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FOLA Submissions

Proposal to Establish a Regulatory Framework that Enables Virtual Acts of Commissioning

Submitted to: Ministry of the Attorney General
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Submitted on: July 22, 2020

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We thank you for the opportunity to provide input regarding the proposal to establish a regulatory framework that enables virtual acts of commissioning (the **“Proposal”**) published on July 14, 2020.

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, 2019 and June 12, 2020. We have received input from solicitors across the province expressing positive comments regarding the increased flexibility afforded by virtual commissioning during the current pandemic, but we have also received many comments expressing concern regarding the potential risks. The regulations to permanently permit virtual commission must, in our submission, balance the competing interests of increased efficiency and protection of the public, particularly vulnerable individuals.

We reiterate our earlier submissions recommending that the government produce a Guide to Commissioning Affidavits and Statutory Declarations in clear and plain language in conjunction with enacting regulations regarding virtual commissioning. Such a guide 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.

We will respond to each of the key elements of the proposal.

- **Allow for virtual commissioning of a document and permit all acts of commissioning to be performed virtually by anyone who would otherwise be authorized to commission in Ontario, if they so choose**

FOLA recommend 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. There is a concern about the implications if a commissioner is not located in Ontario when commissioning a document – will there be a conflict of laws issue? Will Ontario laws govern the commissioning of the document if the commissioner is not located within the province at the time the document is commissioned? What if neither the deponent/declarant nor the commissioner is located within the province when the document is commissioned? We believe this this issue should be fully reviewed before the regulations are finalized.



- **Require that participants can see, hear and communicate with one another in real-time during the transaction**

FOLA supports this requirement. We note that FOLA has published a guide for remote signing that includes a videoconference checklist (available [here](#)) and LawPRO has published a videoconferencing checklist (available [here](#)).

- **Require the commissioner to verify the client's identity**

We note that not all deponents/declarants will be clients of the commissioner. The *Commissioners for Taking Affidavits Act* uses the terms deponent or declarant and the regulations should be consistent in this regard.

Further, will there be requirements for how a commissioner must verify the deponent/declarant's identity if only meeting them for the first time virtually? Lawyers are governed by their respective Law Society, and the Law Societies each have specific client verification rules that can be translated to verifying the identity of deponents/declarants, but not all commissioners are lawyers.

Given the increased risks of fraud or undue influence being undetected in a virtual meeting, FOLA recommends that virtual commissioning should only be permitted when the deponent/declarant 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 commissioner has such knowledge the risk of fraud is minimized. Meeting the requirements for verifying the identity of a deponent/declarant 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 caregivers of elderly individuals and estranged partners or spouses who may abuse the intimate knowledge gained during the relationship.

- **Set out a modified jurat that indicates the document was commissioned virtually and captures the location (city, province) of both the client and commissioner**

FOLA supports the requirement for a modified jurat confirming that the oath was administered virtually and the location of the commissioner. If the regulations require the document to state where the deponent/declarant was located, the commissioner cannot be required to confirm the accuracy of the deponent/declarant's location, and this should be confirmed in the regulations.

It is also recommended that commissioners be required to type or print their names under their signature and confirm their capacity to commission (ie. lawyer, appointed commissioner, etc.).



- **Require the commissioner to take reasonable precautions in the execution of his/her duties as a commissioner, such as ensuring that clients are fully informed and understand what they are signing**

The requirement for a commissioner to take reasonable precautions in the execution of his/her duties should not be restricted to commissioning documents virtually – this is a standard that should be applied to all commissioners administering the oath or declaration to a deponent/declarant.

Caution should be exercised to prevent the development of two standards – one for documents being sworn or declared virtually and another for documents being sworn or declared in the physical presence of the commissioner.

- **Require that a record of every virtual transaction be retained**

We are unsure of what this requirement may involve, as the commissioned document is in itself a record of the commissioning transaction. As we previously submitted, FOLA does not encourage a requirement for a video recording of the virtual meeting at which the oath was administered. There are concerns regarding lawyer/client privilege when a commissioner is a lawyer, in what format recording must be kept, and for how long. There also concerns regarding the development of two sets of standards, one for documents being sworn or declared virtually and another for documents being sworn or declared in the physical presence of the commissioner.

Finally, the proposal indicates that there are “no new administrative costs to business anticipated in relation to the proposal”. If the regulations include requirements for retaining records by way of video recording, or for use of specialized software for virtually identifying deponents, then there could be significant implementation and maintenance costs for commissioners.

We again thank you for the opportunity to provide feedback on this proposal and would be happy to discuss any of these issues in greater detail.