

The Latest on Virtual Commissioning

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Justice MacLeod in *Rabbat et al. v. Nadon et al.*, 2020 ONSC 2933, confirmed the legitimacy of virtual commissioning of affidavits.

In *Rabbat*, a case conference was held virtually in light of the current suspension of in-court appearances due to COVID-19, to establish a timetable leading up to a necessary motion for certification of a class action. With respect to the timeline, the court set a return date for the plaintiffs' outstanding WAGG motion and a tentative date for the motion to certify the class action.

Concerning the WAGG motion, the court ordered and directed:

Any affidavit for use on the motion may be sworn electronically or by e-mail using any reasonable method by which the person commissioning the affidavit can be satisfied of the identity of the deponent, that the deponent has read and understood the contents of the affidavit and is solemnly swearing or affirming as the case may be. The deponent and the person commissioning the affidavit need not be physically in each other's presence.

This appears to be the first written decision directly addressing electronic commissioning and the ability of an affiant to swear an affidavit remotely.

As the reality of the COVID-19 pandemic began to change the landscape of the legal field in Ontario in March 2020, the Law Society of Ontario issued a bulletin stating that until further notice, the Law Society will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public" as not requiring the lawyer or paralegal to be in the physical presence of the client. Rather, alternative means of commissioning such as commissioning via video conference will be permitted.

In a Notice to the Profession effective May 19, 2020, the Ontario Superior Court of Justice endorsed the Law Society's interpretation of the *Act* and noted that where it is not possible to administer an oath in the physical presence of the deponent, a lawyer or paralegal may commission an affidavit by video and the affidavit should state that it was commissioned by video conference.

Further, the Notice to the Profession allows where it is not possible to commission an affidavit by video conference, an unsworn affidavit may be put before the Court, but the deponent must be able to participate in the relevant telephone or videoconference hearing or swear or affirm the affidavit.

Justice McLeod in *Rabbat* has now confirmed the Court's positive treatment of electronically sworn affidavits. While he specifically addresses swearing of an affidavit for use on a motion, the same direction should be applicable to affidavits in other contexts such as for examinations for discovery or for use on cross-examination. Further, Justice MacLeod noted that an affidavit may be sworn via e-mail, an option that has not been previously presented.

Nevertheless, given the inherent risks with virtual swearing and commissioning of documents, it is a good practice to undertake the following:

- In order to satisfy him/herself of the identity of the affiant, the affiant should send to the lawyer, in advance, a scanned copy of the affiant's identification.
- The client must have a hardcopy of the affidavit/document in their hands. This can likely be achieved by sending a copy of the affidavit via e-mail for the affiant to print off.
- The lawyer and client must then use a virtual platform such as Zoom or FaceTime and the lawyer will go through the document with the client and the client will sign the hardcopy of the document while on Zoom/FaceTime with the lawyer. The lawyer should ensure that the camera is pointed at the document as the affiant executes it.
- The client will send to the lawyer a high resolution electronic copy of the signed affidavit with exhibits.
- The lawyer will confirm that the signed affidavit is the same as the one reviewed with the deponent during the meeting, and will then commission the affidavit.
- The affidavit should state that it was commissioned by videoconference.

The Law Society of Ontario provides a useful and detailed [checklist](#) to follow when engaging in virtual commissioning.