



July 22, 2020

Ministry of the Attorney General
Corporate Policy Unit
720 Bay Street, 7th Floor
Toronto, ON M7A 2S9

This letter is in response to the proposal to establish a regulatory framework that enables virtual acts of commissioning (the “**Proposal**”). We support the establishment of the regulatory framework, which we believe will assist the public during and after the current pandemic.

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors. Pursuant to the *Commissioners for Taking Affidavits Act* and the regulations thereunder, all lawyers are commissioners for taking affidavits in Ontario.

Below, we have set out responses and suggestions with respect to each of the bullet points contained in the Proposal; however a central recommendation is that the regulatory framework be consistent with the language and requirements already set out in the *Commissioners for Taking Affidavits Act* (the “**Act**”).

Setting out a separate or enhanced standard for a virtual administration of an oath or a declaration would create two different standards under the Act. This would undermine the understood policy rationale of these proposed changes, namely that deponents, declarants and persons administering oaths or declarations now will be able to select whether they do it in person or virtually. Two different standards will likely result in third parties requiring a particular threshold be met in certain instances, which could result in third parties requiring that an oath or declaration be administered in the presence of a commissioner, notary public or other person. It is noted that subsection 9(3) of the Act¹ sets out the standard which a commissioner, notary public or other person must apply when administering an oath or declaration and has application whether that oath or declaration is made in person or virtually. In each instance, a commissioner, notary public or other person already needs to satisfy themselves to the genuineness

¹ A commissioner, notary public or other person administering an oath or declaration shall satisfy himself or herself of the genuineness of the signature of the deponent or declarant and shall administer the oath or declaration in the manner required by law before signing the jurat or declaration.

of signature. Different circumstances already require different levels of scrutiny by the person administering the oath or declaration and this will continue for both in-person and virtual administering of oaths and declarations. It is important that this consistency remain, and that there is one universal standard which the commissioner, notary public or other person must apply to satisfy the requirements of the Act. The OBA cautions that different standards will lead to confusion as well as different standards of acceptance.

Throughout the Act, the term “deponent or declarant” is used to define the person making an oath and/or declaration. The Proposal uses the term “client”. The OBA notes that in many instances the person making an oath and/or declaration is not a client of the commissioner, notary public or other person administering the oath or declaration. Accordingly, in the final regulations it is recommended that the term “deponent or declarant”, which is consistent with the Act, be used.

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

The term “if they so choose” conveys a certain level of ambiguity. It is important that any person or entity requiring that an oath or declaration of a person be administered by a commissioner in accordance with the Act also be required to accept an oath or declaration administered by a commissioner either virtually or in-person. To this end, the Government could consider adding wording in the regulation that an oath or declaration administered by a commissioner virtually will be recognized as being of the same effect as an oath or declaration administered in the presence of the commissioner pursuant to Subsection 9(1) of the Act.

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

The OBA supports this approach. We recommend that, consistent with Ontario Regulation 129/20², the regulation require that audio-visual communication technology be used. Pursuant to that Regulation, audio-visual communication technology means any electronic method of communication in which participants are able to see, hear and communicate with one another in real time. The regulation should also acknowledge that it does not alter or limit the right of persons experiencing hearing or vision loss to make or administer oaths or declarations, and that

² O. Reg. 129/20: ORDER UNDER SUBSECTION 7.0.2 (4) OF THE ACT - SIGNATURES IN WILLS AND POWERS OF ATTORNEY

they shall be able to make oaths and declarations virtually using audio-visual communication technology.

Require the commissioner to verify the client's identity

As set out in the opening to this letter, there is already a standard that the commissioner, notary public or other person must apply in Subsection 9(3) of the Act. The OBA cautions against the development of two standards. Further, the OBA notes that the term “deponent or declarant” is more appropriate.

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

The OBA agrees with the Proposal that the document should explicitly state that it was administered virtually and that it should state where the commissioner, notary public or other person administering the oath or declaration was located. The OBA recommends that if the regulations require the document to state where the deponent or declarant was located, as indicated in the Proposal, it is important that the person administering the oath or declaration not be required to confirm the accuracy of the deponent or declarant’s location. Rather, their obligation would be limited to noting what information they are being given by the deponent or declarant (i.e. the deponent stated being in _____).

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

As set out in the opening to this letter, there is already a standard that the commissioner, notary public or other person must apply in Subsection 9(3) of the Act. The OBA cautions against the development of two standards. Moreover, it should be noted that the role of commissioner, notary public or other person exercising powers under the Act does not involve informing the deponent or declarant of the content of what they are signing. Rather, the role is limited to affirming the genuineness of the deponent or declarant’s signature. Ensuring the deponent or declarant is ‘fully informed’ connotes something closer resembling a solicitor-client relationship, a relationship not governed by the Act and one that in certain circumstances may incur additional liabilities. The OBA recommends against using this type of terminology.

Require that a record of every virtual transaction be retained

The OBA notes that there is no requirement under the Act that commissioners, notary publics or other persons retain a record of every oath or declaration that they administer in person. As such, this will be a new regulatory burden for those administering oaths and declarations under the Act. We do not believe this type of record keeping is necessary given that the actual document serves as a record of its occurrence. Further, this will be an added burden to those administering oaths and declarations under the Act and serve as a deterrence to them being done virtually. If there is to be a record retention requirement, the OBA recommends that the government consult broadly as to this requirement and specifically as to the information required, the form and the duration of the retention.

We would be happy to discuss any of the foregoing in greater detail and look forward to continuing to work with government to establish a regulatory framework for virtual commissioning.

Kindest Regards,

A handwritten signature in cursive script, appearing to read "Colin Stevenson".

Colin Stevenson
President, Ontario Bar Association