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A Primer on Substantial Compliance for Wills

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With the enactment of section 21.1 of the *Succession Law Reform Act* [*SLRA*],[1] Ontario is now effectively a substantial compliance jurisdiction. Substantial compliance legislation, also known as the dispensing power,[2] permits documents to be admitted to probate that do not comply with all technical statutory formalities. In Ontario, this means that non-compliance with sections 3 and 4 of the *SLRA* will now only render "a document *prima facie* invalid as a will, and inadmissible to probate without an application to the court" under section 21.1.[3] Prior to the enactment of this provision, compliance with sections 3 and 4 of the *SLRA* was mandatory.[4]

Since there is no caselaw addressing the interpretation of section 21.1 yet, this article explores how it may be interpreted in light of jurisprudence from other provinces. Substantial compliance legislation has been operative in Canada since 1983,[5] and almost all of the provinces and territories now have substantial compliance legislation.[6]

Ontario's substantial compliance provision

Section 21.1 came into force on January 1, 2022. The first subsection states:

> Court-ordered validity
>
> 21.1 (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.

Most substantial compliance provisions in Canada require the impugned document to embody or set out the deceased person's "testamentary intentions."[7] In other provinces, the term

[1] R.S.O. 1990, c. S.26 [*SLRA*].
[2] See *McCarthy Estate (Re)*, 2021 ABCA 403 at para. 7 [*McCarthy*].
[3] Ian M. Hull & Suzana Popovic-Montag, *MacDonnell, Sheard and Hull on Probate Practice*, 5th ed (Toronto: Thomson Reuters, 2016) at 97.
[4] *BMO Trust Company v. Cosgrove*, 2021 ONSC 5681 at para 23. Also see *Sills v. Daley*, 2003 CanLII 72335 (ON SC).
[5] Substantial compliance was first legislated in Manitoba; see the *Wills Act*, C.C.S.M. c. W150, s. 23.
[6] The only jurisdictions that do not have substantial compliance legislation are Newfoundland and Labrador and the Northwest Territories.
[7] Quebec's legislation does not require a technically deficient will to embody the deceased's "testamentary intentions." See the *Civil Code of Québec*, S.Q. 1991, c. 64, art. 714.

"testamentary intentions" has been interpreted as a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death.[8]

Subsection 21.1(1) is largely comparable to most substantial compliance provisions in Canada, but its overall wording is most similar to the Nova Scotia[9] and New Brunswick[10] legislation. In all three provinces, the legislation may be applied to a "document or writing" not executed in compliance with the formal statutory requirements, and the court may issue an order to make the non-compliant document both "valid and fully effective". The provisions in these jurisdictions also do not require a minimal level of execution before the courts may apply the dispensing power.[11] For this reason, section 21.1 is technically a will-validation provision, rather than necessarily (at least not explicitly) requiring substantial compliance with the *SLRA*'s formal requirements. In practice, however, we can only expect that it will be applied consistently with substantial compliance principles seen in other provinces.

Having said that, a noteworthy difference between the *SLRA* and the legislation in Nova Scotia and New Brunswick is the type of document that can be probated or altered, revoked, or revived. In Ontario, section 21.1 can only be applied to a non-compliant will, or used to alter, revoke, or revive a will, whereas Nova Scotia and New Brunswick's legislation can also be applied to "a document other than a will," as long as that document embodies the deceased's testamentary intentions. On this point, Ontario's provision is more similar to the dispensing power in Alberta,[12] Nunavut,[13] and the Yukon,[14] which also only apply to wills. Since the scope of section 21.1 is narrower than the dispensing power in many other jurisdictions, caselaw from other provinces may end up being of "limited application" in Ontario.[15]

Applying section 21.1

Jurisprudence from other jurisdictions indicates that the dispensing power can be applied to a variety of documents, including:[16]

- an improperly witnessed will;[17]
- an unsigned will;[18]
- a holograph will that is not entirely in the testator's own handwriting;[19]

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[8] *George v. Daily*, 1997 CanLII 17825 (MB CA) at para 61 [*George*].
[9] *Wills Act*, R.S.N.S. 1989, c. 505, s. 8A.
[10] *Wills Act*, R.S.N.B. 1973, c. W-9, s. 35.1.
[11] See *Ouellet Estate (Re)*, 2012 NBQB 116 [*Ouellet*]. A minimal level of execution also is not required in many other provinces, including British Columbia — see, for example, *Young Estate (Re)*, 2015 BCSC 182 at para. 21 [*Young*].
[12] *Wills and Succession Act*, S.A. 2010, c. W-12.2, ss. 37, 38.
[13] *Wills Act*, R.S.N.W.T. (Nu.) 1988, c. W-5, s. 13.1.
[14] *Wills Act*, R.S.Y. 2002, c. 230, ss. 30, 31.
[15] See *Hood v South Calgary Community Church*, 2019 ABCA 34 at paras. 26-27.
[16] Please note that this is not an exhaustive list.
[17] *McNeill Estate (Re)*, 2016 ABQB 645. In this case, the will was executed with only one witness.
[18] *Ouellet*, *supra* note 11.
[19] *Estate of Perley McEvoy*, 2020 NBQB 11 at para. 21.

- an improperly executed will alteration;[20] and
- an improperly executed document revoking a will.[21]

There are also limits on the types of documents that the dispensing power can save. In all likelihood, based on experiences in other provinces, section 21.1 cannot be used to make any of the following documents valid:

- a substantively invalid will;[22]
- an electronic will;[23]
- a document that the deceased did not see, read, write, authenticate, or adopt;[24] or
- a document that was not prepared at the request of the deceased, or that the deceased was unaware of.[25]

Another noteworthy limitation is that an application can only be brought under section 21.1 if the testator died on January 1, 2022 or later.[26]

The legal test

Typically a non-compliant document must pass a two-step inquiry before it can be validated by the court. First, the court must be satisfied that the document or writing is authentic. Second, the court must be satisfied that the document sets out the testamentary intentions of the deceased.[27] The burden of proof is the balance of probabilities and falls upon the applicant.[28] In *George v. Daily*, [29] the Manitoba Court of Appeal described this onus as "significant," noting that:

> … the court must be ever mindful that the question for determination is testamentary intention and the person who can best speak to that intention, the deceased, is not present to give evidence. The onus will only be satisfied by the presentation of substantial, complete and clear evidence relating the deceased's testamentary intentions to the document in question. Oral evidence describing the circumstances surrounding the creation of the document and the deceased's actions and words in relation to the document might well afford an applicant a better opportunity of satisfying the s. 23 onus than affidavit evidence alone.[30]

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[20] *Swanson Estate, Re*, 2002 SKQB 115.
[21] *Klaprat v. Chezick*, 2017 MBQB 105.
[22] *Hadley Estate (Re)*, 2017 BCCA 311 at para. 34 [*Hadley*].
[23] *SLRA*, *supra* note 1, s. 21.1(2).
[24] *George*, *supra* note 8 at para. 56.
[25] *Ibid* at para. 67.
[26] *SLRA*, *supra* note 1, s. 21.1(3).
[27] *McCarthy*, *supra* note 2 at paras. 10-11; *Young*, *supra* note 11 at para. 34.
[28] *McCarthy*, *ibid.* at para 13; *Ouellet*, *supra* note 11 at para. 41.
[29] *George*, *supra* note 8.
[30] *Ibid.* at para. 97.

At the first stage of the application, the evidence necessary to confirm authenticity will depend on the nature of the document's deficiency and whether there is any serious challenge to its authenticity.[31]

To pass the second stage, it must be clear that the non-compliant document sets out the deceased's testamentary intentions. The following factors may be used to confirm that a document expresses a fixed and final testamentary intention: the document was signed; it revoked previous wills; the document provided instructions for funeral arrangements; and the document included specific bequests.[32] The title of the document may also be relevant.[33] Courts in Manitoba and British Columbia have also held that the further a document departs from the formal statutory requirements, the harder it may be for the court to find that it embodies the deceased's testamentary intention.[34]

Conclusion

While a testator's intentions will no longer be defeated automatically due to failure to comply with the technical requirements in the *SLRA*, it is important to remember that there are no guarantees that a non-compliant document will be validated under section 21.1. The court's curative powers are "inevitably and intensely fact-sensitive."[35] With this in mind, there truly is only one way for a person to ensure that his or her final wishes can be submitted to probate — by executing a will that complies with sections 3 and 4 of the *SLRA*.

[31] See *McCarthy*, *supra* note 2 at paras. 13, 20.
[32] See *Young*, *supra* note 11 at para. 36.
[33] *McCarthy*, *supra* note 2 at para. 20.
[34] *George*, *supra* note 8 at para. 81; *Young*, *supra* note 11 at para. 37.
[35] *Young*, *ibid.* at para. 34, cited in *Hadley*, *supra* note 22 at para. 36.