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MINISTRY OF THE ATTORNEY GENERAL CONSULTATION VIRTUAL COMMISSIONING & NOTARIZATION

On behalf of the Carleton County Law Association, thank you for reaching out to obtain our input and comments concerning virtual commissioning and virtual notarizing. We appreciate the opportunity to share our thoughts and experiences as Ontario makes a fundamental shift in how lawyers commission and notarize documents.

As with many fundamental shifts, there are many things to consider to ensure proper implementation and protection for all parties involved. We have reviewed the excellent written submission of the Federation of Ontario Law Associations (“FOLA”) prepared by Meredith McLennan and Eldon Horner and agree with their review of the issues of concern and their recommendations. In our written submissions, we will highlight similar issues of concern from our practical experience as real estate lawyers. While the last few months have been challenging and difficult for all of us to navigate, it has become quite clear that we need detailed guidance from the Province, from our governing body and from our insurance provider to ensure that lawyers are adequately protecting our clients and ourselves as we carry out virtual commissioning and virtual notarizing.

1. Client Identification



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One of the main areas of concern is identifying a client by video conference. When the client is an existing client, especially in smaller offices, clients are more easily recognizable and easily identifiable. When the client is new to the law office, it is challenging to ensure that the client identification requirements set out by our governing body, the Law Society of Ontario, are met. It is also difficult to follow the fraudulent documentation inquiry guidelines suggested by our insurance provider, LawPro, when client identification is being held up to a camera and a copy scanned and emailed to the law office by the client. It would be our recommendation that the Ministry of the Attorney General work with the Law Society of Ontario and LawPro to ensure all lawyers in this province have clear guidelines and steps to follow to identify a client that will satisfy all parties. It is also imperative to ensure that a higher standard is not placed on lawyers identifying clients virtually rather than in person.

2. Difficulty of Commissioning Documents

There are several issues of concern when using virtual means to commission documents. One of the main concerns is undue influence. It is difficult by video conference to ensure that there is no one else in the room or in close proximity that is influencing the client to swear and sign the documentation. In addition, when meeting a client virtually, it is difficult to pick up on client nuances and ensure the client is in fact signing the documents not under duress and that the clients fully understand what they are signing and it is of their own volition.

Many clients are not technologically savvy and ensuring that a video camera is aimed at them when they swear and sign an affidavit or statutory declaration has proven difficult. In addition, it is sometimes difficult to verify that the documents the lawyer watched being signed by video are one and the same as those documents being delivered to the law office.



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The definition of being in the physical presence of the affiant will have to be broadened to allow virtual commissioning.

3. Virtually Signed Documents Not Accepted

As practicing real estate lawyers, we have found ourselves in the situation where some lenders are refusing to accept signed and commissioned documents unless the lawyer can confirm that they met with the clients in person.

4. Difficulty of making Notarial Copies

In our experience and opinion, it is not possible to identify that a document is a true and genuine copy of an original by virtual means. If the Ministry of the Attorney General wishes to move forward to permit virtual notarization, significant amendments to the existing legislation would be required.

5. Capacity and Loss of Human Connection

The ability to verify a client's capacity, read a client's body language, to identify signs of fraud, to ensure the clients are comfortable with what they are signing and fully understand is greatly diminished when meeting with clients virtually.

6. Practicality

In a real estate transaction, it is much more difficult and time consuming to ensure that clients receive the closing documents well in advance (whether by courier or email) and then have those documents returned to the law office for review and signature by the lawyer that witnessed the virtual signing and commissioned the affidavit. It also increases the disbursements to account for the additional courier fees. If any initials or signatures are inadvertently missed, it is difficult to rectify, especially if the closing date is looming, and adds additional stress to the client and the lawyer.



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7. Privacy

At this time, it is unclear as to what technology should be used to conduct virtual commissioning or notarizing. There have been concerns about foreign ownership of some of the video conference platforms, security breaches and the liability for same, solicitor-client privilege breaches and general privacy issues. It would be imperative for the protection of lawyers and their clients to have a Canadian owned video platform that is approved by the Province of Ontario, the Law Society of Ontario and LawPro.

Some of the challenges that we have raised above would be significantly reduced if there were a requirement that the lawyer swearing the document with the client had previously met the client in person, thereby giving the lawyer the background experience of knowing and understanding the client through personal experience before dealing with the client virtually.

We sincerely thank Mr. Doug Downey and his team for providing us with an opportunity to share our experiences and concerns with virtual commissioning and notarizing. For many years, the Carleton County Law Association and its Real Estate Lawyers Committee have strived to be identified as stakeholders and consulted with when major decisions are being made that affect how we provide legal services to the people of the Province of Ontario. Should you have any further questions or require any clarification on the points raised in our submission, please feel free to contact our association directly.

Craig O'Brien
CCLA President