



SUBMISSIONS TO THE MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Regarding Recommendations by the Law Commission of Ontario on the creation of small estates

Durham Community Legal Clinic

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Introduction

1. The Durham Community Legal Clinic (“DCLC”) was founded in 1985. The vast majority of DCLC’s funding comes from Legal Aid Ontario (“LAO”). In addition to direct legal services such as housing law, social benefits, employment law, WSIB, and human rights, DCLC also is actively involved in public legal education, advocacy and law reform initiatives.
2. DCLC also provides some limited services to our clients for wills and power of attorney. The provision of these services is dependent on staffing resources and funding, and experienced some interruption in 2019 due to the funding cuts to LAO.¹ These services only resumed in 2020, when the second round of cuts to LAO was cancelled.²
3. Recently, DCLC has partnered with an online wills service, Epilogue, to streamline the creation of simple wills and powers of attorney (POA) at no cost for low-income individuals with small estates. The use of technology in this way is essential to DCLC’s strategy to proactively adopt measures consistent with the changes under Bill 161³ to s. 17(2) of the *Legal Aid Services Act*,⁴ specifically to promote access to justice,⁵ provide

¹ Jeff Gray, “Lawyers condemn Doug Ford government cuts to legal-aid funding,” *The Globe and Mail*, April 12, 2019, available at: <<https://www.theglobeandmail.com/canada/article-lawyers-condemn-doug-ford-government-cuts-to-legal-aid-funding/>>.

² CBC News, “Ontario backs down on planned future cuts to legal aid, but this year's cut remains,” Dec. 9, 2019, available at: <<https://www.cbc.ca/news/canada/toronto/legal-aid-doug-ford-ontario-budget-1.5389579>>.

³ *Smarter and Stronger Justice Act, 2020*, receiving Royal Assent on July 8, 2020.

⁴ 1998, SO 1998, c 26 [the “Legal Aid Act”].

⁵ *Ibid*, s. 1.



cost-effective and high-quality legal services to low-income individuals,⁶ and implement innovative provision of legal services.⁷

4. These initiatives are also consistent with LAO's efforts to respond to these changes to the Legal Aid Act,⁸ through its modernization framework that also includes principles such as providing services in a client-focused manner, and being responsive to the needs of low-income individuals and marginalized and disadvantaged communities.⁹
5. DCLC is uniquely positioned to weigh in on and support the Law Commission of Ontario's (LCO) Final Report on "Simplified Procedures for Small Estates,"¹⁰ as our low-income clients exclusively have small estates, and would benefit from the creation of a small estates process for estates valued up to \$50,000.
6. The unnecessary regulatory and legal barriers in handling small estates can pose a significant challenge to low-income clients. The impact on the financial and justice systems in handling these types of estates that do not have a will also utilizes valuable resources, grossly disproportionate to the nature of the issues before the courts.

⁶ *Ibid*, ss. 4(a), 12(1), 92

⁷ *Ibid*, s. 1(b)

⁸ Bernise Carolino, "Legal Aid Ontario to launch modernized framework under new Legal Aid Services Act," Law Times, July 29, 2020, available at: <<https://www.lawtimesnews.com/practice-areas/criminal/legal-aid-ontario-to-launch-modernized-framework-under-new-legal-aid-services-act/331941>>.

⁹ Legal Aid Ontario, "Clinic Modernization: New framework for the delivery of legal aid services by community legal clinics, Phase 1 Consultation Paper," August 2020, at 4, available at: <<https://www.legalaid.on.ca/wp-content/uploads/LAO-modernization-Clinic-consultation-paper-Phase-1-2020-08-EN.pdf>>.

¹⁰ Law Commission of Ontario, "Simplified Procedures for Small Estates," Final Report, August 2015 [the "LCO Report"], available at: <<https://www.lco-cdo.org/wp-content/uploads/2019/09/Small-Estates-Final-Report-EN.pdf>>.



7. Consequently, the LCO Report describes intestate small estates as “the most immediately urgent problem identified in this project.”¹¹ Addressing and adopting these recommendations 5 years after the report is greatly welcomed, and encouraged by DCLC as an important law reform measure that could provide immense benefits for low-income populations.

A2J Implications for Small Estates

8. DCLC supports the LCO’s recommendation that the value limit of a small estate be capped at \$50,000. The LCO Report sets out four primary reasons for doing so and DCLC agrees with the justifications as outlined below:¹²
9. Legal fees for probate range from \$1,000-\$5,000. A cap of \$50,000 ought to cover virtually all estates, where cost may become prohibitive to obtaining probate.
10. The \$50, 000 limit ought to sufficiently prevent large estates from utilizing estate planning tactics to fit within the small estates procedure as the costs of doing so outweigh any savings. Motor vehicles assets are a defining feature of small estates. A \$50,000 limit ensures that these assets fall within the small estates process while also excluding practically all real estate. Real estate transfers involve complexities that often require the services of a lawyer.

¹¹ LCO Report, *ibid* at 31

¹² *Ibid* at 23-24



11. A \$50,000 limit is similar to other value limits in Ontario law such as the *Estate Administration Tax Act*,¹³ whereby the tax owing on an estate increases from 0.5% to 1.5% when the estate is valued at more than \$50,000.¹⁴ A \$50,000 limit also approximates the Small Claims Court maximum of \$35,000,¹⁵ which was increased starting Jan. 1, 2020 from \$25,000 previously.¹⁶
12. Although DCLC does not deal directly with probate matters, all of our clients are low-income and the concerns discussed in the LCO Report are common issues raised by the individuals we serve.
13. The greatest concern for low-income populations is that the estate administration expenses typically come out of the estate, but delays related to probate and obtaining a Certificate of Appointment (COA) often means the estate representative is paying now (out of his/her pocket) in order to be reimbursed out of the estate later. Many low-income individuals cannot afford to front estate administration expenses.¹⁷

¹³ 1998, SO 1998, c 34, Sch.

¹⁴ *Ibid*, s. 2(2)(b).

¹⁵ *Small Claims Court Jurisdiction*, O Reg 626/00, s. 1(1), *Courts of Justice Act*, RSO 1990, c C.43.

¹⁶ Ministry of the Attorney General, "Ontario Making It Faster, Easier, More Affordable to Settle Small Claims," Government of Ontario, Oct. 23, 2019, available at: <

¹⁷ Christine Hakim, "Balancing Accessibility and Procedural Protection in a Small Estates Probate Procedure in Ontario," Law Commission of Ontario, January 2015, at 25, available at: <<https://www.lco-cdo.org/wp-content/uploads/2015/07/small-estates-commissioned-paper-hakim.pdf>>.



14. Probate applications require a significant amount of time, and may take away from paid employment. Steps involved in the probate application process include taking inventory of the deceased's home, finding beneficiaries and giving them the notice of application for appointment as estate trustee, organizing paperwork and asset information or obtaining disclosure if no information is available.¹⁸ Low-income individuals typically cannot afford to take time off from paid employment to properly attend to all of these steps for a small estate.

15. Vulnerable populations (disabled individuals, visible minorities, low-income individuals, etc.) confront additional barriers to accessing the court system generally, and are also more likely to perceive that barriers and complexities exist before accessing the justice system.¹⁹ This problem is exacerbated in situations where courtrooms/court registry offices do not mirror ethnic, gender, and racial diversity found in communities.²⁰ A key part of increasing accessibility is surmounting the perception of inaccessibility.²¹

16. Accessibility is not limited to legal expenses and complexity, but also involves a physical component, which can play a large role in the realm of probate applications. Many of these

¹⁸ *Ibid* at 26.

¹⁹ Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005), at 49.

²⁰ Constance Backhouse, "What Is Access to Justice?" in *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 121-122.

²¹ *Ibid*.



communities do not have adequate access to a courthouse, court registries, or various legal and administrative organizations that can assist with probate processes.²² These issues are worsened in rural Ontario, as there is no system for electronic filing of probate forms. Physical accessibility issues are aggravated for individuals with disabilities, including those who have auditory or visual impairments.²³ Further, it is even more difficult for those with disabilities to travel courthouses or court registry offices.

17. Individuals in rural/remote communities sometimes cannot access a computer with access to the Internet, as libraries may be too distant to access with ease.²⁴ The issue of accessibility to technology has been at the forefront of public discourse with regards to emergency support during the pandemic. For example, many social assistance recipients in Ontario were unaware of the temporary emergency benefit made available to them because the information was largely published online.²⁵

18. Complicating these issues is the fact that LAO does not provide funding for legal advice/representation for estate matters such as probate through its certificate program. Moreover, most areas of estate law, aside from the creation of basic wills, is beyond the scope of practice for the typical Community Legal Clinic (CLC). As such, estate

²² Macdonald, *supra* note 19 at 27.

²³ *Ibid.*

²⁴ Chief Judge Heino Lilles, Territorial Court of the Yukon, “Some Problems in the Administration of Justice in Remote and Isolated Communities”, presentation to the C.I.A.J. Conference, October 11-14, 1989, at 6.

²⁵ Kitching, Heather, “Man Who Missed Out on COVID Benefits Warns Others to Claim Money Before It’s Too Late,” CBC News, 21 July 2020, available at: <<https://www.cbc.ca/news/canada/kitchener-waterloo/social-assistance-covid-19-odsp-ontario-works-1.5656020>>



representatives that need legal assistance with administering a small estate must seek private representation. This imposes another bar for low-income estate representatives handling small estates.

Comments on LCO Recommendations

19. DCLC agrees with all of the LCO’s recommendations, but wishes to stress the importance of specific suggestions set out below in light of the aforementioned access to justice issues. Several brief comments are offered to emphasize the importance of some of the recommendations found in the LCO Report.

Bond or Security for Intestate Matters

20. The LCO Report recommends in Recommendation 6,²⁶

Security not be required as part of an application for a Small Estates Certificate.

21. Although DCLC provides some free services in providing wills to low-income clients, many of these individuals fail to see the utility or are interested in this process given the value of their estate. Once these individuals die without a will, the *Succession Law Reform Act*²⁷ determines how the estate is distributed. For small estates, this typically means the

²⁶ LCO Report, *supra* note 10 at 109.

²⁷ RSO 1990, c S.26, Part II [the “SLRA”].



entire estate is inherited by a low-income spouse or low-income dependent, though common law spouses are excluded.²⁸

22. To ensure the proper administration of an intestate estate, the *Estates Act*²⁹ requires a bond, which is set at double the value of the estate.³⁰ Justice Brown explains the purpose of this bond in *Henderson (Re)*³¹ as follows,

[10] These provisions make clear that the main purpose of an administration bond is to ensure that an estate trustee pays the debts of the estate and distributes the property of the estate to those who are entitled to it. It follows, therefore, that an applicant for a certificate of appointment who seeks an order dispensing with the posting of an administration bond must satisfy the court, by way of evidence, that the protection afforded by a bond to beneficiaries and creditors is not required or will be met in some other way.

For these low-income beneficiaries, a bond of up to \$100,000 is impractical and unfeasible.

23. Although there is a procedure for dispensing of the bond under s. 36 of the *Estates Act* and Rule 74.05(1)(d) of the *Rules of Civil Procedure*,³² many low-income beneficiaries dealing with an estate of under \$50,000 find these processes complex, burdensome, and confusing, and they are unable to obtain legal assistance to sort them out.

24. There is no precedent or standard form for bringing these motions,³³ which therefore creates an unnecessary bar for low-income individuals. These are the members of the public who could benefit the most from this type of intergenerational transfer of wealth,

²⁸ *Estates Act*, s. 29; *SLRA*, ss. 1(1), 44-49.

²⁹ RSO 1990, c E.21.

³⁰ *Ibid*, s. 37.

³¹ 2008 CanLII 69136 (ON SC).

³² RRO 1990, Reg 194, *Courts of Justice Act*, RSO 1990, c C.43.

³³ LCO Report, *supra* note 10 at 35.



but are effectively deprived of it, placing their circumstances in poverty in an even more dire situation.

Online Filing System

25. The LCO Report makes reference to the potential digitization of the estates system in

Recommendation 9,

- a) The Ministry of the Attorney General leverage the institutional expertise gained in designing its online small claims court filing process for the purpose of designing a similar online filing system for a small estates procedure, with the goal of reducing the application costs of probate for small estates and increasing the efficiency of the system overall.
- b) A paper process be retained for applicants who cannot or do not access online services.

26. Ontario introduced a pilot for online filing of civil claims in 2017,³⁷ and this was followed by the expansion of online filing in several other aspects of the justice system.

27. The COVID-19 pandemic has provided further opportunity in Ontario to adopt several new and innovative digital measures. This includes greater use of videoconferencing technology,³⁸ the adoption of CaseLines in the Ontario Superior Court of Justice,³⁹ and online access to civil and criminal court information.⁴⁰

³⁷ Amanda Jerome, "Ontario introduces pilot project for online filing of civil claims," *The Lawyer's Daily*, May 1, 2017, available at: <<https://www.thelawyersdaily.ca/articles/3048>>.

³⁸ Betsy Powell and Alyshah Hasham, "Inside Ontario's first major criminal trial by Zoom," *Toronto Star*, July 19, 2020, available at: <<https://www.thestar.com/news/gta/2020/07/19/inside-ontarios-first-major-criminal-trial-by-zoom.html>>.

³⁹ Bernise Carolino, "Superior Court to pilot CaseLines for select civil motions and pre-trial conferences," *Law Times*, Aug. 5, 2020, available at: <<https://www.lawtimesnews.com/practice-areas/litigation/superior-court-to-pilot-caselines-for-select-civil-motions-and-pre-trial-conferences/332119>>.

⁴⁰ Minister of the Attorney General, "Search for court cases online," *Government of Ontario*, Aug. 17, 2020, available at: <<https://www.ontario.ca/page/search-court-cases-online>>.



28. The Ministry of the Attorney General has gained significantly more institutional expertise with online filing processes since the LCO Report in 2015, and should easily be able to deploy an online filing system for small estates.

29. An online filing system will be of immense benefit for those with difficulties travelling to courts/court registry offices, such as those with disabilities or individuals who live in rural/remote communities. By retaining the paper process, individuals who do not have ease of access to the internet are not confronted with additional barriers.

Community Based Delivery of Information

30. The small estates contemplated in the LCO Report are largely those of low-income individuals, all of whom would be eligible for services in their local CLC. The LCO Report states in Recommendation 10,⁴¹

- a) The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, publish an authoritative, plain-language guide addressing:
 - i. the purpose of the probate system, the responsibilities of estate representatives and the relative costs and benefits of obtaining probate and
 - ii. how to navigate the small estates process.
- b) This guide be made widely available online, in court offices, funeral homes and other public institutions.
- c) In addition to English and French, this guide be published in other languages reflecting the linguistic diversity of Ontarians.

31. The legal literacy and linguistic diversity of Ontarians varies considerably from community to community. However, CLCs are uniquely positioned to know and understand these local

⁴¹ *Ibid* at 109-110.



nuances, and typically have existing relationships with testators or beneficiaries of small estates, which is why they are explicitly referenced in Recommendation 13.

32. In this context, DCLC proposes that CLCs be clearly indicated in any such guide as an “other appropriate service organizations, and that they be fully engaged in the development, delivery, and dissemination of information in any such guide. The call for more simplified language in Recommendation 11 would assist in this even further.

33. The LCO Report also calls for partnerships for a telephone line and public awareness campaign in Recommendations 12 and 14, respectively, and CLCs can play crucial roles in ensuring their success.

Conclusions

34. Canada is currently anticipating the greatest intergenerational transfer of wealth in our entire history. However, this transfer is not occurring in equitable terms, with much of the wealth concentration found among higher-income households.⁴⁷

35. Low-income populations, who are in the greatest need of this transfer of wealth, are often excluded from this process because they are intestate, cannot afford representation or the bond, and find the legal system confusing and disorienting.

⁴⁷ Pete Evans, “Baby boomers under 75 set to inherit \$750B in next decade, CIBC says,” CBC News, June 6, 2016, available at: <<https://www.cbc.ca/news/business/baby-boomer-inheritance-1.3617891>>.



36. Low-income households spend a higher share of their budgets on basic needs.⁴⁸ This not only has the potential to ameliorate some of the worst effects of poverty, but also ensures that this spending occurs locally in their communities.
37. The creation of special rules for estates under \$50,000 would reduce the administrative burden on courts and financial institutions, and allow for small sums of money to flow to low-income beneficiaries, who need it most.
38. The LCO Report, calling for the creation of these rules for small estates, should be adopted by the Ministry of the Attorney General. CLCs such as DCLC can play an essential role in the implementation of the recommendations around these small estates, and should continue to be engaged.

⁴⁸ Diane Whitmore Schanzenbach et al., “Where Does All the Money Go: Shifts in Household Spending Over the Past 30 Years,” The Hamilton Project, August 2016, available at: <https://www.brookings.edu/wp-content/uploads/2016/08/where_does_all_the_money_go.pdf>.