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## FOLA's RESPONSE TO MAG's PROPOSED REFORMS TO THE COMMISSIONERS FOR TAKING OATHS ACT AND NOTARIES ACT

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## **INTRODCUTION**

We thank you for the opportunity to meet with you on March 20, 2019 and to provide written comments to you with respect to the proposed reforms to the *Commissioners for Taking Oaths Act* and the *Notaries Act*.

The Federation of Ontario Law Associations (FOLA) is an organization representing the associations and members of forty-six local law associations across Ontario. Together with the Toronto Lawyer's Association, our members represent approximately 12,000 lawyers across the province. The vast majority of these lawyers provide front-line services to the Ontario public and are required to commission affidavits and declarations or perform duties as a Notary Public on a regular basis.

## **PROPOSED REFORMS**

For Commissioners:

- Enable oaths and declarations to be taken virtually.
- Expand the occupations whose members are commissioners by virtue of office, such as LPP students, police officers, members of the armed forces
- Increase appointment terms from 3 to 7 years

For Notaries:

- Limit notarial powers to the attestation of documents, verification of signatures and all the powers of a commissioner.
- Allow paralegals to be appointed as notaries in a manner similar to lawyers, such that they would be unrestricted notaries for life, just like lawyers.
- Increase appointment terms from 3 to 7 years
- Eliminate the oral exam currently required for all non-lawyer appointees

The bulk of our comments relate to the proposal to allow virtual commissioning of affidavits and declarations.



## **VIRTUAL COMMISSIONING**

We understand that the province is considering permitting the virtual commissioning of affidavits and statutory declarations, as it will make Ontario more “open for business”, will be convenient for the Ontario public requiring a sworn document, and will assist in increasing access to justice. During our meeting, you referenced several US jurisdictions which have recently permitted and regulated virtual notarization.

We first want to note the difference between virtual commissioning and virtual notarization. Virtual commissioning, as we understand it, is when a lawyer meets with a client electronically, rather than in person or in the physical presence of the deponent, to swear the affidavit or statutory declaration. Virtual notarization is confirming that a document is the same as another (original) document or verifying that the document has been signed by the appropriate party (but does not include the administering of an oath).

The administering of the oath, as an officer of the court, is a duty that should not be taken lightly or undermined for the sake of convenience or expediency. Sworn statements are solemn oaths and are relied on by judges, government officials, lawyers and other parties as truthful statements.

The current legislation requires every oath and declaration to be taken by the deponent *in the presence of* the person administering the oath, but does not define whether “in the presence of” requires the parties to be physically in the same room or can be satisfied by an electronic or video meeting.

We note that the Supreme Court of British Columbia in *First Canadian Title Company Limited v. The Law Society of British Columbia*<sup>1</sup> considered this question and determined that the requirement to “attend in person” means attendance in person and not via technology. The Law Society of Saskatchewan Ethics Committee similarly determined that the requirement for a document to be witnessed ‘in the presence of a lawyer’ means that the client must be in the same physical room as the lawyer – not present by way of video conference.<sup>2</sup>

### **Fraud Concerns**

There are significant concerns with the idea of permitting virtual or remote commissioning - the biggest of which is the increased potential for fraud. If a lawyer is only meeting a client by video conference, there is no way for the lawyer to:

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<sup>1</sup> 2004 BCSC 197

<sup>2</sup> <https://lsslib.wordpress.com/2018/01/17/this-week-in-legal-ethics-new-professional-conduct-ruling-10/>



- a) determine if there are other people, off view of the camera, who may be coercing the client in any way;
- b) examine the identification to check for signs of fraud and compare the photo and details with the client;
- c) pick up on subtle cues of uneasiness;
- d) to know if the video has been muted so that the lawyer is not hearing the conversation in the room; and
- e) ensure the client understands the contents and nature of the documents, particularly if there are language or other communication barriers.

Lawyers are attuned to the possibility of coercion, particularly of vulnerable clients. When such clients arrive at a lawyer’s office accompanied by family or friends, the lawyer will have the accompanying family or friend wait in the reception area and will meet with the client alone. The lawyer will then be in a much better position to determine whether the client is being pressured to act or is proceeding of his/her own volition. When a lawyer is dealing with the client remotely (via a video transmission over skype or face time, for example), it is much more difficult to determine that the client is not being unduly influenced by a person who is off camera.

Lawyers are required to verify the identity of their clients. One of the ways to do this is to compare the client’s identification documents with the person sitting in front of them. This will be more difficult to do by video. The video quality may vary, depending on factors such as weather, location of parties and type of video software used. Additionally, an Ontario Driver’s Licence or federal passport (the most common forms of photo ID) contain security features that are not readily confirmed by video or photocopy – such as the holograph image and different colours used. When reviewing an identity card in person, lawyers are also able to feel the thickness and material of the card. By simply reviewing an identity card held up on a video or scanned and emailed, there is no way to ascertain if it has been printed on cardboard or other similar material.

Lawyers can also more easily identify subtle cues of uneasiness in clients when they are meeting in person. A lawyer may not be able to pick up on sweating, hand wringing or fidgeting of a client if the camera transmitting the client is focused on his or her face only, for example.

If a meeting is being conducted virtually, there is no way for the lawyer to determine if the client’s video has been muted so that conversations taking place on the client’s end are not heard.



We are also concerned about the effects of virtual commissioning with respect to clients who may require translation or have other communication issues. Lawyers need to ensure that clients understand the contents of the document being sworn or declared.

### Verification of Identity

As noted, lawyers are required to verify the identity of their clients. Currently, lawyers can access the Ontario Ministry of Transportation [website](#)<sup>3</sup> and, for a fee of \$2.00, can confirm the validity of a Driver’s Licence number. The system will confirm that the Driver’s Licence number is a recognized Ontario Driver’s Licence number and is not suspended, cancelled or expired. While this is helpful, we note that it does not provide access to the photos on the registered licence, so lawyers are unable to confirm that the photo on the licence presented to them matches the photo in the provincial records.

We understand anecdotally that for \$35 a fraudulent Ontario Driver’s Licence can be obtained online, and that the availability of such fake Ontario Driver’s Licence rose significantly after the Service Ontario franchises were sold to independent franchisees and became for-profit centres. We suggest that your Ministry make inquiries with the various law enforcement agencies in the province to confirm the prevalence and availability of fraudulent Ontario Driver’s Licences.

### Electronic Client Identification

We understand that some of the US jurisdictions that have permitted virtual notarization require some sort of virtual identification system, similar to the [TransUnion Identity Verification](#).<sup>4</sup> These systems basically confirm a person’s identity by asking a few questions relating to their banking, credit and residency history.

We are concerned that these types of questions can easily be answered by people known to the individual – and could be exploited by related/intimate parties to perpetrate fraud. For example, adult children, relatives or others with intimate knowledge, and estranged spouses or partners would likely have all the information required to pass a virtual identity test. This would leave already vulnerable members of the Ontario public even more vulnerable.

Part III of the Law Society of Ontario By-Law 7.1<sup>5</sup> require lawyers to verify the identity of clients and has specific rules regarding the identification of clients when the lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds. These requirements include the review of original government issued identification of the person that

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<sup>3</sup> <https://www.dlc.rus.mto.gov.on.ca/dlc/OrderForm.aspx>

<sup>4</sup> <https://www.transunion.ca/product/identity-verification>

<sup>5</sup> <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/b/by-law-7.1-operational-obligations-01-25-18.pdf>



is valid and has not expired.<sup>6</sup> It also provides for the verification of client identity by way of an attestation from certain prescribed professionals when instructions are not being received face-to-face. Can a person review an original government issue identification document via video conference?

Further, we note that the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) provides information on its website with respect to authorized methods of identifying individuals and confirm the existence of entities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>7</sup> and associated regulations. FINTRAC explicitly states: “It is not acceptable to view photo identification online, through a video conference or through any virtual type of application; nor can you accept a copy or a digitally scanned image of the photo identification.”<sup>8</sup>

### Real Estate Transactions

Virtually all real estate transactions in Ontario require a statutory declaration or affidavit to be sworn. In many cases, the real estate lawyer may be the only professional in the transaction to meet with the client in person. If the need for this in-person meeting is eliminated by virtual commissioning, there may be no one meeting in person with a real estate buyer or seller or verifying their identity by physically examining government issued identification.

Many agreements of purchase and sale for real estate transactions in Ontario are signed remotely. Real estate agents do not necessarily ever meet with their clients in person. Mortgages can also be arranged on-line, without the client ever meeting a mortgage broker or bank employee. At some point in the transaction, the parties should meet, in person, with someone who can verify their identity. This is currently the lawyer. By removing the requirement for lawyers to meet with clients in person to commission affidavits, the system is more vulnerable to fraud.

### Convenience comes at a cost

Seniors, one of the most vulnerable sectors of society, are already frequent targets for fraudsters. As noted above, allowing virtual commissioning will leave these vulnerable members of the public even more vulnerable.

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<sup>6</sup> See also <https://www.iso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/identification-and-verification/appendix-7%c2%a0%c2%a0%c2%a0%c2%a0steps-to-assist-lawyers-in-complying>

<sup>7</sup> S.C. 2000, c. 17.

<sup>8</sup> <http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp>



The reforms are meant to provide more convenience to the public. This convenience should be measured carefully against the cost of reduced security.

The increased risk of fraud in Ontario will ultimately be downloaded onto the Ontario public. It will initially be borne by the relevant insurers – lawyer’s professional liability insurers and/or the Law Society Compensation Fund, the provincial Land Titles Assurance Fund and title insurers. As each insurer/assurer/fund receives more claims, the related fees will increase. Law Society registration fees and liability insurance premiums paid by lawyers will increase; Land Registry Office registration fees will increase; and title insurance premiums will increase – all of which will result in higher fees and premiums paid by the public. Worse still, the relevant insurers could decide to exclude such frauds from coverage entirely, leaving the public with no recourse whatsoever.

### Access to Justice

We are not aware of any evidence that there is any issue with the Ontario public accessing Commissioners for Taking Oaths and Affidavits or Notaries Public at a reasonable cost. As has been well publicized, there is an abundance of lawyers in the province, with more and more being called each year. As we understand it, fees for providing these services are quite modest.

Many Ontarians have little experience with legal professionals, except when they buy or sell a house or perhaps have a will drafted. Such interactions with real estate or estate lawyers are often the first time (or first time in a long time) that the public interacts with the legal profession. Solicitors, then, provide a vital role in access to justice – they are often on the front line, providing services to the public. If a member of the public has a legal issue, they call “their lawyer”, who helped them buy their house or settle their parent’s estate or draft their will. If “their lawyer” cannot assist them, they refer them to a specialist who can assist. Clients meeting with a lawyer for a real estate transaction or a will often ask about other issues and these frontline lawyers routinely provide guidance, advice and assistance (most of the time at no charge) to the client during these meetings. There is a real concern that a move to a virtual system will reduce the opportunities for personal relationships and additional assistance by lawyers.

### Jurat

If virtual commissioning is permitted, will there be a requirement for the jurat to be amended to reference the fact that the document was not commissioned in the physical presence of the deponent?



### **EXPANDING COMMISSIONERS BY VIRTUE OF OFFICE**

We appreciate the benefits to the government of reduced labour costs in dealing with the applications by expanding the list of people who are commissioners and have no significant concerns with permitting articling and LPP students to automatically become commissioners without applying for a commission. However, these commissions should only be for work associated with the articling/LPP work that is being supervised by a lawyer. For example, we understand that LPP students are only supervised during half of their programming. We would not be comfortable with (nor do we see the need for) an LPP student being a commissioner while doing the four-month course component of the program.

We are not overly concerned about police or armed forces members and assume that such commissions will also be restricted to work related the job function. Certain municipal employees or councilors and indigenous band members could also be commissioners by the nature of their office to assist in providing commissioning services in remote communities.

We also recommend that the Ministry publish some educational materials relating to the commissioning of documents. We heard from one our members in the north that a municipal office commissioner refused to commission an affidavit for an Application for a Certificate of Appointment of Estate Trustee because they were not real estate documents and he was not familiar with the documents he was asked to commission. The client ended up driving 3.5 hours to Thunder Bay to meet with her lawyer to have the affidavit commissioned. It seems that the commissioner at the municipal town office is not aware that he is not required to understand all of the related documents to administer an oath about the veracity of the statements being made. Narrowly expanding who can become commissioners and educating such applicants with respect to the administering of an oath would alleviate the burden on those in remote areas who require access to commissioners, without incurring the risks associated with virtual commissioning.

### **INCREASED APPOINTMENT TERM FOR COMMISSIONERS**

We are not concerned with increasing the appointment term from 3 to 7 years. This will cut down on the re-appointment applications and not increase any risk to the public.

### **NOTARIAL POWERS**

Section 3 of the Notaries Act states that “a notary public has and may use and exercise the power of drawing, passing, keeping and issuing all deeds and contracts, charter-parties and other mercantile transactions in Ontario, and also of attesting all commercial instruments that may be brought before him or her for public protestation, and otherwise of acting as is usual in the office of notary public, and may demand, receive and have all the rights, profits and emoluments rightfully appertaining and belonging to the call of notary public”.





It is not entirely clear what this actually means or what else is “usual in the office of notary public” besides commissioning/notarizing documents, so we are inclined to agree that clarifying the powers of a notary public is a good thing. However, we understand that other legislation (both federally and internationally) may reference notarial powers and duties, such as the *Bills of Exchange Act*<sup>9</sup>, which expressly delegates powers to a Notary Public in relation to protest. We also understand that certain other maritime/shipping legislation references powers and duties of Notaries Public. Perhaps a basket clause such as “and such other powers of a Notary Public as may be delegated by an act of the federal parliament or a provincial legislature” should be considered.

We recommend that a Notarial Guide be published following the reforms which confirms the scope of powers of a notary public and provides a standard for the notarization of documents.

### **NOTARIAL APPOINTMENTS OF PARALEGALS FOR LIFE**

Paralegals must currently apply to be a notary public and must pass an oral exam. The proposed reforms would see them appointed for life (unrestricted), as lawyers currently are.

Care should be taken to ensure that this will not expand a paralegal’s scope of practice. The Law Society of Ontario should be consulted to ensure that this will not expand the scope of paralegal licences.

### **INCREASED APPOINTMENT TERM FOR NOTARIES**

We are not concerned with increasing the appointment term from 3 to 7 years. This will cut down on the re-appointment applications and not increase any risk to the public.

### **ELIMINATE ORAL EXAMS FOR NOTARIAL APPOINTMENTS**

The consultation deck indicates that the oral exams consist of approximately seven questions regarding the applicant’s understanding of their responsibilities and associated limitations. It is felt that the oral exam brings to light the solemnity of the appointment, but we appreciate the cost-savings and alternate use of judicial time that can be achieved by eliminating this requirement. If the oral exam is eliminated, it should be replaced by a written exam or affirmation of obligations and responsibilities.

### **CONCLUSION**

We understand the desire to modernize legal services and to make effective use of technology; however, there needs to be balance between the convenience provided by technology and the

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<sup>9</sup> RSC 1985, c. B-4



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