ELECTRONIC WILLS AND POWERS OF ATTORNEY: HAS THEIR DAY COME?

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A. INTRODUCTION

[1] The Director of the Alberta Law Reform Institute, Peter Lown, has asked me to prepare an Issues Paper for the Uniform Law Conference of Canada. The question to be addressed is whether or not the law should recognize wills[1] or powers of attorney that are adopted in electronic form.

[2] In the course of thinking about the proposal for recognition of wills in electronic form, I have found myself driven to two conclusions. The first is that the advantages that would be gained from recognizing electronic wills would be small. The second is that the disadvantages that would flow from such recognition would be large, as testators might be persuaded by that recognition to make electronic wills which would give rise to serious problems of authentication and administration. I have therefore concluded that it would be a bad thing for the law to give general recognition of wills in electronic form, though I think that it would be appropriate, in jurisdictions in which courts can dispense with strict compliance with the formalities, to provide that the courts can dispense with writing if there is clear and convincing evidence (to use the formula) that an electronic record has been adopted as a will by a testator. While the case against recognizing powers of attorney in electronic form is not so clear cut, I have also concluded that the law should not specifically recognize them.

[3] Because I have reached these conclusions, the reader will find that this Issues Paper does not lay out the opposing arguments in the usual balanced and objective way. I think, however, that the arguments are all set out in it. I think, also, that this Issues Paper will enable readers to understand the arguments and considerations; that it will enable readers to assess the whole situation; that it will enable readers to see where I have gone wrong and what I have missed; and that it will enable readers to come to their own conclusions.

B. POSSIBLE ELECTRONIC FORMS OF WILLS AND POWERS OF ATTORNEY

[4] I think that the following list exhausts the kinds of wills in electronic form that might be considered for recognition:

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[1] When this Issues Paper refers to a will, it applies equally to a codicil or other amendment to a will and to a documentary revocation or revival of a will.

- computer-generated wills, that is, wills that are prepared on computer or other electronic device and adopted while still in electronic form;
- wills that are prepared and adopted in some other form and are then recorded electronically by scanning or imaging (which are not mentioned further in this Issues Paper as there does not seem to be any advantage to recognizing substitution of an electronic record for an existing paper record);
- audiotaped or videotaped wills, that is, oral wills that are electronically recorded.

The same kinds of electronic powers of attorney can be considered.

C. BACKGROUND DISCUSSION

1. Wills

(a) Policy objectives

[5] Before discussing specific pros and cons of the recognition of wills made in various modes, I will set out some policy propositions that I think should be borne in mind when going into such discussions:

- The law should protect and promote freedom of testation, subject only to restrictions required by public policy.
- The law should adopt measures to ensure
  - that wills that are authentic and intended to express the testamentary intentions of testators are given legal recognition;
  - that documents or records that are not authentic or do not express the testamentary intentions of their makers or purported makers are not given legal recognition as wills.
- In devising such measures, the law should take into account
  - that some wills come into effect shortly after they are made but that many others do not come into effect for 10, 20 or 30 years;
  - that wills and estates have to be administered and that procedures established by law should maximize efficiency of administration and minimize costs of administration.

(b) Caveat testator?

[6] It would be possible for the law to recognize a form of testation that has pitfalls that are likely, in a significant number of cases, to cause wills to be rejected; that is to say, the law can give testators an option and leave it to them to protect themselves against the pitfalls. The view expressed here, however, is that the law should not recognize a form of testation

unless it is reasonably simple for testators to follow and unless testators who follow it will have a high degree of assurance that their wills will be admitted to probate. The law should not lay unnecessary traps for unwary or ill-informed testators. It will be seen below that this, in my view, practical consideration is a major factor militating against the recognition of electronic wills.

(c) How the present law achieves its objectives

[7] The Wills Acts confer what might be called substantive freedom of testation by providing that persons may dispose of their property by will. 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. In some provinces the only permissible procedure is the execution of a will by or on behalf of the testator in the presence of two witnesses who sign as such. Some provinces recognize, in addition, a will that is wholly in the testator's handwriting and signed by the testator. Except for the exceptional case of armed forces personnel and seamen, these are the only procedures by which a testator can make a will that the law will recognize.

[8] 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: paper wills can be administered efficiently.[2] They cannot entirely rule out possibilities of forgery, suppression or error, but in general, the formalities achieve an appropriate balance between the two objectives, the recognition of authentic wills and the rejection of non-authentic documents and records.

[9] A case can, however, be made for the proposition that the formal requirements of the Wills Acts sometimes defeat the intentions of testators who, through ignorance of the requirements or through simple error, do not comply with the formalities. Accordingly, in some provinces, the Wills Acts give the courts a dispensing power to admit a document to probate despite failure to comply with some or all of the formalities. That is, the law says that certain formalities are necessary to recognition, but goes on to provide a way of obtaining recognition of some wills that do not comply with the formalities. This may appear anomalous, but it leaves untouched the positive effects of requiring compliance with

[2] The probate of an occasional tractor rim, door or wall containing a will does not affect the general validity of this statement.

formalities, while allowing justice to be done in exceptional cases without giving testators reason to ignore the formalities.

[10] The wills-related questions discussed in this Issues Paper have to do only with the form in which testators may make valid wills. They do not have anything to do with substantive freedom of testation or with either the promotion or discouragement of self-help wills, which can be made under the present law. They do have to do with procedural freedom of testation, as the recognition of another form of will would give testators an additional choice of form. They also have to do with efficiency and cost-minimization in the administration of estates.

2. Powers of Attorney

[11] Under the common law, a person can appoint an agent orally or by informal writing, and, indeed, will sometimes be held to have conferred agency powers by conduct which does not involve a specific delegation of authority. A power of attorney is a formal appointment of an agent. At common law, if an attorney was to have power to execute a deed on behalf of the principal, the power of attorney had to be under seal. Powers of attorney to dispose of land are required to be in writing so that they can be filed in land titles registries. Alberta requires enduring powers of attorney to be in writing[3] and presumably other jurisdictions that recognize enduring powers of attorney have similar requirements. The reader will no doubt be familiar with the requirements of his own jurisdiction with respect to the need for, and the form of, powers of attorney. Such formal requirements presumably go both to **ensuring* authenticity and to administrative efficiency.

[12] There are differences in the considerations applicable to the possible recognition of wills in electronic form and the possible recognition of powers of attorney in electronic form. Agency is generally a common-law matter, while testamentary requirements are entirely statutory. The emphasis on ensuring authenticity is more important in the case of wills, while the emphasis on efficiency of administration is greater in the case of powers of attorney. However, the considerations involved in the question of recognition of powers of attorney in electronic form are generally similar to those involved in the question of recognition of wills in electronic form.

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[3] Powers of Attorney Act, RSA 1980 c. 13.5. An interesting question that might arise in Alberta is whether or not a personal directive under the *Personal Directives Act*, which looks and talks like a power of attorney but is not so designated, is a power of attorney for the purposes of the exclusion from the Uniform Electronic Commerce Act.

ISSUE 1
What policy considerations should determine whether and under what circumstances the law should recognize
- **wills**
- **powers of attorney**

in electronic form?

D. DOES THE LOGIC OF ELECTRONIC COMMERCE LEGISLATION REQUIRE THE RECOGNITION OF WILLS AND POWERS OF ATTORNEY IN ELECTRONIC FORM?

[13] Section 5 of the *Uniform Electronic Commerce Act* provides that information is not to be denied legal effect solely on the grounds that it is in electronic form, and s. 20 provides that a contract is not to be denied legal effect or enforceability solely by reason that an electronic document was used in its formation. Does it not follow that a will should not be denied legal effect on the sole ground that it is in electronic form? That is, should not the law of wills catch up to commercial reality as exemplified by the model legislation? Why should wills and codicils (and powers of attorney, relating both to financial affairs and personal care) be excluded from the *Uniform Electronic Commerce Act* by s. 2(3)?

[14] Part of the answer is that the advantages of recognizing information in electronic form and contracts entered into by electronic means, in terms of business and governmental cost-savings and efficiency, are immense. There is compelling reason for the recognition of electronic information and contracts formed by electronic means, and for the acceptance of substantial downsides in order to realize those advantages. In contrast, as will be argued below, the 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.

[15] Another part of the answer lies in the comparative difficulty of authenticating a paper will which is executed in compliance with formalities, on the one hand, and a computer-generated will in electronic form, on the other, which is discussed below. Obtaining an acceptable standard of reliability is comparatively easy in current electronic business communications. Obtaining an acceptable standard of reliability would be much more difficult in relation to wills, which are likely to be created by non-business entities acting through computer systems which may or may not have been secure, and which may have to be proved years after their creation. The whole context of business communications and business information is different from the context of the creation of one specific personal

electronic record which may not come under examination until years after it was created.

[16] The introduction to the *Uniform Electronic Commerce Act* says this:

> [The rules] transform questions of capacity ("Am I allowed to do this electronically?") into questions of proof ("Have I met the standard?").

But the questions of proof raised by the recognition of electronic wills would at best be much more costly to answer than those raised by wills that comply with formalities, and at worst would raise significant risks that a question of proof would be answered wrongly because of lapse of time, the lack of current monitoring of authenticity, the lack of secure electronic equipment, and the lack of testators' testimony.

[17] A will is not formed by communications under patterns of communication created or agreed to by a party who is to be bound.[4] A will is the juristic act of a testator which remains static until alteration, revocation or the death of the testator. It is true that it contains information about the testator's intentions. It is also true that in a sense a will is a communication to beneficiaries, courts and financial institutions and registries, but the context of such communication is not the context of electronic communications between persons, and the common occurrence of an extended lapse of time between the creation of a will and its legal recognition changes the context even more.

[18] The model legislation is concerned with communications between persons or between persons and governments. In the contract area it deals with contracts that are formed by communications and provides that the electronic form of a communication does not affect the validity of a contract of which the communication is a component. The model legislation does not contemplate a situation (though it does not prohibit one) in which a contract which has been concluded will be put into electronic form in one computer and will govern the future relationship of the parties, which would be the contractual counterpart of a will. The parties to a contract formed by electronic communications may rely on the communications in electronic form, or they may put the contract into paper form. It must be a very rare case indeed in which they will agree that an electronic record which is in one computer or on one

[4] Section 6 of the Uniform Electronic Commerce Act says that nothing in the Act requires a person to use or accept information in electronic form and thus establishes a "consent" principle that overrides the "non-discrimination" principle of the Act, and which enables a party to refuse to accept communications that do not have sufficient indicia of reliability. There would be no such contemporaneous check on electronically-recorded wills.

removable disk is the contract itself, and the model legislation does not deal with that possibility. It would be hopelessly inefficient in most cases to have a contract in a form which can only be accessed through one computer or disk.

[19] For these reasons, the imperatives behind the legal recognition of information recorded or communicated in electronic form and the legal recognition of contracts formed by electronic communications do not extend to the legal recognition of wills in computer-generated form, nor does the logic of the model legislation apply to the recognition of such wills.

[20] Much of the foregoing discussion applies equally to the recognition of powers of attorney in electronic form. Powers of attorney are more likely to be given effect at relatively early dates, but some, particularly those intended to be used on the grantor's incapacity, may be used after the lapse of time. The evidence of grantors will usually be available to authenticate powers of attorney -- though not when a grantor is incapacitated. The use of powers of attorney is to show them to third parties to establish the power of the attorney to alter the grantor's legal relationships, so that they are highly likely to have to be put into paper form at an early stage, thus negativing any advantages of permitting the use of an electronic form.

ISSUE 2
Do the reasons for giving legal recognition to electronically-recorded business information and electronic business communications apply to the recognition of
- **wills**
- **powers of attorney**

in electronic form?

E. COMPUTER-GENERATED WILLS

1. Introduction

[21] The discussion that follows here is about a computer-generated will in electronic form, that is, a document which is created in electronic form on a computer or similar device by a testator or some person acting on the testator's directions, and which the testator adopts as the testator's will while it is still in electronic form. The discussion attempts to outline the relative advantages of computer-generated electronic wills and paper[5] wills in general and

[5] The discussion will refer to "paper" wills, that is, wills that are written on paper. It does not deal with exceptional cases such as a will written on a wall, a door or a tractor rim.

in relation to convenience of production; cost of production; ease and security of storage; authentication; and administration.

[22] The context of the discussion in this Issues Paper is necessarily the technology which is available in the year 2001. However, if electronic wills are to be recognized, the recognition should be in terms, and on a basis, which will be suitable in 2001 or at any time in the foreseeable future.

2. Media for preparing and storing computer-generated electronic wills

[23] Under present technology, a computer-generated electronic will would be prepared on a computer or a computer-like device. The will could be input by the testator either by key-punch or voice-recognition technology, or, presumably, it could be input by some other person at the testator's dictation or direction. The testator would have to adopt the electronic document as the testator's will. The document could then remain in electronic form in the computer, or it could be put in electronic form onto a removable disk.

3. Comparative advantages of computer-generated wills and paper wills

(a) Comparative freedom of testation and convenience and cost of will-preparation

[24] The law presently requires a testator to make a will in writing[6] on a tangible substance, which in practice is almost invariably paper. As noted above, the law requires the testator, as a condition of the legal validity of the will, either to go through a signing ritual involving two witnesses or to write the will out and sign it. These requirements of procedure and form can be regarded as restrictions on freedom of testation, though that is not their purpose. The recognition by law of a computer-generated electronic will would provide an additional procedure that a testator might follow, and it would thereby enlarge a testator's procedural freedom of testation. Further, 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.

[25] There is nothing in the present law that prevents a testator from preparing a will on a computer. However, the effect of the present legal requirements of writing and compliance with formalities is that an electronically-prepared will must be printed out and then adopted in printed-out form. The recognition of computer-generated wills in electronic form would

[6] This discussion assumes that an electronic record is not "writing" within the meaning of the Wills Acts.

save a testator the labour and cost of preparing a printout in order to execute the printout as a will. That administrative saving, however, does not appear to be a significant advantage, particularly if the administrative consequences of leaving the will in electronic form are taken into consideration.

[26] There would be a further saving of effort to the testator if the signing ritual could be avoided by leaving the will in electronic form and if substitute formalities, if any, would be less burdensome than those now required by law. The question of formalities will be discussed below. The present required formalities are not, however, unduly onerous, though there may be emergency situations, such as the unavailability of witnesses in a deathbed situation, in which they cannot be complied with. Court powers to dispense with strict compliance with the formalities, where such powers exist, help to cope with these exceptional situations. The savings in respect of foregone formalities that would be realized by the recognition of wills in electronic form do not seem likely to be significant.

[27] 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 will. There is usually no significant cost involved in having a self-prepared will witnessed or in 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.

ISSUE 3

(1) What advantages would the recognition of computer-generated electronic wills confer on testators?

(2) How substantial would those advantages be?

(b) Comparative ease and security of storage

[28] Under present technology, a testator could either leave a computer-generated will in the computer or put it onto a removable disk.

[29] A testator who knows that a will is likely to be used in the near future might leave a computer-generated will in the computer through which it was prepared. However, if the time when the will is required is uncertain, it seems unlikely that many testators would choose to leave their wills in computers. Computers have relatively short lives nowadays, and there is no suggestion that the rate of technological change will decline. A testator would

therefore have to contemplate making an alternative disposition of a computer-stored will upon the obsolescence or sale of the computer (assuming that the law would permit the removal of the will to alternative storage). Unless the testator gives notice that the will is in the computer, by posting a notice on the computer or by notifying some person or persons, there will be a risk that the will will not be found.

[30] It seems more likely that testators who opt for computer-generated wills would store them on removable disks or on the future technological counterparts of removable disks. A removable disk can be stored quite easily in a safety-deposit box or with another repository. Although it is likely that whoever opens a safety-deposit box will infer that there is something important on a removable disk which has been kept in the box, prudence would require that a notice be enclosed with the removable disk that it contains a will. Providing for the secure storage of a removable disk would present much the same problems and be open to much the same solutions as providing for the secure storage of a paper will, so that it does not appear that either paper wills or electronic wills would have a significant advantage for testators in respect of storage.

(c) Comparative durability

[31] 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 usually difficult to authenticate.[7] 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. If the answer is affirmative, comparative durability is not a factor in deciding whether the law should recognize computer-generated wills in electronic form. If the answer is negative, the legal recognition of computer-generated electronic wills might induce testators to make computer-generated electronic wills that will deteriorate before the time comes to use them.

(d) Comparative accessibility

[32] The rate of technological change in computers has been high for the past few decades. A further question that should be answered is whether a will generated by computer is likely to be accessible under the state of technology as it will exist when the time comes to use the will. Suppose, for example, that computer-generated wills had been recognized in 1971 and

[7] The statements in this paragraph are based on general tendencies. There are exceptional cases.

that a 1971 removable disk has been discovered in a deceased person's safety-deposit box in 2001. Could the 1971 removable disk be read today? Is there any significant doubt that the technology of 2031 will be able to cope efficiently with a 2001 removable disk? And so on into the foreseeable future?

[33] If the answer is that there is no significant doubt that future technology would be able to cope on a reasonably efficient basis with electronic wills created under earlier technology, comparative accessibility is not a factor in deciding whether the law should recognize computer-generated wills in electronic form. If the answer is to the contrary, the legal recognition of computer-generated electronic wills might induce testators to make computer-generated wills that, unlike paper wills, will not be accessible under the technology when the time comes to use them.

ISSUE 4
What are the comparative advantages of paper wills and computer-generated electronic wills in relation to
- **ease and security of storage?**
- **durability?**
- **accessibility at a testator's death?**

4. Establishing authenticity

(a) Formal requirements with respect to paper wills

[34] The formalities that are now prescribed for the execution of wills (and in some jurisdictions the power to dispense with strict compliance) are intended to facilitate the admission to probate of documents which are authentic expressions of testamentary intention, while excluding documents which are not.

[35] All Canadian jurisdictions recognize wills in written form (not including electronic documents) that are signed by a testator and two witnesses, all being present at the same time ("formal wills"). Some jurisdictions also recognize wills that are wholly in the handwriting of a testator and signed by the testator ("holograph wills").

[36] Usually one of the witnesses to a formal will is available and can take an affidavit as to the proper execution of the will. If not, at least in Alberta, an affidavit identifying the testator's signature will suffice. A holograph will that is made on paper is also durable and is not difficult to keep safe. A holograph will is also not usually difficult to authenticate, as there is usually some person who can identify the testator's handwriting. The formalities

required for formal wills and holograph wills are not ironclad guarantees of authenticity, but they have in general stood the test of time as providing enough evidence of authenticity of wills (in the sense that they are signed by the purported testators) and authenticity of intention as well (as the signing ritual and the placement of the signature usually prove that intention). Compliance with the formalities usually ensures that difficulties of establishing authenticity do not stand in the way of probate.

(b) What is authenticity?

[37] A computer-generated will would be authentic only if the purported testator adopted the electronic record as a will and if the electronic record has not been altered after its adoption. If the law is to recognize the validity of such wills, how will the authenticity of such wills is to be established?

(c) Authentication by written signature

[38] An individual's written signature is unique. Subject to the possibility of forgery or mistake, which are not common in this context, the presence of an individual's signature as testator on a paper will shows that the individual adopted the paper as a will. Further, in the case of a formal will, the presence of the unique signature of the testator and the presence of the unique signatures of two other persons makes the specific paper identifiable as the paper that was the subject of the prescribed ritual.

(d) Authentication by computer record

[39] An important question is whether there can be an "electronic signature", that is, an electronic record which can be included in a computer-generated electronic will and which, in conjunction with the text of the electronic record, will prove that the purported testator adopted the electronic record as a will. That is, the existence of the electronic signature in the electronic record would have to constitute proof that the signature was placed there by or at the direction of the purported testator. A written signature will usually constitute such proof in respect of a paper will.

[40] The law will not accept a typescript as a valid will merely because there is a name typed at the end of it. That is because the appending of the typed name is insufficient evidence -- if it is <u>any</u> evidence, which is highly doubtful -- that the name was typed by or under the direction of the person whose name it is: there is no unique signature to link the testator, and only the testator, with the typescript. Similarly, the inputting of a name in text form at the end of an electronic record is insufficient evidence that the name was input by

or under the direction of the person whose name it is.[8]

[41] The *Uniform Electronic Commerce Act* provides that an electronic signature satisfies a requirement of a signature. The *Uniform Act* itself does not say anything about establishing authenticity.[9] The comment that accompanies it says that the requirement of reliability in the UNCITRAL Model Law on Electronic Commerce was not carried forward because such a test would detract from media neutrality. The comment says that "someone who alleges that an electronic signature meets a signature requirement will have to prove these characteristics to the satisfaction of the court or other decision maker", and it contains the following paragraph:

> The *Uniform Act* does not say how to show who signed an electronic document. Attribution is left to ordinary methods of proof, just as it is for documents on paper. The person who wishesto rely on any signature takes the risk that the signature is invalid, and this rule does not change for an electronic signature.[10]

The difficulties of establishing authenticity are pointed up by para. 58 of the Commentary on the Model Law, which sets out 14 things to consider in determining the reliability of an electronic signature, including the nature and capability of equipment; frequency of transactions; existence of insurance against unauthorized transactions; availability of alternative methods of identification and cost of implementation; the degree of acceptance

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[8] The Legislative Services Branch, New Brunswick Department of Justice, in a December 2000 paper suggests that New Brunswick Electronic Commerce (or Electronic Transactions) legislation should provide that an electronic statement that an electronic document signed "John Doe" would be clear evidence that the name "John Doe" had been placed in the document in order to sign it. The paper recognizes, however, that this would not avoid possible disputes about whether the person whose name is on a document is actually the person who signed it, and it is the resolution of such doubts that the formalities are designed to achieve.

[9] Section 10(2) would allow an authority to make a regulation that "the electronic signature shall be reliable" for identifying the person and the time of signature and the association of the electronic signature with the electronic document.

[10] See s. 3 of the Uniform Electronic Evidence Act, which says that the person who tenders an electronic record has the burden of proving authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. Section 4 says that the best evidence rule is satisfied by proof of the integrity of the computer system. Section 5 establishes rebuttable presumptions of integrity of the system, of which requires evidence that at all relevant times the computer system or device was operating properly and there are no other reasonable grounds for doubting the integrity of the system. In effect, the authenticity of electronic signatures is thus left to be proved by usual evidentiary methods.

of the method of identification in the relevant industry; and "any other relevant factor". Such an analysis seems appropriate, but if it were to apply to determining the reliability of a purported electronic signature of a testator, it seems that the use of an electronic signature would be dangerous to the testator's testamentary health, as proof of the electronic signature would depend on the availability to the court of elaborate evidence about circumstances which might have occurred years before and which might involve a personal computer, or its future counterpart, rather than a sophisticated and secure network, or its future counterpart.

[42] 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?

[43] 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 worth while to undergo the complexity of obtaining certification in order to be able to make a will in electronic rather than in paper form?

[44] If the answers to these questions are affirmative, is it reasonably probable that it will continue to be possible to make the identification to a sufficient level of assurance over a period of decades?

[45] It is undoubtedly true that great numbers of business transactions are carried on today on the basis of PIN numbers and similar forms of electronic identification. These are, however, based on mutual agreement; they involve current communications between parties; they are usually aspects of great masses of transactions so that the costs of occasional lapses of security can be accepted; and they involve comparatively secure computer systems. Can

a prospective testator adopt an "electronic signature" that will necessarily be uniquely associated with that testator a decade or two hence and that will prove that the testator adopted the electronic record as a will in the form in which the record exists at the time of the testator's death?

[46] If all of questions raised above can be answered in favour of the recognition of computer-generated wills, some of the objections to the recognition of computer-generated electronic wills will be overcome. But then it would be necessary for the law to prescribe the minimum conditions that must be met in order to achieve the necessary state of assurance. Would this not involve prescribing a level of new formalities or conditions precedent to recognition that would be much more burdensome than the present formalities surrounding the making of paper wills?

[47] Finally, there is yet another side to the authentication coin. If the recognition of computer-generated wills in electronic form would create a risk that a non-authentic record in a person's computer will be accepted as the person's will, prudent and knowledgeable computer-owners would feel some compulsion to adopt security measures that would not otherwise be necessary, something that should not be imposed in order to facilitate the use of electronic wills by testators. Of course, if the level of assurance of authenticity would necessarily exclude non-authentic documents from recognition, no such difficulty would arise.

(e) Authentication by testator's conduct

[48] If the law were to recognize computer-generated wills in electronic form, a testator could take steps to associate themself with such an electronic-form will. If the will is on a removable disk, for example, a testator might place it in their safety-deposit box in an envelope marked "Will of John Smith" in their own handwriting, and, better yet, might sign beneath those words. If no one but the testator had access to the safety-deposit box, that would be compelling evidence of adoption. However, many testators would not be so careful to create a situation in which tampering would be difficult or impossible: leaving the removable disk in the testator's papers would not undermine the likelihood of a substitution, and a statement by a testator that their will is in the computer would not give an assurance that the electronic record in the computer is precisely as the testator thought it was. Further, if the will is in a computer, there will be many cases in which it will not be possible to show that no one but the testator had access to the computer. The lapse of a decade or two is likely to make it ever more difficult to show that a specific computer-generated will is the will

adopted by the testator. Costs of proving computer-generated wills in electronic form are likely to be substantial, and evidentiary problems are likely to cause valid computer-generated wills to be excluded from probate. On the other hand, the lack of a verifiable safeguard such as a signature will make tampering much easier.

[49] So, 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.

[50] 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.

ISSUE 5

(1) Is there a means of demonstrating that a purported testator adopted a computer-generated will in electronic form that will be at least as reliable as present modes of demonstrating that testators have adopted paper wills?

(2) What is that means?

(3) If the means depends upon a specific procedure or kind of procedure or upon a given state of technological sophistication

- **should recognition be conditional upon that procedure or proof of that sophistication?**
- **may prospective testators be expected to be knowledgeable enough to follow the procedure or ensure the sophistication?**

(f) Presumptions

[51] There is a somewhat broader question of the use of presumptions. If it is thought desirable to facilitate the proof of computer-generated electronic wills, the law could provide that certain indicia give rise to a rebuttable presumption that the purported testator meant to adopt the electronic record as a will. An electronic presentation of the purported testator's name or other way of associating the record with the testator, for example, might give rise to such a presumption, but, in the absence of any way of determining that the name is input by or at the direction of the purported testator, that would be risky. Or the discovery of the electronic record in the purported testator's possession at the time of their death, without more, could give rise to such a presumption. This would also be risky unless it is shown that access to the testator's computer or premises is restricted, as in the case of the safety-deposit-

box example.

ISSUE 6
Should presumptions of regularity of computer-generated electronic wills be adopted? If so, what should they be?

(g) Other formalities

[52] The law might try to prescribe formalities of kinds other than those discussed above, which would give reasonable assurance of authenticity. However, it is not easy to see what these might be.

[53] The December 2000 paper of the Legislative Services Branch, New Brunswick Department of Justice, suggests that if a will is signed electronically by the testator and the witnesses together, there would be plenty of evidence that the document was signed as a will, at least for purposes of the dispensing power. It does not seem to me, however, that following the present witness procedure to produce a will in electronic form will itself give a sufficient assurance of authenticity (though, as noted later, I think that the dispensing power should extend to wills in electronic form). Even if witnesses see a testator input the testator's name at the end of an electronic document, there is no unique feature which can enable the witnesses to identify the document in the future, unless they commit it to memory. Very often witnesses do not see the contents of a will, and they may not even remember the actual ceremony of signing a will years later without seeing their own unique signatures. Witnesses could be given copies which would enable them to identify the document later, but this procedure would be futile if a witness were not available at probate time or if the copies had got lost over the years, and such a ritual would be more burdensome and open to failure than the present ritual.

ISSUE 7
(1) Should the law prescribe specific formalities for the adoption of computer-generated electronic wills?
(2) If so, what should the formalities be?

5. Administration of computer-generated wills

[54] If the law recognizes computer-generated electronic wills, provision will have to be made for their administration. The purpose of a will is to bring about the distribution of the testator's estate to those to whom the testator chooses to leave it. While some wills are not probated, many have to be probated for practical purposes, and all but a very few wills will

have to be communicated to some third party or parties in form that they will accept as reliable. A will that remains uncommunicated in a computer or on a removable disk will only rarely be able to achieve its purpose.

[55] Court, registry and business practices presently require wills or authenticated copies in paper form. There is no foreseeable change in practice that would recognize a will in electronic form on a computer or removable disk. Inevitably, an electronic will would have to be printed out and some form of verification would have to be included with it that will satisfy third parties. If there was any advantage in allowing a will to be retained in electronic form in the first place, that advantage will be counterbalanced by the need to put it in paper form and provide acceptable verification.

ISSUE 8
Can computer-generated wills in electronic form be administered in that form? If not, can measures be devised for the efficient administration of wills in electronic form, and, if so, what should those measures be?

6. Originals

[56] Under the present law, a will is a unique physical object. Copies can be made of it and can be authenticated so as to persuade third parties to act on them. If the will is lost or destroyed under circumstances that demonstrate that it is not revoked by destruction, a copy or other evidence can be admitted to probate in Alberta under Surrogate Rule 24 (and I would expect to find that other jurisdictions have some provision covering such cases), but that is an exceptional case.

[57] If computer-generated wills in electronic form are to be recognized, there will arise a question as to whether there will be an "original" will in the same sense that there is an original paper will. Suppose that a will is prepared in electronic form on a computer and adopted in that form. Suppose that it is then copied to a removable disk for storage. Which, if either, is now the "original"? If the computer record is deleted, is the record on the removable disk now the "original"? If, while the computer record in Computer 1 is the "original", the testator copies the will to Computer 2 so that they can dispose of Computer 1, is the record in Computer 2 now the "original"? Under conventional thinking, only the first record in Computer 1 can be the original, and any copy on a removable disk or another computer must be a copy. On the other hand, it is possible to conceive of the first record as an electronic entity of its own, which is merely shifted to another computer or to a removable disk.

[58] Section 11 of the *Uniform Electronic Commerce Act* suggests the latter answer. It says that a requirement of law that requires a person to present a document in original form (which is the effect of the *Wills Act*) is satisfied by the provision of an electronic record if there exists a reliable assurance as to the integrity of the information contained in the electronic document from the time the document was first made in its final form, whether paper or electronic. The criterion for assessing integrity is whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display.

[59] The question may not be of great practical consequence, and the fact that it arises is not itself a reason for refusing to recognize computer-generated wills in electronic form, but it is something that should be resolved if computer-generated wills are to be recognized. For one thing, the court is probably going to want to probate "the will" or "the original will". For another, the Wills Acts typically provide that a will can be revoked by the testator "burning, tearing or otherwise destroying it". If the idea of revocation by restriction is to be applied to computer-generated wills, it will be necessary to know which representation of a will is to be the will for the purpose of the section, or whether any representation will suffice. (It should also be clear that deleting an electronic will from a computer or a removable disk comes within "burning, tearing or otherwise destroying" the will.)

[60] While it is more likely that a copy of a videotaped or audiotaped will would be considered only a copy, the same discussion applies to such wills, if they are to be recognized.

ISSUE 9

(1) If

- **computer-generated wills in electronic form**
- **videotaped or audiotaped wills**

are recognized, and if

- **a computer-generated will is copied or moved to a renewable disk or another computer**
- **a videotaped or audiotaped will is copied**

then

- **will one or more of the electronic representations be considered an "original"?**
- **should the principle of revocation by destruction apply, and, if so,**

to which representation or representations and by what form of destruction?

F. AUDIOTAPED AND VIDEOTAPED WILLS

1. Videotaped wills

[61] The present law does not recognize an oral will, that is, a will which is spoken by the testator. It is not likely that anyone would suggest that a will that has to be established by the evidence of other parties would be sufficiently reliable to warrant recognition.

[62] If, however, a testator were to state their testamentary wishes during a videotaped session, there would be a significant increase in reliability. Identification of the testator would not normally be difficult, and it would usually be clear that the testator intended to express their testamentary intentions through the videotape. The videotape is likely to present convincing evidence of the testator's testamentary capacity or lack of it, and, if prudently used, would establish that there was no one present who could exert undue influence on the testator. The likelihood of tampering appears to be rather slight, particularly if the videotape is carefully kept. If the videotape is properly stored, deterioration could be avoided.

[63] However, there is little to be gained from the recognition of videotaped wills. At present, a prudent testator who wants to have visible evidence of their testamentary capacity and freedom from undue influence can have the execution of a paper will videotaped. The testator can even read the will into the videotape to provide additional evidence that the paper will is the document that was executed. That is to say, the only advantage of the videotaped will would be the avoidance of the preparation of the paper will. Even this would be only a temporary advantage, as it would be necessary to transcribe the videotape under some as yet undetermined probate procedure in order to administer the estate. The disadvantages of administration outweigh the small and ephemeral advantage of not having to write down the testator's wishes.

2. Audiotaped wills

[64] The remarks made above about the recognition of videotaped wills generally apply to the recognition of audiotaped wills. The advantages of an audiotaped will, however, are rather less than the advantages of a videotaped will, as an audiotape would provide less evidence about a testator's testamentary capacity and would not disprove the presence of some person who exercises undue influence over the testator.

ISSUE 10

Should the law recognize videotaped or audiotaped wills?

G. SHOULD IT BE POSSIBLE TO INCORPORATE AN ELECTRONIC RECORD INTO A WRITTEN WILL?

[65] Under the present law, it is possible for a will to incorporate by reference another document which is not part of the will. The most common example appears to be one in which a testator, by his or her will, leaves property on trusts established by another document. According to Feeney, *Canadian Law of Wills*, (a) the other document must be in existence when the will is made; (b) the other document must be referred to in the will; and (c) the reference must be enough to identify the document.

[66] Feeney does not cite any authority directly on the question whether or not an electronic record can be incorporated into a will. He does cite some judicial decisions for the proposition that a holograph will cannot incorporate another document which is not wholly in the handwriting of the testator, though these are not authoritative enough to declare the law on the point settled. Given the insistence on handwriting as proof of authenticity, this proposition appears to be reasonable enough: if a document which is not in handwriting is incorporated in a will, the resulting will is not wholly in handwriting. Similar reasoning would suggest that where, as in the case of a formal will, the statute requires that a will be in writing, it cannot incorporate something that is not in writing, because the resulting will would not be wholly in writing. It is also extremely unlikely that a court, under the present law, would hold that an electronic record is "writing".[11] For these reasons, it is unlikely that an electronic record can be incorporated into a will under present law.

[67] Should it be possible to incorporate an electronic record into a will? A specific incorporation by an authentic act of a testator would at least demonstrate that the testator was aware that there was an electronic record and would show that the testator intended to adopt the electronic record, or at least to adopt what the testator thought that the electronic record said. There would still, however, be significant questions as to whether the electronic record which is found when the will becomes operative is the electronic record referred to by the testator and whether it has been altered in any way since the date of the will (though if the record has been on one computer the whole time, there should be an indication of the last

[11] The Uniform Electronic Commerce Act says that a requirement that information be in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference. This does not say that writing includes an electronic record, but merely that an electronic record will do when a statute calls for writing.

alteration to the record). Most of the other objections to the recognition of a computer-generated will apply also to the incorporation of electronic documents.

ISSUE 11
Should the law permit the incorporation by reference of an electronic record into a will that itself complies with the formalities?

H. SHOULD THE DISPENSING POWER EXTEND TO ADMITTING AN ELECTRONIC RECORD TO PROBATE?

[68] Sect. 19 of the *Uniform Wills Act* gives a court power, "notwithstanding a lack of compliance with all the formalities of execution" imposed by the *Uniform Act,* to declare effective a "document" which is "intended by a deceased to constitute a will" and which "embodies the testamentary intention of the deceased". Five provinces have adopted legislation along similar lines. Law reform agencies in two more provinces have recommended such legislation. In most cases, the dispensing power applies to "a document or a writing on a document". The Saskatchewan legislation applies to "a document or writing". The Alberta recommendation would make the dispensing power apply to a "writing". The Quebec dispensing power applies to a "will" without specifying any form in which the will must appear.

[69] Most of the provisions merely require the court "to be satisfied". The Alberta recommendation would apply if the court "is satisfied by clear and convincing evidence". The Quebec provision applies if the will "unquestionably and unequivocally contains the last wishes of the deceased".

[70] 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". It is even possible that a court might interpret "writing" to include an electronic record. It seems rather unlikely that a court would go that far, though if the first case is one in which the circumstances are as strong as in the *Rioux* case referred to below and if the testator's intention is as clear as it was in that case, the words might be stretched to that extent. It would be better to settle the point by legislation, however, than to leave it to statutory interpretation in the future.

[71] Should the dispensing power permit a court to admit a computer-generated electronic record to probate if satisfied, on whatever level of proof is prescribed, that the electronic

recorded was intended as the will of a deceased person? [12]

[72] A case in which the dispensing power was used to admit an electronic record to probate is the Quebec case of *Rioux v. Columbe* (1996) 19 ETR (2d) 201 (Que. S.C.).In that case the testator committed suicide. A note beside her body gave directions to find an envelope which contained a computer disk marked "this is my will/Jacqueline de Rioux/February 1, 1996." The disk contained one electronic file which made testamentary dispositions. The file had been saved to computer memory on the same day, and the deceased had noted in her diary that she had made a will on computer. As noted above, the Quebec provision applies to a "will" without stipulating that the will must be in any specific form. The exercise of the dispensing power in this case appears to have been entirely appropriate as, under these unusual circumstances, there could not be any reasonable doubt that the electronic record on the disk was indeed the testator's will.

[73] The facts here met most of the objections to the recognition of electronic records as wills, as those objections are stated above. The testator left directions in her own writing. The electronic record was where she said it would be. The creation of the electronic record was virtually contemporaneous with the testator's death. The unique identification of the record as the testator's act was clear and there was little or no opportunity for anyone to tamper with the electronic record.

[74] 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.

ISSUE 12
Should a court have power, in the exercise of a power to dispense with compliance with formalities, be able to admit an electronic record to probate,

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[12] The recommendation of the Alberta Law Reform Institute in its 2000 Report 84 was that the dispensing power should not extend to electronic records. That was not a recommendation on the merits. Rather, the Institute thought that the question of applying the dispensing power to electronic records should be considered along with a reconsideration of the formalities as a whole.

and, if so, under what circumstances and subject to what safeguards?

I. POWERS OF ATTORNEY

[75] The legal situation with respect to powers of attorney is different from the legal situation with respect to wills because there is no statute that forbids informal powers of attorney. The only question raised in this Issues Paper with respect to powers of attorney is whether or not they should be included in the *Uniform Electronic Commerce Act.* If the answer is no, the question of what powers of attorney will be legally recognized will be left to the common law and to any specific requirements of form required by specific legislation.

[76] The advantages to a grantor of preparing and adopting a power of attorney in electronic form are much the same as those of preparing and adopting a will in electronic form. The grantor will be given the additional freedom of being able to use an additional medium. The grantor will be spared the burden of printing out the power of attorney, and, if lesser formalities are accepted, will be spared the burden of observing the formalities of execution, which is somewhat less than the burden of the formalities surrounding the execution of a formal will.

[77] Unlike wills, many powers of attorney are meant for present use, and grantors will still be alive to give evidence. On the other hand, some powers of attorney are executed in order to cover the future incapacity of grantors, so that use can be deferred for some years, and grantors in such circumstances will not be able to give acceptable evidence of authenticity.

[78] It is difficult to see, however, why a grantor would want to prepare a power of attorney in electronic form. The basic function of a power of attorney is to be shown to others to satisfy those others that the attorney has the power to alter the legal relations of the grantor, that is, to enter into contracts, pay money and dispose of property. A power of attorney therefore has to be in a form which will persuade third parties of its authenticity. But an electronic record is not in such a form. Third parties are not likely to be willing to rely on a record which is not associated with the grantor by a signature, and they are not likely to be willing to rely on a record which they can see only in a specific computer or on a specific electronic disk or videotape or audiotape. They are likely to want either an original or a paper copy authenticated by a signature, and such a requirement will do away with the advantages, such as they are, of avoiding the creation of a paper document in the first place. The creation of a power of attorney in electronic form is therefore unlikely to achieve the purpose for which the power of attorney is adopted, at least until it is reduced in some acceptable way to paper form.

ISSUE 13
Should the *Uniform Electronic Commerce Act* be amended so as to recognize powers of attorney that have been adopted in electronic form?