Toronto Lawyers Association TLA

July 22, 2020

The Honourable Doug Downey, Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Via online submission

Dear Attorney General Downey,

RE: Virtual Commissioning Regulations

We are in receipt of MAG's "Proposal to establish a regulatory framework that enables virtual acts of commissioning", posted on July 14, 2020, and wish to offer some constructive feedback and comment upon the summary of proposal, with reference to specific statements in the proposal:

"Require the commissioner to verify the client's identity": To reduce needless formalities, regulations should include an express exception to verification of the client during the videoconference if the commissioner (a) has previously identified the client and recognizes the client to be that person, and/or (b) the individual is personally known to the commissioner.

"Set out a modified jurat that indicates the document was commissioned virtually and captures the location (city, province) of both the client and commissioner": We do not believe that the form of jurats can completely be amended by regulation, as the form of jurats for statutory declarations are defined by both s. 43 of the *Evidence Act* (Ontario) and s. 41 of the *Canada Evidence Act*. A statutory amendment may therefore be required.

In addition, to prevent inconsistency as other jurisdictions introduce commissioning by videoconference, it may be prudent for the provincial, territorial and federal Attorneys General to develop a standard form of jurat to be adopted uniformly in all Canadian jurisdictions. A few moments of extra effort to this end at this stage will ensure greater efficiency in the future.

As MAG proposes to include in the amended jurat the location of the client, we must note that the certificate made in the jurat is that of the commissioner, not the deponent, of the act performed. Accordingly, the commissioner cannot certify in an unqualified manner the location of the deponent. Any language relating to the location of the deponent ought to be in qualified language

that recognizes the inability of the commissioner to certify same (e.g., "…and the deponent advised that that they were in the Town of [x] in the County of [y]…"), or the regulation should deem that any certification made by the commissioner as to the location of the deponent is not absolute.

"Require that a record of every virtual transaction be retained": We are unclear as to what is meant by "a record", as it can extend from a written memorial of the virtual transaction (akin to notarial journals required to be kept by most notaries in the United States) to a complete audio-visual recording of the entire meeting between commissioner and deponent (as some American jurisdictions have required in relation to remote notarizations).

We assume that MAG's intent is to require no more than a written notation that the event took place, in which case, this requirement is a redundancy. MAG should approach with some caution the creation of a significantly different evidentiary standard for in-person vs. virtual commissioning. Historically, in the Canadian common-law provinces, the completion of the jurat itself is evidence of the commissioner having fulfilled the formal requirements of administering an oath, affirmation or declaration. The jurat itself is a record of an act of a commissioner, and is prima facie proof that such act has been properly performed. To create a substantially different and more burdensome evidentiary standard for virtual commissioning (namely, mandating an independent record separate from the jurat) results in something of an absurdity, insofar as there is no comparable requirement for an in-person administration of an oath, affirmation or declaration. This risks being the epitome of needless red tape, with no good reason (other than reactionary caution) to impose a higher evidentiary standard for virtually commissioned documents than those commissioned by face-to-face videoconference

If an audio and/or video recording is within MAG's contemplation, we offer some comments:

1. A significant proportion of commissioners in Ontario are either lawyers or their staff. This stands in contrast to American notaries, who are often lay appointments. Any precedents from the United States should be approached with significant critical engagement, as the office of notary public in that country is not largely associated with an independently regulated profession. The safeguards deemed necessary for the American experience may not be required in the overall circumstances of the Ontario experience.

2. MAG oversees the appointment and regulation of the public office of commissioners, whose office is limited to the function of administering oaths, affirmations, and declarations. As noted above, many commissioners are lawyers, which form an independently regulated profession, or their staff. In this profession, the communication between professional and client is subject to the constitutionally protected right of solicitor-client privilege. MAG's jurisdiction to mandate any recording of a meeting between commissioner and deponent is therefore likely strictly limited to an act specifically relating to the fulfilment of that office. An overly broad encroachment into the solicitor-client relationship, whether in public, criminal, civil or private law matters should not be proposed, and in our view would be unconstitutional. If MAG does wish to consider requiring the recording and retention of virtual

commissioning, the requirement for recording must be strictly limited to that portion of the interaction that relates to the administration of the oath, affirmation and declaration. It would be a jurisdictional over-reach for MAG to mandate that the recording include other parts of the meeting.

3. If any portion of the meeting is to be recorded and retained, timelines for retention need to be expressly defined in the regulations. Likewise, it is unclear who might be entitled to access the recording, and some clarification of the proposed scope of access is needed for us to be able to provide further comment. Insofar as the recording relates to any solicitor-client privileged information, the recording, itself would be privileged.

4. If any portion of the meeting is to be audio or video recorded and retained, MAG should revisit the following assessment: "There are no new administrative costs to business anticipated in relation to this proposal." There will be a storage and security cost associated with the secure storage of potentially large amounts of data, together with increased risk of data breaches. These risks will be particularly acute if MAG seeks to impose a broad recording requirement. The acuteness of this imposition will be correlated to the breadth of any recording MAG seeks to mandate – a broad recording mandate (which may capture more sensitive information) with an indefinite or lengthy retention period will impose a higher ongoing maintenance cost, costs that must ultimately be passed along to the customer..

We trust that these comments will be received in the constructive spirit that they are offered, to help MAG attain a smooth implementation of virtual commissioning. Given some of the uncertainties on which we have had to comment, we would appreciate the opportunity to comment upon near-final draft regulations to advise whether there are any further issues with the proposal.

Yours very truly,

Brett Harrison
President
Toronto Lawyers Association

cc: Ian Speers, Speers Law, TLA Director and Real Estate Committee Chair