

CBABC BRIEFING NOTE

Land Titles Document Execution

March 30, 2020

PURPOSE

This briefing note summarizes the impact of recommended physical distancing measures (to avoid the spread of virus during the pandemic) on the execution of land conveyancing documents in British Columbia.

BACKGROUND:

Since mid-March, the BC government has strongly urged residents and businesses to take precautions to avoid physical contact between people to avoid the spread of COVID-19; this includes spread through contact with objects including paper documents. As a result, many law firms have moved to home-based operations to avoid daily contact with staff, clients and documents. Work is done electronically to ensure that essential services offered by lawyers and paralegals will continue.

On March 17, the Law Society changed its rules to permit identification of a client through video conference technology - in order to allow lawyers, their staff and clients to maintain appropriate distance and avoid the spread of the virus. However, the witnessing of certain paperwork, such as land titles transfer documents, continues to require in-person visits. There is a noticeable lack of masks and gloves made available to the general public (PPE supplies are being directed to other essential services in health care), making it far more risky for lawyers and their staff to carry out the handling of paper documents without risk to health.

LEGAL IMPEDIMENTS:

The relevant legislation and caselaw may not permit remote or video witnessing of documents. On March 19, 2020, the CBABC submitted a request via letter to the Attorney General to amend legislation to allow use of video conferencing to view witnessing of documents for the purpose of facilitating a property transfer. This letter read, in part:

We recognize that the Registrar's guidance is rooted in the terms of the *Land Title Act* and judicial treatment of those terms. In particular, the prohibition on remote or videoconference witnessing of execution of instruments is derived from the decision of the British Columbia Supreme Court in *First Canadian Title Company Limited v. The Law Society of British Columbia*, 2004 BCSC 197 ("FCT"), wherein the Court held that requirements for the witnessing of an instrument set out in sections 42, 43 and 44 of the *Land Title Act*, cannot be met through the use of interactive videoconferencing, in part because of the difficulty in properly verifying the identity of the transferor through videoconference.

The CBABC has not received a reply to this letter and our request to make adjustments to allow video conferencing technology.

MEASURES TAKEN:

Relevant portions of Section 5 of the Land Titles Act (BC) include the following:

43 The signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that

(a) the individual **appeared before** and acknowledged to the officer that he or she is the person named in the instrument as transferor, and

(b) the signature witnessed by the officer is the signature of the individual who made the acknowledgement.

If instrument not witnessed

49 If

(a) the signature of a transferor is not witnessed in the manner required by this Part, and

(b) the registrar is of the opinion that the circumstances require,

the registrar may receive the instrument for the purpose of registration in the same manner as if its execution had been witnessed in accordance with this Part on being satisfied

(c) as to the facts, and

(d) as to the testimony, by affidavit,

(i) of a person 16 years of age or older acquainted with the transferor and the signature of the transferor stating his or her belief that the signature subscribed to the instrument is the signature of the person named in the instrument as transferor, or

(ii) in the case of a corporate transferor or corporate attorney, of a person 16 years of age or older having personal knowledge of the matters contemplated in sections 44, 46 and 48 (2) that would otherwise be acknowledged by the authorized signatory before an officer under those sections.

Defects

50 If there is a defect in the execution of an instrument, the registrar may, if the registrar considers that the instrument is legally binding, register it, and the registration is valid for all purposes despite the defect.

On March 24, the LTSA posted this notice providing further guidance:

1. Parts 42 – 48

This part of the *Land Title Act* requires individuals executing an instrument to appear before an officer. However, in circumstances where individuals do not wish to appear before an officer due to social distancing concerns, **the Registrar will accept an Affidavit of Execution sworn under section 49 of the Act**. For more details on section 49, including preferred forms of affidavit, please see paragraphs 5.88 to 5.101 of the [Land Title Practice Manual](#).

2. Instruments Executed and Witnessed Contemporaneously in Counterpart

Another acceptable option would be for individuals to sign an execution copy of a document **in the presence of, but at a safe distance from, the officer** who would apply his/her signature and officer details on an identical execution copy. If the Registrar requires the applicant to produce the execution copy under section 168.57 of the *Land Title Act*, having the two signatures on separate pages will not trigger any action against the designate who certified the document.

3. True Copies Accepted for Supporting Documents

The Director of Land Titles has [published a list](#) of supporting documents for which a true copy may be used in place of the original document.

Under these new guidelines, members suggest that it still will require the law firm to have a staff member present to witness the signature of the client in-person, and then execute the Affidavit of Execution before another agent. In order to facilitate this, the person must leave their home and attend at a location where the client is available to meet in person.

ISSUE:

As a result of these new guidelines, the CBABC undertook a request for feedback from its members. Approximately 16 lawyers provided comments and feedback, all but one indicating that video conferencing technology ought to be allowed (if even as a temporary measure) to ensure the safety and well-being of those in the profession and their clients.

The comments provided further insight into the inherent risks of the guidelines provided by the Director of Land Titles:

“The notice being repeatedly circulated allowing us to either witness a counterpart document, or use affidavits of execution, do not adequately address the problem:

1. *Affidavits still require us to have 2 people in close proximity with each other. If the goal is to have people stay home and work remotely, this doesn't get us there. We have to keep the office open and staffed*
2. *Witnessing LTSA documents in counterpart also will require us to see clients. Lawyers will either be required to drive around to the homes of clients in isolation, assuming they are even within driving distance, or to continue bringing clients into the office which poses a risk to all our clients and staff.*
3. *Some of my clients do not have home scanners or faxes, meaning that we still end up touching the same paper that they do.*
4. *Some of my clients, particularly those in care homes who are in most need of their sale proceeds, are on lockdown and we cannot enter their facility at all, even to witness at a distance.*

Even video-conferencing witnessing may provide a challenge for some of my elderly clients, but it remains our best option. Ideally we could witness the document via video conferencing, and also receive a copy of ID bearing the clients signature (ie. driver's licence and back of credit cards). At the very least, in respect of existing clients who we have previously ID'd, without requiring two people to meet in person to swear an affidavit of execution."

It is clear that although lawyers are on the list of "essential services", there are situations where lawyers are not even allowed access to their clients to personally witness documents – such as in the case of clients who are in long-term care homes or hospitals. New restrictions at those facilities make it impossible for legal professionals to attend to their clients to facilitate the execution and witnessing of legal documents.

Lawyers have also noted that the guidelines place a significant burden on clients to make a choice between risking their health (and those sharing their household) in order to comply with the guidelines by attending in person to be witnessed signing documents, or risk being sued for failing to execute necessary documents to complete a purchase or sale of real property.

"I appreciate the LTSA is doing its best to provide alternatives but, without a workable solution, my clients are facing an impossible choice of putting their health, and the health of others, at risk or watching their transactions grind to a halt (and potentially be sued).

Executing/witnessing by video conference seems a reasonable compromise in the circumstances. The law society (for client verification) and the courts have already permitted it. I fail to see why land title document execution should be treated materially differently. At minimum, I would suggest that if a client is previously known to the lawyer, then executing/witnessing land title documents by video conference should be permitted, can satisfy the certifications required under Part 5 of the Land Title Act, and poses little risk to the integrity of the land title system."

In addition, title insurance companies have offered their support to recognize documents that are executed through video conferencing technology, one of which was brought forward by one of our members:

“Stewart Title Insurance offered this:

This submission is on behalf of Stewart Title:

‘Stewart Title has been a supporter of real estate lawyers in Canada since we first began offering title insurance policies in this country almost two decades ago. We truly believe maintaining the role of the real estate practitioner is essential to maintaining the integrity of our land systems. The COVID-19 pandemic is causing serious challenges to legal practitioners particularly in British Columbia where video conferencing is not currently permitted for the execution of land title documents. This puts the health of lawyers, their staff and the community at risk.

It appears that resistance to making changes to allow video conferencing for the execution of land title documents in BC is largely based on concern about how such a change could be used for potential title fraud. Our title insurance policies for lenders and owners include protection from losses due to title fraud.

In light of the COVID-19 pandemic, Stewart Title is not requiring face-to-face meetings as a precondition to obtaining title insurance coverage. Provided that legal practitioners continue to take steps to validate the identity of clients including viewing government issued ID, our policies will continue to provide the comprehensive coverage for title fraud whether signatures occur in person or digitally.

In light of these extraordinary times we support the legal community in their request to permit video conferencing for the execution of land title documents and verification of client’s identification.’ “

There were also comments suggesting that a formal amendment is not required to allow video conferencing technology to witness documents:

“Despite many at the LTSA who we have been trying to appeal to, there is no requirement that the Land Title Act be amended. This is merely an interpretation of the words “appear before” and if the only obstacle to decreasing the risk of others being infected with COVID 19 and in effect, saving lives, then our law firm has already contemplated bringing a court action to re-assess the meaning of “appear before” in the context of 2020, and particularly in the context of a pandemic where all levels of government have stated that we should conduct practices contrary what the LTSA requires.”

One member raised the concern that by requiring in-person witnessing, this may cause transactions for real property to grind to a halt, which may greatly interfere with transfer taxes, a major revenue stream for the government. There were several concerns raised by small and solo law firms that there was no ability to send someone to witness documents if that lawyer is required to self-isolate due to an illness in their home. Another member expressed the concern that a lender was uncomfortable even accepting an Affidavit of Execution, despite the guidelines recommending the use of one. A couple of members

cautioned that even if video-conferencing were allowed, this may not be of use to those clients who do not have access to WiFi or the technology required to video-conference.

CONCLUSION

The CBABC respectfully asks the government to review the caselaw and legislation to clarify whether:

- (a) the new guidelines which allow an Affidavit of Execution still require a person to be present to visually witness document execution, and if so, then
- (b) a change in legislation is required to allow for video-conferencing to witness the execution of documents for land transfers, in particular section 43 of the Land Titles Act, to include video technology as an acceptable means of appearing before an officer.

In the alternative, the CBABC asks the government to consider temporary measures which can be invoked during this state of emergency to allow an exception to the legislation and deem “appear before” to include appearances by way of video conferencing, for the duration of the pandemic.

For further information or to provide any clarification or additional information that may be of assistance, please contact:

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