



Submissions to the Standing Committee on the Legislative Assembly

*Regarding Bill 245, An Act to amend and repeal various statutes, to
revoke various regulations
and to enact the Ontario Land Tribunal Act, 2021*

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About the Durham Community Legal Clinic

The Durham Community Legal Clinic (DCLC) provides access to justice through quality legal services, advocacy and information for people living on a low income or in poverty.

The DCLC's catchment area is all of Durham Region. The DCLC provides legal services with respect to, among other things, landlord and tenant issues and income maintenance issues.

Besides delivering its core services, the DCLC also administers and works with the Access to Justice Hub. In 2018 the DCLC, together with Durham College, the City of Oshawa and Durham Region created this service. The Hub, administered through our clinic, provides a coordinated single-entry system from which low-income and precariously employed residents of Durham can access information and services pertaining to financial literacy, benefits, and transfers, 12 streams of law and human services navigation, all delivered seamlessly by a variety of service providers. Besides us, to date Hub partners are: John Howard Society Durham; Canadian Mental Health Association Durham; Durham Mental Health Services; Region of Durham Family Support Workers; Brain Injury Association Durham; Durham Region Unemployed Help Centre; Community Development Council of Durham; Durham Welcome Centre Immigrant Services. All DCLC staff work closely with the Hub.

Bios:**Lavinia Inbar**

Lavinia Inbar is a Staff Lawyer at the Durham Community Legal Clinic. Ms. Inbar has practised primarily in the areas of administrative and criminal law and has taught law at the college and university levels. She has practised “poverty law” in the community legal clinic system and criminal defence both in private practice and as duty counsel. Ms. Inbar has represented clients on Legal Aid criminal law certificates, including Gladue panel certificates (for Indigenous defendants).

Sabrina Azraq

Sabrina Azraq is a volunteer at the Durham Community Legal Clinic. She is the National Legal Services Coordinator for the Canadian Council of Muslim Women and is also a law student.

Submissions of the Durham Community Legal Clinic

- Our comments are limited to certain parts of **Schedules 8 and 9** which pertain to the **Substitute Decisions Act, 1992** and the **Succession Law Reform Act**.
- The COVID-19 pandemic has created significant challenges for all Ontarians accessing the justice system, and this is especially true for low-income Ontarians, the disabled and the elderly. Normally, lawyers are required to do things like checking the identification of clients and witnessing their signatures on documentation. Attending at a lawyer's office in person to get these important and legally required steps done, has not been possible for many people during the pandemic.

Regarding Schedule 8:

- During these strange and difficult times, Ontarians are facing an increased need to ensure that they have proper estates planning documents in place, including powers of attorney documents. There are powers of attorney for property and there are powers of attorney for personal care. The latter are, arguably, especially important. A power of attorney for personal care, may be used where a person may be about to enter or may be in a long-term care home facility or may be hospitalized, is facing significant decisions surrounding health care consent and may be unable to make those decisions. Such people require a substitute decision-maker.

- The *Health Care Consent Act*¹ provides a hierarchical list of substitute decision-makers (SDMs), which includes family, absent any other legal mechanism. However, if no one from that list is available, the government may step in through the office of Public Guardian and Trustee (PGT). The PGT could become your substitute decision maker. A third mechanism is appointment by the court, where someone must apply to the court to become your court-appointed guardian. However, wherever possible, most people, while they still have the capacity, would prefer to choose for themselves who their SDM would be, without the involvement of a statutory list, a government body or the court – which is why a power of attorney for personal care is so important. A power of attorney for personal care, which only comes into effect when you are no longer capable of making personal care decisions by yourself,² is a document through which you, while still capable, get to appoint for yourself, who will be your substitute decision maker in the event of the loss of capacity.

- The person you name as your attorney, can make decisions about your health care, housing and many other aspects of your personal life such as choice of meals and clothing, if you become mentally incapable of making these decisions. Chances are that you want a say in who will be the person who will make decisions of such an intimate nature when you are incapable of doing so yourself.

- The creation of this very important document requires witnesses, but the eligible witnesses for a Power of Attorney for Personal Care exclude a person's spouse or partner, child,

¹¹ 1996, SO 1996, c 2, Sch A, s. 20.

² *Ibid*, at s. 10(1).

person whose property is under guardianship, or a person under the age of eighteen.³ In other words, the people with whom you are probably socially isolating and are the only people you can be with in person, are not eligible to be witnesses. With social distancing restrictions in place, finding eligible witnesses is more challenging. These amendments allow for remote witnessing, to facilitate the creation of these important legal documents, documents that are useful for everyone but that are particularly important for some of the most vulnerable members of our community, low-income people, the disabled and the elderly.

Regarding Schedule 9:

- Similar witnessing requirements exist for wills, under the *Succession Law Reform Act*.⁴ The amendments under Schedule 9, add a provision for “audio-visual communication technology” under s. 4(1), and define permitted use of this technology. Our position regarding the remote witnessing of wills would be similar to that regarding powers of attorney for personal care.
- The new remedial section of s. 21.1 will allow a court to rectify deficiencies in wills, which is going to be especially important in the post-pandemic context where we anticipate many wills will not have been properly executed. Our position on these amendments is that we feel that allowing the courts a little more flexibility in this respect, while possibly raising some challenges, will largely benefit the more vulnerable members of our community who may not

³ *Ibid.*, ss. 48(2), 10(2).

⁴ RSO 1990, c S.26, s. 4.

have been able to avail themselves of professional assistance in drafting their wills during the pandemic or simply were not able to afford professional assistance.

- The amendments to ss. 16-17, 43.1, which collectively remove the provisions that would invalidate a will on marriage, and the spousal entitlements under the *Family Law Act*,⁵ may be problematic. These provisions jointly operated to protect the marrying spouse, typically a woman in our society, given inequities and patterns of property ownership, and would have provided some entitlement on marriage despite a pre-existing will. We suspect that there will be some challenges that the courts will have to work out with respect to these statutory changes, but the challenges are not, in our opinion, insurmountable.

Conclusion

- Although remote witnessing is generally a good idea, and will benefit the vast majority of Ontarians, the reality is that many low-income Ontarians do not have access to internet or remote technology. As a result, they may effectively be prevented from accessing these legal tools, unless there is facilitation from local community legal clinics such as ours.
- Many of the amendments to Schedules 8 and 9 require the involvement of a licensee of the law society, i.e., a paralegal or lawyer, which is largely unattainable to low-income Ontarians outside of community legal clinics.

⁵ RSO 1990, c F.3.

- In sum, the DCLC support the amendments in Schedules 8 and 9 of Bill 245, in particular the amendments permitting the remote witnessing of powers of attorney and wills, but caution that in-person services must still be available and accessible for people unable to utilize remote technologies. Allowing the DCLC the flexibility to serve some of our clients remotely while preserving our ability to travel into our community to provide in-person services to those who lack remote technologies and are unable to travel to our offices, clearly enhances access to justice for some of the most vulnerable members of our community.