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FOLA Submissions

Ministry of the Attorney General Consultation re: Virtual Commissioning and Virtual Notarization

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I INTRODUCTION

We thank you for the opportunity to provide input regarding Bill 190, the *COVID-19 and Reforms to Modernize Ontario Act* and the recent reforms to the *Commissioners for Taking Affidavits 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.

FOLA has been actively engaged on this issue for some time and previously provided submissions on April 19, 2020. We have, prior to and after the introduction of Bill 190, received input from solicitors across the province expressing positive comments regarding the increased flexibility, but we have also received many comments expressing trepidation regarding the potential risks associated with the amendments. The implementation of reforms must, in our submission, balance the competing interests of increased efficiency and protection of the public, particularly vulnerable individuals.

II SCOPE

1. Virtual Commissioning - If you or your members/staff have been commissioning affidavits virtually, what safeguards have you been following? What have you learned from that process?

Solicitors who have reported to FOLA have anecdotally reported that virtual commissioning is occurring frequently across the province. These same solicitors have also reported that many

(perhaps a majority of) real estate clients prefer to attend in person to review and execute the documents. There are a variety of reasons for the preference for in person meetings. Solicitors have advised that the extra steps involved in educating clients, ensuring technology is present and working, and the need to have a return of documents with “wet signatures” for closing as required by many lenders and certain governmental authorities (such as CRA for New Housing Rebate Applications) all combine to see the process of virtual commissioning result in more time being expended rather than less. Many solicitors reported issues with clients having access to printers and scanners, being able to successfully use the required technology, not understanding when and where to sign the documents, and the additional costs relating to virtual commissioning, including courier costs to return originally executed documents.

FOLA has published a Guide for Remote Signing, which includes a Video Conference Checklist, as well as an Authorization for Virtual Meetings that many lawyers have found useful, copies of which are attached as Schedules “A” and “B”.

Aside from ensuring that clients have access to the relevant technology, the most challenging part of virtually commissioning documents is verifying the identity of clients, particularly those with whom the lawyer is meeting for the first time. This will be addressed further in Section IV - Risks and Safeguards.

2. Virtual Notarization – A Notary Public is authorized to verify that a document is a true and genuine copy of an original. Current best practices suggest that verifying that a document is a true and genuine copy cannot be done by viewing original documents online, through video conference, or virtual application. The provision of a copy or a digitally scanned image of the original document alone may also not be acceptable.

a) Do these best practices resonate with you?

These best practices do resonate with FOLA and its members. Confirming that a document is a true copy of an original is easiest when the physical original document is placed with the

Notary who can then proceed to duplicate the original and produce the required Notarial Certificate to be appended to the copy. If an “original” is defined as including a pen and ink signature, there is no way for a Notary to confirm the “wet ink” signature remotely. It is also significantly more difficult to determine if a document has been altered by reviewing an image of the document online, through a video conference or virtual application.

- b) What restrictions, if any, should be placed on which notarial acts or acts of commissioning may be performed virtually?

FOLA recommends that virtual commissioning be restricted to instances where the commissioner is physically located in Ontario at the time the document is being sworn or declared.

Given that the processes involved in virtual notarizing or commissioning are new to the legal profession and to the public, and given the substantial risks of fraud or undue influence being present, FOLA further recommends that allowing such things to be done when the deponent/client is not in the physical presence of the commissioner should only be permitted when the client is personally known to the commissioner or when there has been at least one meeting in the physical presence of one another previously.

Being “personally known” may result from social interaction or from previous business dealings. Where the lawyer, commissioner or notary has such knowledge the risk of fraud is minimized. Meeting the requirements for verifying the identity of one’s client without some personal interaction may be possible but we are at present unaware of specific technology that reliably provides for such identification verification. The data and document manipulation are where those engaged in fraud may have skills which greatly outdistance the typical lawyer or commissioner. Further, identity verification systems that rely on the individual’s knowledge of certain information (ie. banking, credit or residency history, etc.) leaves clear room for fraud by



intimate or related parties, including, for example, adult children or care-givers of elderly individuals and estranged partners or spouses who may abuse the intimate knowledge gained during the relationship.

- c) Are there circumstances where virtual notarization or virtual commissioning should be prohibited?

As noted above, FOLA recommends that virtual commissioning should only be permitted when the client is personally known to the commissioner or when there has been at least one meeting in the physical presence of one another previously. Further, FOLA does not recommend permitting virtual notarization of documents.

III ENABLING TECHNOLOGY

1. O.Reg 129/20, the emergency order under the *Emergency Management and Civil Protection Act* that enables the execution of wills and the execution of powers of attorney using the assistance of audio-visual communication technology, defines “audio-visual communication technology” as any electronic method of communication in which participants are able to see, hear and communicate with one another in real time.

- a) Would a similar definition be a sufficient baseline requirement for virtual commissioning and virtual notarization?

FOLA believes that such a definition does present a sufficient baseline for engaging in virtual commissioning.

If virtual notarization is permitted, the quality of the communication is critical. Significant technology may be required to determine if a signature being viewed via electronic communication is truly an original. The same applies to seals, stamps and other such markings on original documents.



- b) What additional IT criteria should be considered to ensure the privacy and security of documents being commissioned and being notarized electronically?

FOLA lacks the requisite IT knowledge base to provide meaningful input to this question. We note that most lawyers, notaries and commissioners are also not likely to have an extensive IT knowledge base upon which to determine whether a particular audio video, storage, or other technological platform has sufficient privacy and security features. Any regulations involving IT criteria must be simple to understand or else the government should implement some sort of approval process for technology providers so that lawyers, notaries and commissioners can simply confirm if a specific technology includes the required safeguards.

Having said that we are aware that many US states have implemented specific rules which may be of assistance.

We do wish to comment on what we understand to be a possible requirement to record the interaction between the client and the lawyers, notaries or commissioners. Particularly when dealing with a lawyer who may be performing the service, we would urge the Ministry not to include a requirement for video recording. Given that the discussions and interaction will be subject to solicitor client privilege, recording the details may be problematic. In addition, most often the swearing of an affidavit or declaration is one part of a very long discussion with the client(s) which may touch on many subjects. If any form of video recording is to be required, we would recommend that the requirement be limited only to that portion of the meeting involving the actual execution of the affidavit or declaration. If there is a requirement to include a modified jurat, such recording seems unnecessary particularly when a licensee of the Law Society of Ontario is commissioning the document. The Law Society has vigorous client verification and identification requirements.



If there is a requirement to record part or all of the interactions, the specific requirements for acceptable methods of recording, storage, length of time recordings are to be kept, and potential uses for the recording etc. should also be considered.

2. The Law Society of Ontario’s best practices for virtual commissioning suggest obtaining a high-resolution image of the client’s government-issued identification document as proof of identity.
 - a) What other technological or process-based options exist to constitute proof of client identity?

FOLA is presently unaware of specific technology that reliably provides for identification verification. 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](#).¹ 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 7.1² requires 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

¹ <https://www.transunion.ca/product/identity-verification>

² <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.³ 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 satisfactorily 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*⁴ 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.”⁵

IV RISKS AND SAFEGUARDS

1. The Law Society of Ontario has noted that the main risks to virtual commissioning and virtual notarization include: fraud, identity theft; undue influence; duress; capacity; client left without copies of the documents executed remotely; and clients feeling that they did not have adequate opportunity to ask questions or request clarifying information about the documents they are executing.
 - a) Should a commissioner or notary be required to ask the client a series of questions before performing the transaction?

As noted earlier, FOLA provided lawyers with a Guide for Remote Signings, which includes a video meeting checklist. We believe that a best practices standard is a better solution than a mandatory series of questions. Such an obligation would require repetition with a client who

³ See also <https://www.iso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/identification-and-verification/appendix-7%20a0%20a0%20a0%20a0steps-to-assist-lawyers-in-complying>

⁴ S.C. 2000, c. 17.

⁵ <http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp>

has an ongoing relationship with their lawyer and/or completes numerous transactions with the lawyer each year.

If virtual commissioning is not restricted to instances where the deponent is already known to the lawyer or commissioner, FOLA would support a mandatory series of questions to be used whenever the deponent/client is completely new and unknown to the commissioner/lawyer. Most lawyers currently have some form of “intake” process or questionnaire which can form part of the process.

- b) Before performing a virtual transaction, should a commissioner or notary be required to attest that they believe that their client is not under undue influence or duress, and that they have the capacity to proceed with the transaction?

FOLA’s position is that such a belief should be mandatory on behalf of the commissioner or notary whether meeting with the client virtually or in person.

Commissioners should be required, particularly when engaging in virtual commissioning, to ensure the deponent completely understand the substance of what is being sworn and the implications of swearing and incorrect or false document. The commissioner should also have a mandated process to ensure, so far as is possible, that the deponent has not been improperly pressured into providing the sworn statement.

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.

- c) Are there any limitations to ensuring that clients receive, in a timely manner, a copy of the document(s) commissioned or notarized virtually?

FOLA suggests that the delivery of documents to clients is really a business matter to be addressed by the lawyer/notary/commissioner and the client. Best practices and/or Rules of Professional Conduct (for lawyers and licencees acting as a notary or commissioner) may be appropriate but it should not be the subject of legislation or regulation.

2. What other risks does the ministry need to address to protect Ontarians?

a) Fraud Concerns

There are significant concerns with the implementation of 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:

- 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) 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 video, 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. Commissioners need to ensure that clients understand the contents of the document being sworn or declared.

b) 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](#)⁶ and 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. If the government provided lawyers in good standing with the Law Society access to a portal to confirm the photo on file related to a particular drivers licence number, then lawyers would be in a much better position to verify the identity of a deponent. If the photo on file with the provincial government matches the photo on the driver's licence or copy provided and matches the image of the client, the identify of the client can be verified.

c) 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.

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

⁶ <https://www.dlc.rus.mto.gov.on.ca/dlc/OrderForm.aspx>

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.

d) 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.

e) Jurat

The regulations governing virtual commissioning should include provisions for how the oath is to be administered and whether or not the jurat should be modified. If the jurat is to be modified to confirm that the document was not sworn or declared in the physical presence of the commissioner, the required wording should be confirmed. Additionally, FOLA recommends that the document be said to be sworn or declared at the location of the commissioner rather than the deponent (as there is no way for the commissioner to independently confirm the location of the deponent).

f) Guide to Commissioning and Notarizing

In conjunction with enacting regulations regarding virtual commissioning, it is FOLA's position that the government should produce a Guide to Commissioning and Notarizing in clear and plain language. It should set out the requirements for administering an oath or solemn declaration and the additional requirements for virtually commissioning affidavits or declaration and notarizing documents. It could include best practices for ensuring, so far as is possible, that the deponent has not been improperly pressured into providing the sworn statement. There could also be a Guide to having a document commissioned or notarized to educate the public with respect to the requirements and the implications of swearing an incorrect or false document.

V 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 increased risks of fraud and ultimate cost to the public. Cost savings, if any, on individual matters



will be very small while the consequences of fraud or undue influence may be enormous for the individual(s) affected. At the end of the day incremental change is likely the best approach.

We again thank you for the opportunity to speak with you and to provide these submissions. If we can be of any further assistance please do not hesitate to contact us.