

INFORMATION BULLETIN:

COVID-19 RELATED MEASURES ACT – Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements

On July 8, 2020, the Legislature passed the *COVID-19 Related Measures Act* (CRMA). Part 2 of the CRMA (COVID-19 Provisions) provides a temporary legal framework to enact and extend the duration of ministerial orders or regulations made under the *Emergency Program Act* (EPA) in response to the COVID-19 pandemic.

The CRMA came into force on July 10, 2020.

Effect of Part 2 of the CRMA on the Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order (M162)

Background

On May 19, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order M162 under the EPA, the Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order (Electronic Witnessing Order).

The Electronic Witnessing Order provides that during the COVID-19 state of emergency:

- an enduring power of attorney or representation agreement may be signed and witnessed while the witness and the person making or signing the document are in each others' electronic presence, so long as the witness is a lawyer or notary public; and
- an enduring power of attorney or representation agreement may be signed in counterpart.

Effect of Part 2 (COVID-19 Provisions) of the CRMA

The CRMA:

- enacts the Electronic Witnessing Order as a provision of the CRMA, effective May 19, 2020 and extends its application for a further period of 90 days after the end of the state of emergency that was declared on March 18, 2020;
- permits the Lieutenant Governor in Council, by regulation, to extend the operation of the Electronic Witnessing Order as a provision of the CRMA, for up to one year; and
- repeals the Electronic Witnessing Order as a ministerial order under the EPA.

References to “this order” in the Electronic Witnessing Order, enacted as a provision of the CRMA.

Section 3 (8) of the Electronic Witnessing Order provides as follows (underlining added):

(8) *An enduring power of attorney made in accordance with this order must include a statement that it was signed and witnessed in accordance with this order.*

Similarly, section 4 (7) of the Electronic Witnessing Order provides (underlining added):

(7) *A representation agreement made in accordance with this order must include a statement that it was signed and witnessed in accordance with this order.*

The Electronic Witnessing Order is now enacted as a provision of the CRMA, continuing the requirements of sections 3 (8) and 4 (7). Government takes the position that:

- to comply with these requirements, a statement pursuant to sections 3 (8) and 4 (7) could be phrased as being signed and witnessed “*in accordance with the Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order as enacted by the COVID-19 Related Measures Act*” (underlining for emphasis only);
- an enduring power of attorney or representation agreement made on or after July 10, 2020 (the day the CRMA came into force) should reference the CRMA. However, as M162 has been enacted as a provision of CRMA, a purposive and liberal interpretation suggests that reference to M162 is adequate; and
- the repeal of the Electronic Witnessing Order as a ministerial order under the EPA does not impact the validity of enduring powers of attorney and representation agreements made pursuant to that Order (i.e., prior to the coming into force of the CRMA).

The CRMA does not enact the Electronic Witnessing of Wills (COVID-19) Order

Background

On May 19, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order M161 under the EPA, the Electronic Witnessing of Wills (COVID-19) Order.

The CRMA does not enact the Electronic Witnessing of Wills (COVID-19) Order; it will be repealed when Bill 21, the *Wills, Estates and Succession Amendment Act, 2020*, is brought into force or expire when the Declaration of Emergency ends, whichever comes first.

Bill 21, the *Wills, Estates and Succession Amendment Act, 2020*

When brought into force, the amendments made by Bill 21 will allow wills to be executed and witnessed while the will-maker and witnesses are in each others’ electronic presence. Therefore, remote witnessing of wills will continue beyond the expiry of the state of emergency. The sections of Bill 21 that permit wills to be made in electronic form will be brought into force by

regulation, once the Supreme Court probate rules have been updated to address the filing of electronic wills.

Bill 21 contains transitional provisions that provide that a will that was remotely witnessed after March 18, 2020, is valid. Therefore, the legislation will replace the temporary remote witnessing provisions in the Electronic Witnessing of Wills (COVID-19) Order (M161) and will also validate wills that were remotely witnessed between March 18, 2020, and the issuance of M161. Government's position is that remotely witnessed wills that reference M161 do not need to be changed.

Wills, Estates and Succession Amendment Act, 2020 (third reading, Bill 21 - 2020):
<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/5th-session/bills/third-reading/gov21-3>