

## LATEST UPDATE AND SUMMARY ON VIRTUAL WITNESSING OF WILLS AND POWERS OF ATTORNEY: EXTENSION FOR THE FORESEEABLE FUTURE

by Sasha Kraus

Winter is underway in Ontario and the new year has begun. We are all eager to enter into 2021 and bid farewell to 2020 (a year we're all happy to put behind us!). Vaccines for COVID-19 are slowly being rolled out within the province, and there is a light at the end of the tunnel to latch onto.

Notwithstanding the excitement over the arrival of vaccines, the province is currently in the depths of the second wave of the COVID-19 pandemic and faces a few difficult months ahead before we will begin to feel a sense of collective relief. Ontario is in a precarious state right now; the number of daily infections continues to be high and hospitals are nearing capacity limits. For these reasons, many of the emergency orders introduced by the Ontario government in 2020 will continue to be extended for the foreseeable future.

We anticipate that the Regulation [O. Reg. 129/20](#), which allows for virtual witnessing in counterpart for the execution and witnessing of Wills and Powers of Attorney in Ontario (the "**Regulation**"), will be extended indefinitely until the end of the pandemic. The most recent extension occurred on January 15, 2021, by way of [O. Reg. 15/21](#), as the Ontario government once again prolonged the order for Wills and Powers of Attorney to be witnessed virtually to **February 19, 2021**. [O. Reg. 458/20](#) has accordingly been updated to reflect this date as well.

### Background

As mentioned in our previous [newsletter](#), in response to the COVID-19 pandemic, the Government of Ontario enacted *The Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020 c. 17 (the "**Act**") on July 24, 2020. The Act provided that any orders previously made under the *Emergency Management and Civil Protection Act* (the "**EMCP Act**") that had not been revoked as of the effective date of the Act are continued as valid orders under the Act and cease being orders under the EMCP Act. The Act also imposed time limitations on such orders. An order continued under the Act ceases to apply 30 days after it is continued under the Act unless the Lieutenant Governor in Council, by order, extends the effective date of the order.

Regulation [O. Reg. 129/20](#), as mentioned above, was originally made effective under the EMCP Act as of April 22, 2020. It was continued under the Act in July with effect until late August 2020, and has since been continuously extended.



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## Virtual Witnessing

In uncertain times like these, it is important for us all to stay the course and maintain social distancing measures as best as we can. In response to the doubling of COVID-19 cases over the first weeks of January 2021, the Ontario government, in consultation with the Chief Medical Officer of Health, declared a second [provincial emergency](#) under section 7.0.1(1) of the EMCP Act, effective on Thursday, January 14, 2021, at 12:01 a.m.

The stay-at-home order requires everyone to remain at home, with exceptions for permitted purposes or activities. The objective of this order, and additional protective health measures that have since been outlined, is to limit people's mobility and reduce daily contacts. It is imperative at this time to remain cautious and keep safe. The Government has enacted the abovementioned orders with this in mind, and continues to extend the virtual witnessing measures regularly, in order to provide the necessary flexibility required to address the ongoing health risks associated with COVID-19.

Virtual witnessing is a good solution for many individuals to take advantage of during the Canadian winter and as the cases of COVID-19 continue to rise. It allows Wills and Powers of Attorney to be signed from the comfort of one's own home, and provides peace of mind for those who are uncomfortable to meet in person, but do not wish to put these important matters on hold until spring or summer (when we expect the cases to decrease again).

## How It Works

Many clients find the concept of virtual signing and witnessing to be unclear. It can certainly be more difficult for those clients who do not have great familiarity with technology. Set out below is a short summary of the remote signing process of Wills and Powers of Attorney, where certain formalities must be adhered to and wet signatures (i.e. original hand signatures on paper, as opposed to electronic signatures, which are available for most documents other than Wills and Powers of Attorney) are required for all parties.

### Option 1 – Execution with multiple counterparts

Typically, the lawyer will courier the original documents directly to the client and the second witness, if that witness will be signing at a different location than the client or the lawyer.

The lawyer will then schedule a virtual execution meeting, by way of Zoom or another audio-visual communication platform, and the lawyer will guide the client and witness through the signing process, ensuring that each participant is able to witness one another's signature.

During the virtual signing meeting, the parties to the execution should confirm that all of the documents are the same. This can be achieved by including version codes on documents, holding each page up to the screen and/or confirming the first and last word of every page being signed. Once all parties have signed the required documents, each counterpart document will need to be compiled together into one complete document.

The client (and the second witness if that witness is in a separate location) will need to courier their signed documents back to the lawyer. Once the lawyer receives the executed documents, he or she will review the documents to ensure that they are in fact the same and have been properly executed.

If the lawyer has access to a second witness in their same location, the process may be able to be expedited as there will be less paperwork to courier and subsequently attach.

## Option 2 – Execution using one original

Under this option, instead of signing multiple copies on one video call, one original set of documents is executed using two separate video calls.

As with signing in counterparts, the lawyer will typically courier the original documents to the client and will arrange a video call with the client and the second witness (in this option the second witness is usually in the same location as the lawyer).

On the 1st video call, the client confirms that the documents are the ones received from the lawyer. The client then signs the documents in the video presence of the two witnesses. The client subsequently couriers the signed documents back to the lawyer.

Once the signed documents have been received, the lawyer schedules a 2nd video call with the client and the second witness. The client then watches the lawyer and the second witness sign the documents.

The main advantage of this option is that there is only one original document, thereby avoiding doubling or even tripling the length of the document. The main disadvantage, however, is that the signing takes place over two meetings, which frequently are one or more days apart due to courier services.

Despite the convenience that comes with virtual signing and witnessing, there are certain drawbacks. The cumbersome process involves additional costs and efforts due to the intricacies involved. Additionally, extra care must be exercised to ensure that executed documents signed and witnessed in this way are valid and not subject to legal challenge down the road.

Moreover, as this procedure is so new, to our knowledge no virtually executed Wills have as yet been submitted for probate (and it therefore remains unclear as to how the probate process will proceed for counterpart signed Wills). For this reason, where a Will is signed in counterparts, many lawyers are recommending that it be re-signed after the pandemic, once it is safe to meet in person.

It is imperative that clients continue to consult with their estate planning lawyers to discuss all options that are available to them. If you have any further questions regarding the signing of your Wills or Powers of Attorney, please do not hesitate to contact us.

## QUICK FACTS:

- The orders currently in force under the Act, as referred to above, remain in effect until February 19, 2021;

- Under the Act, orders can be extended for up to 30 days at a time, and the government must continue to report on all extensions;
- The [e-Laws website](#) and [Ontario.ca/alert](#) are two useful resources to locate the full list of emergency orders that have been made;
- According to [Public Health Ontario](#), there have been 256,960 reported COVID-19 cases to date (as of January 24, 2021) in the province;
- Ontario has implemented the largest immunization plan in its history;
- If you have symptoms compatible with COVID-19, or if you have been advised of exposure by your local public health unit or through the COVID Alert App – get tested! You can access [Ontario.ca/covidtest](#) to find the nearest testing location.
- Many COVID-19 testing centres have streamlined their registration processes, and results are generally provided between 24-48 hours.