Isaiah Smith (they/them)

50 Laurel St., Waterloo, Ontario, N2J 2H2 | 647-447-6843 | smithnycisaiah@gmail.com (preferred)

11/18/2022

WRLA Members
85 Frederick St, Kitchener, ON N2H 0A7
519-742-4102

To Members of the Waterloo Region Law Association,

This correspondence regards my search for an Articling Position for the 2023/2024 articling term in the Waterloo Region.

My name is Isaiah Smith. I am a non-binary, queer identifying person, and student at Osgoode Hall Law School completing their 3rd and final year of a professional degree in law (JD). In late 2020, as the COVID-19 pandemic began to increase in severity, I moved to the Waterloo Region to assist in my single, disabled father's home care while completing my studies in law remotely. Though this care arrangement is no longer in place, it ultimately precluded my involvement in the Toronto 2023 Articling Recruit. Regardless, the Waterloo Region has become my home, and I would endlessly cherish an opportunity to also call it the home of my clients and my legal career overall.

Having experienced homelessness due to discrimination based familial estrangement in my youth and early adulthood, I possess a deep-rooted passion for advocacy, both for myself and others. Same, an exceptional capacity for competent, independent action; personal reflection and growth; and cooperation and community improvement. Accordingly, I am confident the service mandate of most, if not all WRLA members/associated organizations falls squarely within not just my demonstrated area of legal expertise, but human experience as well.

Beyond the above, since the start of my legal career, I have completed over 680 *pro bono* service hours while working with various public-interest, not-for-profit organizations, leaving me with a diverse array of skills and abilities relevant to a myriad of different legal service provision contexts. For example, my two most recent and relevant pieces of legal work experience were at Parkdale Community Legal Services (PCLS) as a Student Caseworker, and the Canadian Centre for Housing Rights (CCHR) as a Student Legal Researcher.

In both the above-mentioned positions, I acted as an arm of a coordinated team of legal service providers to advance a singular public-interest focused organizational mandate. In the case of the CCHR, this was through researching, analyzing, and drafting legal opinions, research memorandums, public legal education materials, and other written materials to enhance the CCHR's capacity to provide unbridled/summary legal services to tenants throughout Canada experiencing threats to housing security, safety, or general adequacy/suitability for life. Similarly, at PCLS, this was achieved via discharging all the latter duties, in addition to acting as a full-service legal representative for a rotating docket of 15 some client files (some multi-party), in case management meetings with opposing parties/counsel, negotiations, and attending both mediations and litigation before Ontario's Landlord and Tenant Board (LTB) related to LTB N-form eviction and/or T-form tenant rights applications.

All said, the skills I developed in research, analytical thinking, problem-solving, interpersonal communication, organization, and management while inhabiting these roles and existing as a once homeless, non-binary person I believe have left me beyond equipped to be a WRLA member's/associated organization's future Articling Student.

Even if you cannot support an Articling Student however, please do not hesitate to reach out. As a first-generation post-secondary and law student, I am always interested in expanding my professional support and mentorship network. I am sure you would be an indispensable element of it, and I look forward to hearing from you.

Your time and consideration are valued greatly,

Isaiah Smith

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Education

Juris Doctor (J.D.) Candidate Aug. 2020 – Apr. 2023
Osgoode Hall Law School, Toronto, Ontario

Honours Bachelor of Arts (B.A.) Sept. 2015 – Jun. 2020
York University, Toronto, Ontario

- Major: Criminology, Minor: Psychology

Work Experience (Legal)

Student Caseworker – Housing/Tenant Rights Sept. 2021 – April 2022
Parkdale Community Legal Services (PCLS), Toronto, Ontario

- Chosen to be part of a select cohort of 5 Osgoode Hall law students (through Osgoode's Intensive Program in Poverty Law) for full-time, term-long placement in PCLS's Housing/Tenant Rights Division, following a comprehensive and competitive multi-stage interview/screening process

- Under supervision of clinic staff lawyers, managed a variable docket of 10-15 PCLS Housing/Tenant Rights Division client case files (files included both individual and group claim types)

- Contributed to front-line, front-facing clinic work by conducting initial client intake interviews on a weekly basis

- Held hands-on responsibility over surveying and developing the factual contexts underlying each assigned client file, as well as relevant legal arguments while overseeing client intakes and consulting with clients during case management meetings

- Represented, advocated for, and as much as possible, realized client interests and wider PCLS policy initiatives before Landlord and Tenant Board (LTB) Adjudicators in the context of LTB N-form eviction and/or T-form tenant rights applications, requiring an extensive, flexible, and expanding knowledge of Ontario's *Residential Tenancies Act, 2006*, *Human Rights Code*, as well as a capacity to accurately research and apply relevant municipal/city property standard and use by-laws

- Utilized alternative dispute resolution methods/forums such as pre-hearing negotiations with opposing counsel/litigants and LTB facilitated/private mediation, to increase PCLS's case processing efficiency and access to justice more generally for assigned clients

- Drafted a diverse array of letters and other written materials for clients and clinic staff lawyers, including demand and legal opinion letters, legal research memorandum, affidavits for LTB hearings, practice questions for cross-examination, in addition to a wide range of tenant rights focused public legal education materials

- Acted as first response, on-call contact from PCLS for assigned clients on any issues or changes related to their case that may have arisen during their retainer period

- Engaged daily with various other practices of community-based lawyering including public legal education, general community organizing and tenant union development, cross-organizational coalition building, and media strategizing

Student Legal Researcher - Pro Bono Students Canada (PBSC) Volunteer Sept. 2020 – April 2021
Canadian Centre for Housing Rights (CCHR), Toronto, Ontario

- Drafted a detailed, comparative legal research memo for supervising lawyers containing information on:

  (1) Statutory rights enforcement mechanisms available to renters in Saskatchewan relative to in Ontario,

  (2) the rules and procedures governing landlord-tenant disputes heard at Saskatchewan's Office of Residential Tenancies (ORT),

  (3) the effectiveness of the ORT application and hearing process from the perspective of Saskatchewan tenants, and;

  (4) common barriers experienced by renters in Saskatchewan to accessing legal aid and the availability of education materials on tenant rights in Saskatchewan and their sources

- Produced a quick-reference document for staff lawyers containing a collection of substantive tenant's rights protections and procedures provided by Saskatchewan's *The Residential Tenancies Act, 2006,* enhancing CERA's capacity to provide unbridled/summary legal services to tenants experiencing issues accessing safe and well-maintained housing, or otherwise protecting their security of tenure from outside of Ontario

Awards and Distinctions

Parkdale Community Legal Services 25th Anniversary Student Bursary Sept. 2022
- Conferred to students that provided legal services to Toronto Parkdale neighbourhood community members on a full-time basis during a previous academic term

York University Continuing Student Scholarship Aug. 2019 – 2021
- Awarded to students who have achieved outstanding academic results in past academic terms

Candidate for Joshua Yasay Award of Excellence in Criminology and Community Service June 2020
- Nomination extended to 4th year criminology students at York University who have attained high levels of academic success and positively impacted their community

Faculty of Liberal Arts and Professional Studies Sessional Academic Achievement List Apr. 2016 – Jun. 2020
- Recognition for securing a final sessional grade point average of 8.0 (A) or higher

Work Experience (General)

Research Assistant Jun. 2018 – Jun. 2020
Trauma & Attachment Research Lab and Clinical Practice, York University, Toronto, Ontario

- Transcribed and thematically coded interviews with therapy program participants using a peer reviewed psychological assessment measure
- Received professional clinical communications training and orchestrated intake/outtake interviews with therapy program participants
- Constructed informational worksheets on post-traumatic stress disorder coping strategies for therapy program participants
- Converted labs superseded pre/post therapy questionnaire battery to a digitized format using REDcap database design software

Administrative Assistant Aug. 2017 – Aug. 2019
York University Psychology Resource Centre (PRC), Toronto, Ontario

- Co-lead work-study labour-status and wage negotiation initiative during summer 2019 alongside 2 peers. Advocated for co-workers verbally and in writing to psychology department management, and as a result achieved a $5.85 hourly wage increase and York University Staff Association (YUSA) unit 2 union membership for all PRC student employees
- Informed MAc/PHDc level students and psychology department faculty on the psychometric properties of over 1000 different psychological assessment materials available at the PRC
- Screened PRC users for the requisite credentials to borrow/purchase psychological assessment materials
- Drafted and edited online resource catalogue entries for the PRC's official university website. Reviewed entries individually and in a peer group to ensure appropriate citations, relevant psychometric data, and publisher provided guidelines on requisite material use qualifications were present before publication
- Reorganized the PRC's archive of historical psychological testing materials. Investigated and compiled a document detailing the psychometric properties of archived historical testing materials, and constructed a database of said materials for internal office use and upload to the PRC's official university website
- Trained and acted as peer supervisor for 4 co-workers

Exam Monitor Nov. 2017 – Apr. 2018
Osgoode Hall Law School, Toronto, Ontario

- Assembled, distributed, and collected exam packages in accordance with a selection of binding procedural guidelines provided by the Osgoode Hall Law School Office of Admissions & Student Services
- Lead in-exam administrative announcement making and directed communications related to relevant testing procedures and requirements of student conduct
- During winter 2018 exam period, recruited a peer in response to a need voiced by supervisor for additional Exam Monitor support

Vice-President / Deputy Director General Apr. 2016 – Apr. 2017
Amnesty International, York University chapter, Toronto, Ontario

- Co-managed the planning and orchestration of 20 diverse human rights activist initiatives; assigned members tasks and oversaw their completion, procured tabling permits and/or reserved event space, and coordinated communications between involved organizations.
- Relayed vital legislative, contextual, and historical information regarding ongoing global and domestic human rights crisis to interested individuals during general meetings, tabling sessions, and organization events
- On a weekly basis, directed meetings with organization executives and general members to discuss event planning, resource management, inter-organizational protest coalition development, and issues and/or concerns
- On a weekly basis, held open office sessions to facilitate access for York University students and Toronto human rights political activist community members to information detailing organization events, activist initiatives, and volunteer opportunities

Practice Area Preferences

Property

- Real and Personal
- Tenant Right's Enforcement/Advocacy
- Wills, Estates, and Probate
- Trusts
- Sale/Transfer
- Standards/Use/Assessment
- Approval/Registration
- Leasing/Licensing
- Insurance
- Statutory/Common Law Rights Enforcement
- By-law Drafting, Review, and Enforcement

Public, Constitutional, and Human Rights

- *Charter* s. 2, 7, and 15 Claims
- *Constitution* s. 35 Aboriginal Rights/Title Claims/Treaty Rights
- *Human Rights Act/Code* Violations
- Right to Housing/Housing Adequacy Advocacy
- Housing Discrimination
- Criminal Justice Defense
- Provincial Regulatory Offenses
- Youth Justice
- Alcohol, Gaming, and Legal Cannabis Regulation

Family

- Marriage and Conjugal/Common Law Relationships
- Separation/Annulment/Divorce
- Mediation
- Parentage/Preconception Agreements, Assisted Reproduction/Surrogacy, and Polyamory
- Adoption
- Child Welfare/Support/Custody
- Division of/Matrimonial Property
- Equalization

Health

- Policy Review and Development
- Agreements/Claims
- Privacy/Confidentiality/Data Management

Geographical Preferences

Waterloo, Guelph, and Hamilton Regions, Southeast Ontario- <u>willing/able to relocate</u>

- Waterloo
- Kitchener
- Cambridge
- Guelph
- Brantford
- London
- Hamilton
- Owen Sound

Personal Factors/Additional Information

- Non-binary, queer identifying person from a rural background possessing direct experience with and exposure to homelessness, housing discrimination, familial estrangement, non-traditional family arrangements, and other gendered phenomenon that intersect with property, family, and health law more generally

- Enjoys backpacking, back country camping, overlanding, whittling, wood burning, playing guitar, and spending time with their two cats and fiancée

Canadian Centre for Housing Rights

192 Spadina Ave Suite 427
Toronto, ON, Canada M5T 2C2
housingrightscanada.com
T: 1-800-263-1139

October 4, 2022

To Whom It May Concern:

I'm writing in support of Isaiah Smith's application for a position with your organization. Isaiah was a pro bono law student at the Canadian Centre for Housing Rights (which at that time was called the Centre for Equality Rights in Accommodation) from September 2020 – April 2021, and during that time made meaningful contributions to CCHR's research**,** policy, and law reform work. CCHR is a non-profit charity that defends housing and human rights by educating individuals and communities, advancing rights-based housing laws and policies, and by providing legal information and services to hundreds of Ontarians each year.

During their time at CCHR, Isaiah undertook legal research into statutory rights enforcement mechanisms available to renters in various provinces across the country, reviewed rules and procedures governing housing disputes, and examined barriers tenants face when trying to access legal aid. As demonstrated through their subsequent and continued work on housing and tenancy issues, Isaiah is dedicated to working on policy issues related to human rights, property law, and the tenant and housing rights context in particular.

Isaiah demonstrated excellent interpersonal and communication skills, and worked well both independently and cooperatively in a team setting. CERA's legal work is multi-dimensional and includes policy advocacy at the provincial, municipal and federal levels in a very fast-moving and issues driven environment. In all of their work with CCHR Isaiah was responsive to requests and deadlines and always happy to help with assignments.

If you have any questions or would like to discuss this further, I can be reached at ahodgins@housingrightscanada.com.

Sincerely,

Annie Hodgins
Executive Director

WRITING SAMPLE

"The *SLRA* Shift to Substantial Compliance in Ontario: Context and Consequences"

Author: Isaiah Smith

Completed: April 19, 2022 Written for: LW/LAW2050 P - Estates

Introduction

Socio-Political Background

Against the backdrop of the waning, yet still extant COVID-19 pandemic; a period of multi-dimensional insecurity including wide-spread economic instability and semi-controllable threats to personal health and wellbeing; it would be trite to say that death has been thrust to the forefront of Canada's cultural consciousness. Bombarding Canadians for the last two, going on three years, have been images of at-capacity healthcare facilities, rushing ambulances, critically ill persons, and grieving families; the relative perceived threat of such bolstered by often conflicting and confusing warnings from public health authorities and politicians alike respecting emergent risks to economic and physical wellbeing, as well as the general state of isolation lived in by most Canadians throughout the pandemic's height as an effect of widespread restrictions on movement and gathering.[1] In this unique socio-historical context, the otherwise inherently normal and expected, albeit distant, notion of death has been stained with unpredictability, urgency, and fear. And as a result, a growing body of people turn to estate state planning significantly earlier on in their lives than was previously usual as a means of recapturing some sense of control and expectancy around death.[2] Crucially, the aforementioned occurs alongside all those who were unexpectedly forced to navigate the planning, or even actual execution/disbursement of their or a loved one's estate due to COVID-19 related critical illness

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[1] See *e.g.* the following study focused upon examining the COVID-19 misinformation "infodemic" that emerged alongside the pandemic itself: Shu-Feng Tsao et al, "What social media told us in the time of COVID-19: a scoping review" (2021) 3:3 Lancet Digital Health E175-194. Online (open access): <https://www.thelancet.com/journals/landig/article/PIIS2589-7500(20)30315-0/fulltext>.

[2] See *e.g.* the following statistics compiled by "Legal Zoom", a growing, wholly online US-based legal services provider. 32% of adults under 35 said they wrote a will because of the COVID-19 pandemic; More Americans were searching "online will" on Google in April 2020 than at any other time since 2011; 54% of American adults would encourage a loved one with COVID-19 to create a will or estate plan. Legal Zoom staff, "Estate Planning Statistics" (12 October 21), online: <https://www.legalzoom.com/articles/estate-planning-statistics>.

(in which case a formal will may not even be available), imparting significant pressure on Canadian courts to both correctly and fairly apply relevant core pieces of succession legislation and jurisprudence, and provincial governments in tandem, to review and retool said legislation to meet changing needs and address novel, emergent issues.

Bill 245, the *AAJA*, and Modernizing Ontario Succession Legislation

Having briefly surveyed the relevant socio-political background, the main focus of this paper will be addressed. Almost exactly a year ago in April 2021, Bill 245, existing now under the moniker the *Accelerating Access to Justice Act, 2021* (the "*AAJA*"), received Royal Assent.[3] As presented by the office of the Attorney General of Ontario, the *AAJA* was drafted for the general purpose of modernizing outdated legal processes, procedures, and standards, and to introduce changes which would better reflect the realities of life in Ontario today and the way that most residents thereof organize their affairs.[4] Of said modernizations and changes, those made to the *Succession Law Reform Act* (the "SLRA"); importantly, the primary, controlling legislative mechanism relevant to will execution and estate planning/organization in Ontario; are arguably some of the most sweeping and grand.[5] To provide a snapshot, s. 4 of the *SLRA* delineates a requirement that all estate planning documents must be signed by two witnesses, in the physical presence of the testator/grantor and one another, and for all three individuals to sign the same original copy of the document.[6] Of course, the COVID-19 related restrictions on movement and gathering discussed above presented novel barriers to this physical presence requirement; particularly for individuals compiling estate planning documents across provincial

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[3] Ontario, Office of the Attorney General, "Bill 245, Accelerating Access to Justice Act, 2021" (explanatory note), by Doug Downey (Attorney General), online: <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-245>.
[4] *Ibid.*
[5] RSO 1990, c S26.
[6] *Ibid*.

lines. Accordingly, the newly amended s. 4 of the *SLRA* allows for the remote execution of wills and powers of attorney through the use of audiovisual (not merely audio or visual alone) communication technology.[7]

Modification to the Strict Compliance Standard for Valid Wills

Despite the clearly instrumental prospective effect the latter amendment will have on estate planning and execution in Ontario however, there is another amendment wrapped up within the *AAJA* that is arguably even moreso instrumental. The *AAJA* fundamentally modifies the provisions of the *SLRA* respecting the legal standard for valid will construction at base, ultimately, and in effect, transforming such into a *def facto* substantial compliance standard. Indeed, the new section 21.1 of the SLRA grants courts in Ontario the authority to declare a will to be valid notwithstanding non-compliance with all statutory requirements, opening the flood-gates legal issues and discourse surrounding where this new discretionary power bestowed upon adjudicators begins and ends, and within what contexts it should most appropriately be exercised.[8] At its root, this change has brought new life to debate surrounding legal certainty in will execution and estate planning in Ontario.

With the above in mind, it need be noted that said briefly discussed change to Ontario's previous strict compliance requirement for valid will construction is not necessarily a novel concept within Canadian law. For example, in 2014, the *Wills, Estates, and Succession Act* (the "*WESA*") came into force and effect in B.C, and with it, a remedial provision which grants the courts broad authority to "cure" a will that does not satisfy the signing and witnessing requirements prescribed by the act.[9] Accordingly, this paper will delve into the scholarship and

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[7] *Ibid*; see also *Supra* note 3.
[8] *Ibid*.
[9] SBC 2009, c 13, s 58.

jurisprudence surrounding various Canadian jurisdiction's shifts to less strict statutory standards for the construction of valid wills. Through which, the possible remedial, or otherwise, damaging effects of said legislative changes in Ontario may be distilled.

Strict and Substantial Compliance: Widely Divergent Standards

Case Study: Substantial Compliance in B.C.

Within the following section, *Hubschi Estate (Re)*; a recent case taken up by the B.C Supreme Court (the "BCSC"); will be discussed to highlight how a substantial compliance standard for the construction of valid wills differs from the standard of strict compliance upheld by Ontario courts prior to the aforementioned changes to the *SLRA* made by the *AAJA*.[10] This discussion will also serve the secondary purpose of laying the groundwork for determination of the ultimate potential remedial, or otherwise damaging effects of said legislative changes.

To briefly provide the factual background of *Hubschi* before discussing the reasons and final decision of the BCSC, the deceased in said case, Mr. Hubschi, passed without leaving a complete, signed, formal will.[11] His family had looked through all his personal items to no avail, finding only notes and other documents indicating an interest in estate planning generally.[12] However, when Mr. Hubushi's computer was unlocked, a document entitled "Budget 2017" was discovered. This document contained the following line:

> "Get a will made out at some point. A 5 – way assets split for remaining brother and sisters. Greg, and at or Trevor as executor."[13]

Said document was ultimately taken before the BCSC by Mr. Hubschi's family to determine if it could be cured of its failure to adhere to the statutory formalities for Wills laid out in the

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[10] [2019] BCJ No 2278, 2019 BCSC 2040, 2019 CarswellBC 3516 [*Hubschi*].
[11] *Ibid* at paras 1-2; 14-15.
[12] *Ibid.*
[13] *Ibid*.

WESA.[14] As mentioned briefly in this paper's introductory sections, s. 58 of B.C's *WESA* allows a court to validate a "record, document or writing" otherwise non-compliant with the prescribed formal requirements as though it were a Will, provided that it represents the testamentary intentions of the deceased.[15]

Moving now to the reasons and final decision of the court, the BCSC in said case initially drew upon the relevant body of jurisprudence speaking of the standard of evidence required for the curing of otherwise formally deficient wills, within the meaning and purposive ambit of s. 58 of the *WESA* and said act generally.[16] This standard asks if, on a balance of probabilities, there is evidence before the court that the written document in question embodies the testamentary intentions of the deceased.[17] In making such a determination, the BCSC considered a comprehensive body of evidence including:

1. Available details establishing Mr. Hubschi's integral history and ongoing close relationship with his adoptive family (particularly, the remaining brother and sisters mentioned in the document that was discovered).[18] Here, the BCSC considered that Mr. Hubschi was surrendered to the Children's Aid Society as a child and subsequently adopted. Moreover, he never married or had children of his own, nor maintained any form of relationship with his birth mother or extended natural family.

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[14] *Ibid*.
[15] *Supra* note 9.
[16] *Supra* note 11 at paras 23-26; 29-31.
[17] *Ibid*.
[18] See *e.g Ibid* at para 50.

2. Evidence establishing that Mr. Hubuschi's adoptive siblings engaged in comprehensive, ongoing care for him following a leg surgery prior to his death which left him completely bedridden.[19]
3. Accounts of Mr. Hubuschi's health state around the time the document was last opened and edited.[20] Available evidence of this sort highlighted that Mr. Hubushi's health state would have been seriously deteriorating at the time he last opened and edited this document. In fact, he had last opened it on the very day he died.
4. That Mr. Hubschi had been included with his adoptive brothers and sisters, in the division of his adoptive mother's estate.[21]

Ultimately, it was found by the BCSC that in light of all the above evidence, Mr. Hubshi's testamentary intentions were sufficiently reflected at the time he reviewed the document and created the computer entry on the day he died, thus providing adequate grounds to validate such for the purposes of execution.[22] Had Mr. Hubishi's family launched this inquiry in Ontario prior to the enactment of the *AAJA*, it likely would have ended up much differently however. Indeed, Ontario's previously prominent strict compliance regime would have likely vitiated the computer document found by Mr. Hubishi's family by virtue of it failing to meet a multiplicity of formal requirements for valid wills imposed by the *SLRA*, including the signature and witnessing requirements.

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[19] *Ibid*.
[20] See *Ibid* at para 49.
[21] See *Ibid* at para 51.
[22] *Ibid* at paras 55; 59-60.

Strict Compliance in Ontario

If it is the case that Ontario's previous strict compliance regime would have likely produced a widely divergent result in *Hubschi*, one might query justifications for, or otherwise, the primary function of such in Ontario estate law.

Generally, in the prevailing jurisprudence and legal scholarship pertaining to this topic, the primary animating purpose and reason for the upholding of a strict compliance standard for valid wills points towards maintaining legal certainty around estate planning and execution in Ontario, as well as showing appropriate deference to the provincial legislature/head of power. One might look towards *Sills v. Daley*, an oft cited Ontario Superior Court of Justice (the "OSCJ") case in this area, for example.[23] There, the OSCJ considered whether an Ontario court had the discretion to admit a document to probate on the basis that there had been "substantial compliance" with the *Wills Act* (prior to its replacement by the *SLRA*).[24] The deceased in this case had signed a will which was then signed by one, but not two witnesses.[25] Her sister had been asked, but she refused on the grounds of being a potential beneficiary.[26] Though the OSCJ heard and was receptive to argument regarding the general wide discretion it holds to develop the common law, it concluded its analysis by stating "To declare the Will as valid would be to by-pass the clear provisions of the Act and to create a discretion in the Court which is not found in the Act."[27] Ultimately, holding that the document before the court was not a valid testamentary document, and that it should not be admitted to probate.[28] This decision was later enthusiastically

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[23] [2002] OJ No 5318, 2003 CanLII 72335 (ON SC) [*Sills*].
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid* at para 44.
[28] *Ibid*.

affirmed in *Ettorre Estate (Re)*, its underlying reasoning buttressed with a floodgates argument attached to concerns related to legal certainty in estate planning and execution in Ontario.[29] To quote the presiding Justice Cullity in the aforementioned case:

"*... I would be reluctant to apply the principle of substantial compliance in the absence of a legislative mandate … To do so would be to depart radically from the interpretation that [the relevant succession acts]… have received in the past and introduce uncertainty and, thereby, encourage even more litigation in a context in which it is notoriously endemic.*"[30]

Justice Cullity's observation regarding the typically highly strict method of interpreting succession legislation utilized by Ontario courts in the extant, relevant jurisprudence up to the point of *Re Ettore Estate* rings true, with earlier cases such as *Sisson v Park Street Baptist Church*; where a will signed by only one witness was found to be valid because the witness who signed testified that the other witness was present but forgot to sign; representing exceptions, not the norm.[31] Notably, the latter case was distinguished by the OSCJ in the earlier discussed *Sills* by virtue of such being an genuine, inadvertent, innocent error; whereas in *Sills*, the document was deficient because the testator simply, and knowingly did not have another signing witness, yet was still seeking validation.[32]

As alluded to throughout this paper's opening sections as well, the centrality of a strict interpretation of the *SLRA*'s provisions related to requirements for valid wills was not lost in the years leading up to and immediately prior to the *AAJA's* enactment and its related changes to the *SLRA*- not even in light of COVID-19 related restrictions on gathering and movement, and what new barriers such imposed for the witnessing and signature requirement prescribed by the *SLRA*.

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[29] [2004] OTC 780, 2004 CanLII 22087 (ON SC).
[30] *Ibid* at para 37.
[31] [1998] OJ No 2885.
[32] *Supra* note 24 at para 44-45.

One need only look towards the recently emergent, relevant Ontario jurisprudence for evidence of the latter. For example, in *Re Swiddle Estate*, a case taken up by the ONSC in 2021, at the time that a codicil was signed, the drafting solicitor and other witness were neither in the physical presence of the testator nor in their presence by way of audio-visual communication technology.[33] Instead, the witnesses were in communication with the testator on a voice call (not a video call) at the time the codicil was signed.[34] The codicil was later couriered to the witnesses who then each signed the same document.[35] Importantly, on the latter facts, it need be noted that while such clearly do not meet the formal requirements for valid wills expressly laid out by the *SLRA*, here, at issue also was how a recent Emergency Order in Council could potentially change said determination in the circumstances.[36] In short, this Emergency Order; in spirit, preempting the earlier discussed *AAJA's* changes to the *SLRA*; permitted the remote execution and witnessing of wills upon the meeting of certain requirements.[37] Of these requirements was that remote execution and witnessing be done via audio-visual, not merely audio, communication methods.[38] Accordingly, with reference to the *SLRA* and the caselaw discussed above, the ONSC found that the codicil could not be validated; ultimately, reaffirming the centrality of the doctrine of strict compliance in Ontario estate law even in the time of COVID-19 and related legislative change.[39]

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[33] [2021] OJ No 924, 2021 ONSC 1434 at paras 1-4.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid* at para 6.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid* at paras 7-8.

A Shift Towards Substantial Compliance

Humanizing Estate Law in Ontario

Notwithstanding all the above, prior to the *AAJA's* changes to the *SLRA*, relative to the other provinces, Ontario constituted an exceptional jurisdiction in terms of its firm adherence to the doctrine of strict compliance. As demonstrated in this paper's introductory sections, in western jurisdictions like B.C., substantial compliance is the ultimate norm upheld and followed by the courts when asked to validate an otherwise formally deficient will.[40] B.C alone is not the only western province to follow such a standard either. Indeed, in Alberta, a series of 2012 amendments to said province's controlling succession legislation, the *Wills and Succession Act* (the "WSA"), prescribe that the court may order a will is valid on application if it is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator.[41]

In as much as the Ontario courts may have had, in the past, legitimate grounds to reject engaging with a substantial compliance standard, for the reasons of showing due deference to the Division of Powers, maintaining legal certainty, and reducing unnecessary litigation in particular; today there exist equally compelling grounds to argue for a more flexible alternative. Clearly, in *Hubschi Estate (Re)*, a substantial compliance standard lead to the equitable result of a much beloved and cared for brother being allowed to devise his belongings to his adoptive siblings, as he so wished and articulated, despite that said wish and its formal articulation not exactly matching that prescribed by statute. Said decision left room for consideration of wider holistic factors; highlighting the deceased's rapidly deteriorating health state post-surgery, and the likely rushed approach to end-of-life planning engaged in; ultimately, allowing Mr.

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[40] *Supra* note 9.
[41] SA 2010, c W12.2, s 37.

Hubischi's acts and the document before the court to be seen clearly in their unique context. In other words, said standard, its related analysis, and the ultimate decision emerging from such ultimately reflected a very human understanding of the facts at hand- that simply, if the deceased could have met all formal statutory requirements for a valid will, they likely would have. But also, that the deceased in fact did and could not, and their mere honest and inadvertent failure to do so should not in and of itself be reason to invalidate a document that may contain their actual, sole, and final testamentary intentions.

Preventing Absurd Results

These more equitable decisions, facilitated via the implementation of a substantial compliance, as opposed to strict compliance, standard for valid wills, are furthermore not ones which need necessarily run contrary to an aim of maintaining legal certainty in Ontario estate law, nor avoiding opening the floodgates to unnecessary litigation. Canadian courts; including those of Ontario; already hold wide, plenary discretion in many areas of law, and are well equipped to make determinations of fact and law, such that the common law surrounding the validation of otherwise formally deficient wills would not develop into a state of absurdity. Indeed, looking towards a related Alberta case, *Edmunds Estate,* there the Alberta Court of Queens Bench (ACQB) demonstrated this sort of restraint in refusing to validate an unsigned will prepared for a testator before their death by their paralegal.[42] Here, the ACQB engaged in a comprehensive review of the relevant jurisprudence to find that even the amended *WSA* did not provide the Court with the authority to validate an unsigned will in the absence of clear and convincing evidence that the deceased had intended to sign the document and/or that they had

[42] 2017 ABQB 754, 2017 CarswellAlta 2609 at paras 5; 36.

failed to do so by inadvertence or mistake.[43] And here, no such evidence existed.[44] The deceased could not have been said to have failed to sign the document by mistake, as they died before making arrangements to execute the will, and the draft will was found to be intended to be their last valid will only if another that had been drafted fell short of what was required by the legislation.[45]

Concluding Observations

Aggregating all the above, it is clear the changes to the *SLRA* brought by the *AAJA* respecting the new power of Ontario courts to cure otherwise formally deficient estate documents will force Ontario courts to depart from the extant, related intra-provincial jurisprudence, and engage with new, challenging evidentiary questions to glean the intentions of the deceased from what may be circumstances that cloud such, and/or a document that does not adequately outline such in the prescribed form. On approach to this task, jurisprudence from other provinces will be particularly valuable for Ontario courts to utilize as a standard for how legal certainty can be continually maintained in Ontario estate law, as well as to reduce creating the legal conditions for unnecessary litigation to flourish. All caution aside however, said changes will likely ultimately allow Ontario courts to better meet the needs of Canadians embarking on the journey of end-of-life planning in the age of COVID-19 and digital communications.

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[43] *Ibid.*
[44] *Ibid* at para 39.
[45] *Ibid*.

Table of Authorities

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Secondary Sources