). If you want to sign the message which you sent to an addressee, you pass the message through a mathematical function (known as a hash function) which provides a summary (hash code) of the message. This summary is unique for every message and is much like a fingerprint. You then encrypt this hash code with your Private Key and attach the code to the end of your message. This attached code is known as a digital signature. The addressee can then verify that the message was sent by you by decrypting the digital signature, using your public key, to get the hash code. The addressee then passes the received message through the same hash function. If the two hash codes are the same, then the message was sent from you (Non-repudiation) and was not altered (Integrity). The maker of a document attaches an electronic signature or digital ID to the document.<sup>47</sup>

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<sup>44</sup> s. 3(b)

<sup>45</sup> However, under s. 14, regulations governing electronic signatures may be adopted.

<sup>46</sup> Canada Communications Security Establishment, "What is Public Key Cryptography?" (<http://www.cse-cst.gc.ca/en/services/pki/pkc.html>).

<sup>47</sup> Canada Communications Security Establishment, "What is a Digital Signature?" (<http://www.cse-cst.gc.ca/en/services/pki/pkc.html>).

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The digital ID containing signature information may be obtained through a certificate authority. The certificate authority manages certificates, and makes them accessible so that anyone dealing with the person who created the certificate can authenticate the electronic signature. Alternatively, a self-signed digital ID can be created. In this case, authentication is possible only if the decryption key is made available.

In practice, the process is relatively simple. The maker of the document must have appropriate software for handling encryption. The services of certificate authorities are available on-line. Once a digital ID is established, it is only necessary to click on a signature icon to electronically sign a document. Popular document-creation software such as Adobe Acrobat now have electronic signature capabilities built into them.

Both the Uniform Law Conference and the English Law Commission doubted that electronic signature systems developed for electronic commerce are readily adaptable to electronic wills. The English Commission stressed the transactional nature of electronic commerce:

A will is not a contract or a commercial transaction, but is a unilateral declaration by an individual. The testator is (usually) dead by the time the authenticity of the signature is challenged. Also the will can be revoked unilaterally at any time by the testator. Therefore it is not appropriate to simply adopt the arrangements thought suitable for commercial contracts.<sup>48</sup>

It is certainly the case that electronic signatures based on PK cryptography are used primarily to authenticate documents, such as contracts, that are passed between the parties to a transaction. The ability of the maker of a document to guarantee authenticity by providing a public key to the recipient makes it well suited to commerce. However, the core principle of PK cryptography is creation of a unique identifier that can be decoded and authenticated by anyone. The two-key system of PK cryptography means that the public key can be widely disseminated without compromising security. If an electronic signature is certified by a certificate authority, it will be readily available to anyone who needs to verify it. If the certificate is self-created, it can be authenticated by anyone given access by the maker of the certificate. In the case of an electronic will, access might be given to the executor, or the lawyer who drew the will.

There are, however, some aspects of electronic signature technology as it has been implemented to date that would make it difficult to use it to authenticate electronic wills.

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<sup>48</sup> *Wills and Equity Working Party on Electronic Wills.*

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In particular, because most electronic transactions are completed in a short time, available certificates obtained from certificate authorities carry expiry dates that would make them unsuitable for wills.

The Uniform Law Conference expressed more fundamental doubts about electronic signatures:

If the evidentiary difficulties and the risk of rejection are to be avoided, the first question is whether there is, under existing technology, a form of “electronic signature” the inclusion of which in, or the association of which with, an electronic record will identify the person who created the electronic record as a specific individual (e.g., a purported testator) or some person acting under the direction of the specific individual. And the second question is, does the electronic signature do so to a sufficient level of assurance to justify relying on the electronic record as having been adopted by a purported testator or person acting under the direction of a purported testator? And does the electronic signature prove that the electronic record was not altered after the electronic signature was “affixed”? Further, will problems of proof be capable of solution without too much risk or cost? A possible answer might be the use of third-party certification, schemes for which are now in operation. Does certification go so far as to tie an electronic record uniquely to an individual? Would certification be useful years later? Is it likely to be widespread enough to be useful to testators? Would testators find it worthwhile to undergo the complexity of obtaining certification in order to be able to make a will in electronic rather than in paper form?<sup>49</sup>

Even in the short space of four years since the Conference considered these questions, the availability of sophisticated electronic signature technology has significantly increased. The discussion of PK cryptography and digital ID above suggests that the current technology is now capable of providing satisfactory answers to most of these questions. Electronic signatures uniquely identify the maker of a document, and provide assurance that the document has not been altered. Encryption is at least as good a guarantee that the signature is genuine as handwriting. Certification is now readily available, inexpensive, and not much more difficult to manage than a word-processing program.

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<sup>49</sup> “Electronic Wills and Powers of Attorney: Has Their Day Come?”

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It is important to note that full recognition of electronic wills would require more than simply removing the exemption for wills in *The Electronic Information and Documents Act*. It is in this regard that the transactional focus of the legislation is most relevant to the recognition issue. The Act does not authorize any particular form of electronic signature. It assumes that, within broad limits, the parties to a transaction will select an available method of authentication that meets their agreed upon standards of security and certainty. The annotations to the *Uniform Electronic Commerce Act* state that:

The general law does not set any technical standard for the production of a valid signature. The essential question is the intent of the person who created the mark or symbol alleged to be a signature. This would normally be proved by evidence extrinsic to the document, though the position of a name written in ink may lead readily to the conclusion that it was intended to be a signature. Evidence of intent of electronic signatures will develop with practice.<sup>50</sup>

Because a will is not a product of agreement between parties and will be tested for authenticity only after the death of the maker, more explicit regulation of the authentication method is required. There are strong, and well established, policy reasons for not leaving the formalities for making a will a matter for the testator to determine. As the Uniform Law Conference observed:

The Wills Acts confer what might be called substantive freedom of testation . . . However, the Acts do not confer complete procedural freedom of testation; that is, they do not allow a testator to make a will in whatever form the testator chooses. Instead, they prescribe certain formalities that must be observed in the adoption of a will. . . . The formalities are intended to ensure that authentic expressions of testators' intentions, and nothing else, are admitted to probate, that is, recognized by law. They also serve administrative efficiency.<sup>51</sup>

While it would of course be possible to specify the form of electronic signature required to authenticate an electronic will, doing so would run the substantial risk of codifying a procedure that will quickly become out of step with developing technology.<sup>52</sup> It should be noted that the UNCITRAL model law on electronic

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<sup>50</sup> *Uniform Electronic Commerce Act* (annotated), s.10.

<sup>51</sup> "Electronic Wills and Powers of Attorney: Has Their Day Come?"

<sup>52</sup> An explicit definition of "electronic signature" applicable to wills could be adopted in *The Wills Act*, or if the exemption for wills was removed from *The Electronic Information and Documents Act*, in a regulation under s. 14 of the Act. The definition might be less problematic as a regulation, but in any case if amendment of the definition is required by technological innovation, a regime with a shifting set of requirements would be created. This should be avoided if possible.

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signatures proposed more explicit guidelines in regard to electronic signatures than the electronic commerce legislation based on it have adopted. The annotations to the Uniform Act state that the UNCITRAL model was rejected because its approach to electronic signatures is not “media neutral”, and thus not flexible as technology changes.

The Nevada electronic wills legislation attempts to provide more stringent signature requirements than electronic commerce legislation while remaining “media neutral”. The Nevada *Wills Act* defines an “electronic will” as an electronic record that “contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator.” An “authentication characteristic” is defined as

a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.<sup>53</sup>

Whether or not this formula will ensure appropriate assurance of authenticity, it is much less clear and certain than the simple writing and signature requirements applicable to traditional wills. While experience and judicial decisions may reduce it to a set of conventional procedures, we are of the opinion that the Nevada legislation cannot be regarded as an attractive substitute for traditional formalities.

**4. *The protective function.*** Formalities are intended to prevent or discourage fraud. This is Fuller’s “protective function.” He included under this heading the witness requirements in wills legislation. Although some commentators have suggested that the witness requirements might be difficult to meet when a will is prepared electronically, potential problems do not appear to be serious. Three electronic signatures would have to be created and managed to create a valid will, but available technology makes it possible to place more than one electronic signature on a document.

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<sup>53</sup> NRS 133.085, subsections 1,6.

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On balance, it would appear that satisfactory electronic equivalents to the traditional formalities attaching to wills are currently available. The Uniform Law Conference observed that “given that many people are now accustomed to using computers for recording words, the recognition of computer-generated electronic wills would allow at least some testators to use a medium with which they are more familiar and comfortable.”<sup>54</sup> However, we agree with the Conference that more is required to justify formal recognition. There are some reasons for caution before according recognition to electronic wills.

While available electronic signature and authentication methods could be applied to electronic wills, the fit is not perfect. Although the problems of durability and accessibility of electronic records that have troubled commentators in the past now seem less significant, they will not be resolved until definitive standards and practices have been adopted. Perhaps most important, the technology is still developing rapidly. If there were significant advantages in encouraging the use of electronic wills at present, or if there was a significant demand for the option, these problems could be minimized. But we have concluded that if full recognition cannot be shown to respond to an immediate need, it is likely premature.

### **3. Would recognition meet an existing need?**

There can be little doubt that the distinction between electronic and paper documents will continue to disintegrate as computers assume ever more record-keeping functions. It is not difficult to imagine, perhaps sooner than later, that maintenance of paper records will come to be regarded as both obsolete and inefficient. As one computer industry commentator has observed:

It is often said that rather than eliminating the demand for paper computers have increased it, creating an enormous need to print things out. This may be a temporary phenomena, however, as new technologies that reduce the need for paper are about to become commonplace.

What's driving the development of these technologies is environmental awareness combined with business need -- paper is slow. Printing and delivery of paper, whether a report, invoice or purchase order, is a labour and equipment intensive process that can take minutes, hours or days. Digital

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<sup>54</sup> “Electronic Wills and Powers of Attorney: Has Their Day Come?”

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"paper" can be delivered almost instantly via the Internet, potentially saving companies billions of dollars.<sup>55</sup>

In addition, the capacity to store the ever-increasing volume of paper records is a problem that will diminish only if electronic record-keeping replaces, rather than duplicates or complements, paper record-keeping.

An "electronic wills box" may eventually replace its traditional equivalent in law offices. But that time has not arrived. It is true that increasing familiarity with computer use may make electronic wills attractive to some individuals, but there is little evidence that either the legal profession or the public have any more than a curious interest in electronic wills at present.<sup>56</sup> As the English Law Commission observed:

It is anticipated that very few clients at the present time would want to execute a will on line and therefore it is debatable whether it is justifiable at the present time to consider a complete change in the process of creating and executing wills when such a change is at present unwarranted.<sup>57</sup>

Until storage of paper documents comes to be regarded as inefficient and onerous, there is little or no advantage in adopting an electronic will. It is likely that most wills are now prepared using a computer word processor. Adoption of an electronic will would avoid the cost and effort of producing a hardcopy for signature and witnessing, but the advantage in doing so is trivial, and is diminished by the need to establish an electronic ID and make it accessible.

We agree with the Uniform Law Conference that:

It does not seem likely that the recognition of computer-generated wills in electronic form would result in significant cost savings to testators in connection with the preparation and adoption of a will. There is usually no significant cost involved in having a self-prepared will witnessed or in

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<sup>55</sup> Andy Walker, "A paperless future: Signatures & paper", *Cyberwalker* (<http://www.cyberwalker.com/>).

<sup>56</sup> The Nova Scotia Law Reform Commission included a question about recognition of electronic wills in a consultation paper on reform of the *Wills Act*. All responses received by the Commission were favourable to electronic wills. However, this likely represents no more than interest in the concept. (Nova Scotia Law Reform Commission, *Reform of the Nova Scotia Wills Act*, 2003).

<sup>57</sup> *Wills and Equity Working Party on Electronic Wills*.

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writing out a holograph will. Nor, if a testator has a will prepared by a lawyer, would the recognition of computer-generated wills in electronic form be likely to bring about any significant saving in professional fees.<sup>58</sup>

While law reform agencies will almost certainly be forced to revisit this conclusion, at present we believe the case for formal recognition of electronic wills is not strong enough to justify adoption of a set of electronic formalities for recognition of electronic wills.

#### 4. Should *The Wills Act* preclude formal recognition of electronic wills?

The discussion of the present law in this paper suggests that the “writing” and “signature” requirements in *The Wills Act* may not preclude adoption of an electronic will. The discussion of electronic signatures technology suggests that available forms of electronic signature may be functional equivalents of a handwritten signature. Despite exclusion of electronic wills from the scope of *The Electronic Information and Documents Act*, it may be possible to create an electronic will under the present law.

The English Law Commission has argued that if it is not desirable at present to enact a suitable set of electronic formalities for wills, the uncertainty in the law should be resolved by legislation “to specify that electronic communication (i.e. an electronically created will) cannot satisfy the requirement of the *Wills Act*.” The Commission suggested that this step should be taken “as soon as possible to avoid confusion and uncertainty.”<sup>59</sup>

We are not certain that this issue is as pressing as the Law Commission suggests. Properly employed, available technology could provide electronic authentication that

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<sup>58</sup> “Electronic Wills and Powers of Attorney: Has Their Day Come?”

<sup>59</sup> *Wills and Equity Working Party on Electronic Wills*. The Commission noted that the uncertainty also applies to powers of attorney, and recommended a similar solution.

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would satisfy the policy of *The Wills Act*. It could be argued that the status of electronic wills under the present statutory regime should be left to the courts to decide. However, because the technology is new and unfamiliar, a legislated solution may be more appropriate. It was argued above that, given uncertainty about the application of the law to the new technology, electronic wills cannot easily fulfill the channeling functions of formalities. Even judicial decisions based on the specific facts of a few electronic wills cases would likely not clarify the law sufficiently to make electronic wills a safe option.

We would be reluctant to recommend that formal recognition be denied by statute to all electronic wills, including those that embody a clear testamentary intention, if the substantial compliance provision in *The Wills Act* did not extend to electronic wills. Since we recommend below that the substantial compliance provision should be expressly extended to electronic wills, we have concluded that it would be appropriate to expressly exclude electronic wills from formal recognition.

### **Should the substantial compliance rule apply to electronic wills?**

#### **1. Introduction**

In Saskatchewan and other jurisdictions<sup>60</sup> that have adopted “substantial compliance”<sup>61</sup> as a remedial measure, it would be relatively easy to ensure that electronic wills that disclose a clear testamentary intention are admitted to probate without giving formal recognition to electronic wills. The Quebec substantial compliance provision has been used to admit an electronic will to probate. Even though the wording of the Quebec provision may have made that decision easier than it would be in Saskatchewan, it is not unlikely that the courts in this province will follow Quebec’s lead.

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<sup>60</sup> Manitoba, Saskatchewan, Quebec, New Brunswick, and Prince Edward Island have adopted substantial compliance provisions, most modeled on Section 19 of the *Uniform Wills Act*. So have five of the six Australian states. In the United States, the *Restatement of the Law Third* and the *Uniform Probate Code* contain provisions to much the same effect. This legislation is collected and compared in Alberta Law Reform Institute, *Wills: Non-compliance with formalities*, June 2000 (Final Report no. 84).

<sup>61</sup> The term “substantial compliance” is used in the marginal note to the Saskatchewan provision, but not in the text of the statute. It has been suggested that “dispensing power” is a more accurate term (see below). However, the term “substantial compliance” is now firmly established in the Saskatchewan legal lexicon, and will be used here.

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As the discussion which follows will show, amendment of *The Wills Act* to expressly extend substantial compliance to electronic wills is consistent with the policy goals of substantial compliance, and would prevent the injustice of refusing probate to a will merely because it was left in electronic form. At the least, extension of substantial compliance would serve as a temporary response to the developing capability to create electronic wills with strong indicia of authenticity. But even if formal recognition is eventually given to electronic wills, a place will remain for an extended substantial compliance provision. Electronic formal requirements, like conventional formalities, may be inadvertently breached. In both cases, a remedy should be available to preserve the testator's intention.

### 2. The policy of substantial compliance provisions

Compliance with formalities provides clear evidence of a testator's wishes, and of his or her intention to be legally bound by the will.<sup>62</sup> But there are inevitably cases in which a testator fails to comply with the prescribed formalities through ignorance, inadvertence, or mistake. If the testator in such a case nevertheless clearly disclosed testamentary intentions, there is no good reason not to give legal effect to them. The *American Restatement* sets out the policy of substantial compliance ("harmless error" in the terminology preferred in the United States) succinctly:

[T]he statutory formalities are not ends in themselves but rather the means of determining whether their underlying purpose has been met. . . . A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.<sup>63</sup>

Substantial compliance does not deny the important functions of formalities. Only wills that strictly comply with the statutory formalities are automatically entitled to probate. Those that fail the test will be admitted only if the court is satisfied on the evidence available to it that testamentary intent is clear.

The substantial compliance provision adopted in Saskatchewan and other Canadian provinces is more accurately described as a "dispensing power". The legislation

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<sup>62</sup> See the discussion of the functions of formal requirements above.

<sup>63</sup> *Restatement of the Law Third, Property, Wills and other Donative Transfers*, §3.3. For further discussion of the policy of substantial compliance, see John H. Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law" (1987) 87 *Col. L. Rev.*, and "Report of the Saskatchewan Commissioners on Substantial Compliance, Proceedings of the 69<sup>th</sup> Annual Meeting, *Uniform Law Conference of Canada*, 1987.

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allows the court to dispense with formalities in appropriate cases rather than look for substantial attempts to comply with them. The Act provides:

37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

Note that the Act allows the court to admit a will to probate even if the “document or writing was not executed in compliance with all the formal requirements imposed by this Act.” Any doubt that the Act creates true dispensing power was resolved by the Saskatchewan Court of Appeal in *Re Bunn Estate*, in which the Court held that the section does not require any attempt at compliance with formalities.<sup>64</sup>

This formula gives broad scope to the courts to consider evidence that may disclose testamentary intent without regard to form. The only formality which apparently cannot be dispensed with under the Saskatchewan legislation is the requirement that there must be some “document or writing” that expresses the testamentary intent. But the policy underlying the formula suggests that even this requirement should be interpreted liberally. Thus it is not unlikely that an electronic form of will would be held to qualify as a “document” for purposes of the section.

The only reported Canadian decision on the application of substantial compliance to an electronic will was decided under the Quebec substantial compliance provision, which does not make a “document or writing” an express requirement. However,

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<sup>64</sup> (1992), 45 E.T.R . 254 (Sask. C.A .). In this case, a document disposing of the testator’s assets, in her handwriting, but unsigned, was enclosed with a properly executed will which only named an executor. The unsigned document was admitted to probate. The Saskatchewan Court of Appeal rejected the Manitoba Court of Appeal decision (*Re Langseth Estate* (1990), 39 E.T.R . 217) which held that the similar Manitoba substantial compliance provision requires some attempt at compliance with the formalities. However, following a recommendation from the Manitoba Law Reform Commission, the Manitoba section was amended to provide that the court may give effect to a testamentary document “notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements.” (S.M. 1995, c. 12, s. 2.).

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apart from the absence of a paper document, the facts in the Quebec case of *Rioux v. Columbe*<sup>65</sup> were exactly the sort that Saskatchewan courts have taken to indicate a testamentary intention. The deceased committed suicide. A note left beside her body gave directions to locate an envelope containing a computer diskette marked “this is my will/Jacqueline de Rioux/february 1, 1996”. The diskette contained the text of a will, which had been saved to the diskette on the same day. The deceased had also noted in her diary that she had made a will on computer. Although the court observed that care must be exercised before validating a will recorded on computer diskette, it had no doubt that the electronic record was intended to be a will, and admitted it to probate.

### 3. Is amendment of the substantial compliance provision necessary?

In the Uniform Law Conference background paper on electronic wills, W.H. Hurlburt commented on *Rioux v. Columbe* with the observation that:

I do not think that one anecdote should drive policy to recognize all electronic wills. However, this case does show that at least one testator, for some reason, had adopted an electronic record as her will, and it also shows that there can be circumstances, however rare, in which an electronic record can be shown, as conclusively as anything can be shown, to embody the testator’s testamentary intentions. Therefore, I think that the occurrence of this one case supports the extension of a dispensing power to electronic as well as to written records.<sup>66</sup>

This conclusion is sound. If anything, it is perhaps too cautious. As the discussion above has shown, electronic wills authenticated using available electronic signature technology are reliable evidence of testamentary intent. Nor should we expect cases involving electronic wills to be rare. Since many, if not most, wills are now created using computer word processors, we can expect more than a few testators, through inadvertence or misunderstanding of the law, to leave their wills in electronic form. The availability of will forms on the Internet will likely increase the likelihood of this occurring. One Internet source of will forms examined in the course of preparing this Report warned that wills must be printed out and properly executed to be valid. But most do not, and warnings may go unheeded in any event. While electronic wills that have not been clearly and deliberately adopted by association with an electronic ID are less secure evidence of settled intent, the dispensing power allows the courts to consider each case on its own merits.

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<sup>65</sup> (1996) 19 ETR (2d) 201 (Que. S.C.).

<sup>66</sup> “Electronic Wills and Powers of Attorney: Has Their Day Come?”

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In its report *Wills: Non-compliance with formalities*, the Alberta Law Reform Institute recommended that substantial compliance should not extend to electronic wills. Although the Institute has now reversed its position<sup>67</sup>, the arguments advanced in favour of excluding electronic wills should be considered. The Institute took the position that:

Conventional thinking is that an electronic record cannot satisfy the requirements for a will. Even current model equivalency rules that accept electronic records in relation to most legal relationships exclude from their scope wills and codicils . . . We think that, if the question of admissibility of an electronic document to probate is to be considered, it should be considered in the context of the formalities as a whole and not in the context of a dispensing power. The dispensing provision which we recommend in this report is not intended to extend to electronic records.

It has been suggested above that “conventional thinking” may no longer reject electronic wills as expressions of testamentary intent. Exclusion of wills from electronic commerce legislation is dictated more by the transactional focus of the legislation than by principle. The policy of substantial compliance is designed to deal with the kind of fact patterns that will come before the courts when electronic documents are used in an attempt to make testamentary dispositions. Even if formal requirements were modified to give recognition to electronic wills, there would remain a distinct and separate function for the dispensing power in relation to electronic wills.

We are convinced that the substantial compliance provision in *The Wills Act* should extend to electronic wills. Even if the courts are prepared to interpret the present provision to include “electronic document” within the definition of “document,” it would be desirable to clarify the law to expressly encompass electronic wills in the substantial compliance provision.

#### **4. Proposed amendment to section 37 of *The Wills Act***

Doubt that the substantial compliance provision of *The Wills Act* now extends to testamentary documents in electronic form is entirely a matter of the meaning of the phrase “document or writing” in section 37. The obvious solution to this problem is either to delete the phrase, or add a definition that clearly includes “electronic document.”

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<sup>67</sup> See above.

## REPORT ON ELECTRONIC WILLS

The Uniform Law Conference has considered both options. The first would follow the model of the Quebec substantial compliance provision, which applies to a “will” without stipulating that the will must be in any specific form. The Conference rejected this option because “it would have the effect of opening up the possibility of oral wills or circumstances where there is nothing in any tangible format.”<sup>68</sup> We agree that this would potentially extend the policy of substantial compliance as it has developed in Saskatchewan further than necessary for present purposes.

The Conference also considered adopting a definition of writing for purposes of the substantial compliance provision in the *Uniform Wills Act* modeled on either the *Uniform Electronic Evidence Act* or the *Uniform Electronic Commerce Act*. The Conference adopted the former:

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.

However, on reconsideration, doubt was expressed that the formula excludes voice recordings stored on a computer. Thus it was recommended that an additional provision be adopted to the effect that:

In this section, “electronic form” means, in respect of a document, data that

- (a) is recorded or stored on any medium in or by a computer system,
- (b) can be read by a person, and
- (c) is capable of reproduction in a visible form.<sup>69</sup>

In our opinion, it must be kept in mind that the purpose of the dispensing power is to allow the courts to admit any clear and certain record of testamentary intent. Even minimal formalities are problematic in substantial compliance provisions, as the

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<sup>68</sup> *Proceedings of The Uniform Law Conference of Canada, 2002*, “Recognition of Wills and Powers of Attorney in Electronic Format.”

<sup>69</sup> *Proceedings of The Uniform Law Conference of Canada, 2003*, “Recognition of Wills and Powers of Attorney in Electronic Format.”

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difficulty created in the present context by the reference to “document or writing” suggests. What is required is neither more nor less than a simple indication that electronic format does not preclude application of the substantial compliance provision. The precise scope of the dispensing power should be left to the courts. Thus we suspect that the choice of definition of “document or writing” is not critical, so long as it does not introduce a limit on the scope of the dispensing power that might have unexpected consequences.

The Uniform Law Conference recommendation is perhaps not the only acceptable solution, but it is adequate. Noting also the desirability of uniformity, we recommend its adoption in Saskatchewan.

## REPORT ON ELECTRONIC WILLS

### RECOMMENDATIONS

1. The Commission recommends that formal recognition of wills created and stored in electronic or digital format only should not be adopted at present, either by removing the exception for wills in *The Electronic Information and Documents Act, 2000*, or by enacting electronic formalities in *The Wills Act*.
2. The Commission recommends amendment of section 37 of *The Wills Act* to expressly provide that an electronic will that clearly discloses testamentary intent is admissible to probate under the dispensing power contained in section 37. To achieve this purpose, the Commission recommends adoption of the definition of “document” proposed by the Uniform Law Conference:

For the purposes of this section only, “writing” includes data that

  - (a) is recorded or stored on any medium in or by a computer system,
  - (b) can be read by a person, and
  - (c) is capable of reproduction in a visible form.
3. The Commission recommends that uncertainty about the formal status of electronic wills under *The Wills Act* should be resolved by expressly providing in *The Wills Act* that a will created and stored in electronic or digital format only does not satisfy the formal requirements of the Act.
4. The Commission recommends that the technology available to create and authenticate electronic wills, and the extent of public interest in electronic wills as an alternative to traditional wills, should be monitored to determine whether a need to reconsider these recommendations arises in the future.

## REPORT ON ELECTRONIC WILLS

### **APPENDIX 1: Nevada Wills Statute (Electronic Wills)**

NRS 133.085. Electronic will.

1. An electronic will is a will of a testator that:
  - (a) Is written, created and stored in an electronic record;
  - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
  - (c) Is created and stored in such a manner that:
    - (1) Only one authoritative copy exists;
    - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
    - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
    - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.
2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all of his estate, real and personal, but the estate is chargeable with the payment of the testator's debts.
3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this state. An electronic will is valid and has the same force and effect as if formally executed.
4. An electronic will shall be deemed to be executed in this state if the authoritative copy of the electronic will is:
  - (a) Transmitted to and maintained by a custodian designated in the electronic will at his place of business in this state or at his residence in this state; or

## REPORT ON ELECTRONIC WILLS

(b) Maintained by the testator at his place of business in this state or at his residence in this state.

5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.

6. As used in this section:

(a) "Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.

(b) "Authoritative copy" means the original, unique, identifiable and unalterable electronic record of an electronic will.

(c) "Digitized signature" means a graphical image of a handwritten signature that is created, generated or stored by electronic means.

(Added to NRS by 2001, 2340)

## REPORT ON ELECTRONIC WILLS

### **APPENDIX 2: Uniform Law Conference proposals**

UNIFORM LAW CONFERENCE OF CANADA CIVIL LAW SECTION

RECOGNITION OF WILLS AND POWERS OF ATTORNEY IN ELECTRONIC  
FORMAT

2002 Yellowknife, NWT

Peter J. M. Lown, Q.C., Director Alberta Law Reform Institute

Yellowknife, NWT August 18-22, 2002

#### 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 B Amend s. 19.1(3) to add a reference to s. 3.

## REPORT ON ELECTRONIC WILLS

[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.

## REPORT ON ELECTRONIC WILLS

[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.

UNIFORM LAW CONFERENCE OF CANADA  
CIVIL LAW SECTION

RECOGNITION OF WILLS AND POWERS OF ATTORNEY  
IN ELECTRONIC FORMAT

2003 Fredericton, NB

Peter J. M. Lown, Q.C., Director  
Alberta Law Reform Institute

(Excerpts)

In 2002 the Conference was presented with three options to allow the consideration of e-wills within the area of substantial compliance. Option 1 would have allowed the courts to dispense with the requirement of writing completely – this option was rejected. Option 2 proposed to redefine writing only for the purpose of section 19.1, and gave the Conference a choice between the provisions of the *Electronic Evidence Act* and the *Electronic Commerce Act*.

[4] I was charged with the responsibility of drafting the amendment. However, in doing so, I came to the conclusion that the proposed amendment might have the effect of allowing oral wills (recorded in digital form). This phenomenon was rejected by the Conference, and the reasoning was partly why e-wills were to be admitted, if at all, only by way of the dispensing power. ....

[6] I have reviewed these issues with Mr. Earl Evaniew of the Legislative Counsel Office at Alberta Justice, and with Mr. W. H. Hurlburt, Q.C. (who prepared the original memo on e-wills for the Conference).

[7] We have added a new subsection to section 19.1 which reads as follows:

19.1(4) In this section, “electronic form” means, in respect of a document, data that

- (a) is recorded or stored on any medium in or by a computer system,
- (b) can be read by a person, and
- (c) is capable of reproduction in a visible form. . . .

[11] We regard this draft as preferable to the previous options and recommend that the Conference approve it as an amendment to section 19.1 of the *Uniform Wills Act*.