



**Manitoba Law
Reform Commission**

**BRIDGING THE GAP FOR REMOTE
COMMUNITIES: ELECTRONIC WITNESSING
OF AFFIDAVIT EVIDENCE**

**Consultation Paper
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CONSULTATION REPORT

Comments on this Report for Consultation should reach the Manitoba Law Reform Commission (“MLRC”) by **February 28, 2020**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the provisional recommendations identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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MLRC assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, MLRC may quote from or refer to your comments in its Final Report.

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CHAPTER 1: INTRODUCTION

In 2017, members of the legal profession brought to the attention of the Manitoba Law Reform Commission (“MLRC” or the “Commission”) challenges facing clients living in remote (often northern and Indigenous) communities where an individual needs to swear or affirm an affidavit but does not have access to a person authorized to administer an oath or affirmation and witness the signature pursuant to section 64(1) of the *Manitoba Evidence Act* (“*MEA*”).¹ Consequently, the Commissioners decided to pursue a review of the formal requirements for witnessing of affidavit evidence set out in the *MEA*. The main question to be considered is whether an affiant may swear, affirm, make or declare an oath, affidavit, affirmation or statutory declaration pursuant to the *MEA* electronically rather than in the physical presence of an authorized person.

Under the *MEA*, evidence taken under oath, affirmation, or statutory declaration shall be taken “in the presence” of a commissioner or other person authorized to take such evidence.² The affidavit can be sworn by oath³ or an affirmation⁴. A statutory declaration is similar to an affidavit as it contains statements of fact and is attested to by the declarant before authorized individuals.⁵

Similar to the presence requirement in s.62(1), Rule 4.07(1)(e) of the *Court of Queen’s Bench Rules* states that an affidavit used in a proceeding shall “be signed by the deponent and sworn or affirmed *before a person* authorized to administer oaths or affirmations”⁶ [Emphasis added]. There could be potential criminal consequences if an affidavit or statutory declaration is not executed in accordance with the legislation.⁷

¹ CCSM c E150. All relevant sections of *The Manitoba Evidence Act* are attached as Appendix “A”.

² *Ibid*, s. 64(1) provides that “every oath, affirmation, and statutory declaration, shall be taken by the deponent or declarant in the presence of the commissioner or other officer or person administering it, who shall satisfy himself of the genuineness of the signature of the deponent or declarant, and shall administer the oath, affirmation, or declaration, in the manner required by law before he signs the jurat or attestation”.

³ *Black’s Law Dictionary*, 6th ed, defines an ‘oath’ as “Any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. Section 15(1) of the *MEA* requires that an affiant confirm the following “Do you swear that the contents of this affidavit as subscribed by you are true, so help you God?” when swearing an oath.

⁴ *Ibid*, an ‘affirmation’ “is a solemn and formal declaration or asseveration that an affidavit is true...” Section 16(2) of the *MEA* provides that where an oath is not preferred, an affiant may instead affirm by responding ‘yes’ to the question posed to him: “Do you solemnly affirm and declare that the contents of this affidavit as subscribed by you are true?”

⁵ *Supra* note 1, pursuant to s. 61, a statutory declaration occurs when ‘Any person authorized to take affidavits may receive the solemn declaration of any person voluntarily making it before him, in attestation of the execution of any writing, deed, or instrument, or of the truth of any fact, or of any account rendered in writing...’ Unlike an affidavit, a statutory declaration is not sworn, rather, it is ‘declared’ to be true and similar to an affidavit, it must be witnessed by one of the individuals authorized by the *MEA*.

⁶ *Court of Queen’s Bench Rules*, Man Reg 553/88 [QB Rules].

⁷ *Supra* note 1, s. 65. This section states: “Every person administering an oath, affirmation, or statutory declaration, who signs a jurat or attestation without the due administration of the oath, affirmation, or declaration, or who, in a proceeding in or out of court or for the purpose of making or maintaining any claim, makes, files, or uses, any affidavit or statutory declaration, knowing it has not been taken or made in conformity with this Act, is guilty of an offence and is liable, on summary conviction, to a fine of not less than \$25 but not more than \$500 for each offence.”

Consider the language of section 138 of the *Criminal Code* of Canada:

Everyone who

(a) Signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared....

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Those granted the right to witness the signature of an affiant under section 62(1) of the *MEA* are:

Affidavit, etc., to be taken within province

62(1) Any oath, affidavit, affirmation, or statutory declaration, for use in the province may be administered, sworn, affirmed, made, or declared, within the province before any of the following persons:

(a) A commissioner for oaths.

(b) The Lieutenant Governor.

(c) The Clerk of the Executive Council of the province.

(d) A justice of the peace in the province.

(e) The judge of any court in the province.

(f) The master, referee, Registrar or deputy registrar of the Court of Queen's Bench, or the deputy of any of them.

(g) A district registrar, deputy district registrar, or a deputy of a district registrar, of any land titles office in the province, or the Registrar-General under *The Real Property Act*.

(h) A barrister-at-law or attorney-at-law duly admitted and entitled to practise as such in the province.

(i) A notary public appointed for the province.

(j) The mayor, reeve, or clerk of any municipality, the resident administrator of any local government district, or the secretary-treasurer of any school district or school division, established under *The Public Schools Act*.

(k) The postmaster of any post office in the province who is appointed under the *Canada Post Corporation Act* (Canada).

(l) The chief sheriff or any sheriff in the province or the deputy of any of them.

(m) A member of the Royal Canadian Mounted Police Force.

(n) A surveyor authorized to practise under *The Land Surveyors Act*.

For the sake of brevity, those persons authorized to administer an oath or affirmation and before whom an affidavit may be signed will be collectively referred to as “authorized individuals”.

In practice, the above provision has generally been interpreted to mean that such documents are executed in the *physical* presence of the authorized individual. Given the breadth of the current list, the majority of Manitobans have access to at least one of the persons listed above. However,

preliminary research and consultation with lawyers working in remote and northern communities suggests that the presence requirement does pose a financial and/or practical challenge to some residing in remote communities where none of the persons listed in section 62(1) of the Act are readily accessible.

Currently, the presence requirement under the *MEA* that an affiant be physically present before a lawyer or an authorized individual is an access to justice issue for many in remote communities. It requires that individuals find transportation, childcare, and funds to make their way to an urban centre where they can be physically present with their lawyer or an authorized person to sign their affidavit evidence.

In Chapter 2 of this report, the Commission provides background information on this topic, including a historical overview of the legislation, current procedure for the witnessing of affidavit evidence and the current landscape of the use of technology in Manitoba in the taking of evidence. In Chapter 3, the Commission will review and consider the law in other jurisdictions, including the United States and the United Kingdom, pertaining to remote notarization of documents including affidavits. In Chapter 4, the Commission identifies five areas for consideration and potential legislative change.

The Commission hopes to receive feedback from the legal community and the public at large on each of the issues raised in this paper before making recommendations.

CHAPTER 2: BACKGROUND

Before considering whether reform is required, it is necessary to review the legislative history of the *MEA* as it pertains to witnessing the signing of affidavit evidence. This chapter will review the history of the *MEA* and describe how witnessing of affidavit evidence works in practice. This chapter will also review how courts in Manitoba are using audio-video technology in the courtroom currently.

A. History of Witnessing of Affidavit Evidence in Manitoba

In 1872, the Manitoba Legislature passed *An Act to Amend An Act to Establish a Supreme Court*⁸ which, for the first time, provided guidance in regard to the taking of affidavit evidence. Section 35 read:

The Lieutenant Governor in Council may appoint: in each County of the Province, a suitable person or persons to take affidavits, in any cause pending in the Court of Queen's Bench or County Court, or to take affidavits to hold to bail, and to take recognizance of bail, or any other affidavit in any civil matter.⁹

At the time, those entitled by statute to witness affidavits were required to be appointed on an individual basis and were not able to be appointed as part of a class or profession. It was within the discretion of the Lieutenant Governor in Council to determine who would be "suitable". Additionally, there was no indication that an affiant was required to be physically present to swear, affirm or sign a document.

The Legislature has since made numerous amendments pertaining to affidavit evidence. In 1880, the Legislature passed *An Act Respecting Public Officers, their Duties and Appointments* ("*Public Officers Act*").¹⁰ This was the first legislation passed specifically dedicated to the signing and witnessing of affidavit evidence. However, the amendment to the Act was with regard to signing and witnessing affidavit evidence outside the province. Section 69 of the *Public Officers Act* specified who can administer oaths and how it should be carried out:

Oaths, affidavits, affirmations, or declarations, sworn, affirmed, or made, out of the Province of Manitoba before any commissioner authorized by the Lord Chancellor, to administer oaths in chancery in England, or before any notary public certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough, or town corporate in Great Britain...or made before a commissioner for taking affidavits in the next preceding section mentioned, or other competent authority of the like nature¹¹

This was a shift by the Legislature as it introduced the requirement that the affidavit must be sworn or affirmed *before* the enumerated person. The legislation also introduced an exclusive list of

⁸ SM 1872, c 3.

⁹ *Ibid*, s 35.

¹⁰ CSM 1880 c 7, short title: Manitoba Evidence Act.

¹¹ *Ibid*, s 69.

persons authorized to administer oaths, affidavits, affirmations or declarations to take affidavit evidence.

Over time, there have been a number of amendments to the list of authorized individuals to witness affidavit evidence. In 1884, *An Act respecting Affidavits or Declaration required by any Statute of Manitoba*¹² was passed. It provided a list of authorized individuals very similar to previous legislation but did not include in the list “mayor or chief magistrate.”¹³ Subsequent amendment introduced in 1940 increased the number of individuals authorized to witness the signing of affidavit evidence.¹⁴

The wording “in the presence of” appears in 1933, when the Legislature introduced a revised version of the *MEA*¹⁵ that amalgamated all provisions related to affidavit evidence. The new wording provided more clarity, requiring an affiant to be physically present when swearing or signing an affidavit.¹⁶ This *physical presence* requirement has remained the same while changes have been made to the list of authorized individuals.

Since 1933, there have not been significant changes made to the *MEA* and particularly pertaining to the physical presence requirement. However, there have been authorized individuals added to the list under section 62(1) of the *MEA* and there have been individuals or groups removed from the list.¹⁷

B. Overview of Affidavit Evidence Procedure

This section will provide an overview of the current procedure governing the witnessing of affidavit evidence in Manitoba.

¹² SM 1884 c 7. This Act repealed and replaced *An Act Respecting Public Officers, their Duties and Appointments*.

¹³ *Ibid*, Pursuant to section 1 “an affidavit or declaration...if taken or made before any Commissioner for taking affidavits, Magistrate, Justice of the Peace, Judge of any Court, Notary Public, or any other person authorized to take affidavits in this Province, shall be valid and effectual.” However this Act was repealed and replaced by SM 1886 c 22, 23 *An Act Respecting Affidavits, Affirmations, and Declarations*. Section 2 of this Act states that “Any answer, affidavit, affirmation or declaration...may be sworn, affirmed or declared, if within this Province, before any commissioner for taking affidavits, judge of any court, clerk of any county court, registrar or deputy-registrar or notary public [...]”

¹⁴ RSM 1940 c 65. *An Act Respecting Witnesses & Evidence*.

¹⁵ SM 1933 c 11.

¹⁶ *Ibid*, s 53(1).

¹⁷ *Supra* note 14, s 56 provided a revised list of authorized individuals including a justice of the peace or police magistrate, the judge of any court, the master, referee, prothonotary, clerk of the Crown and pleas, or registrar of the Court of King’s Bench or the deputy of any of them, the clerk of any county court, any registrar or deputy registrar, any barrister at-law or attorney at-law, the clerk of any municipality or municipal district or the secretary-treasurer of any school district in the province or the postmaster of any post office appointed under the *Post Office Act* (Canada), the sheriff or deputy sheriff, a member of the Royal Canadian Mounted Police force, a surveyor authorized to practice under “*The Land Surveyors Act*.” The most recent list under the *Manitoba Evidence Act* is almost identical to the list added in 1940 with the exceptions that today’s list includes a clerk of the Executive Council, a mayor and the Lieutenant Governor.

(a) What is an Affidavit?

An affidavit is a “written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.”¹⁸ Affidavits are used in place of sworn oral testimony as evidence in court to present the facts of one’s case.

Typically, documents referenced in an affidavit will be attached as exhibits. Examples of exhibits include: receipts, copies of email chains or photographs.

(b) How is an Affidavit Executed?

As discussed previously, an affidavit must be sworn or affirmed in person before an authorized individual under the *MEA* who administers the oath or affirmation.¹⁹ The list of persons authorized to administer the oath or affirmation and witness the affiant’s signature includes commissioners for oaths, lawyers, judges, members of the RCMP, notary publics, and justices of the peace, among others.²⁰

The affidavit will first set out the affiant’s name and the city/town in which the affiant lives followed by the statements of fact which the affiant wishes to include in the affidavit set out in consecutively numbered paragraphs. Each paragraph should be confined as much as possible to a particular statement of fact.²¹ Following the statements of facts, the affiant will sign the affidavit, affirming or swearing to its truthfulness.²² Subsequently, the affidavit is signed and dated by the person who witnessed the swearing/affirming of the affidavit.²³

The *MEA* prescribes various formal requirements for the proper execution of an affidavit. They include:

- that the affidavit be in prescribed form²⁴;
 - that an oath or affirmation be administered in the form set out in the *MEA* or in a form to the same effect²⁵;
 - that it be identified where and when the oath or affirmation was taken²⁶;
 - that the affidavit is signed by the affiant who is attesting to the truthfulness of its contents²⁷;
- and

¹⁸ *Supra* note 3.

¹⁹ *Supra* note 1, ss 62(1), 64(1).

²⁰ *Ibid*, s 62(1).

²¹ *Supra* note 6, r 4.07(1)

²² *Supra* note 6, r 4.07(1).

²³ *Ibid*.

²⁴ *Supra* note 6, r 4.07(1).

²⁵ *Supra* note 1, s 64(1)&(2).

²⁶ *Ibid*, s 64(3).

²⁷ *Supra* note 6, r 4.07(1)(e).

- That it contains a properly worded jurat or certificate evidencing the fact that the oath or affirmation was administered by a duly authorized individual and then signed by that individual.

Non-compliance with the formal requirements for the taking of affidavits may lead to the exclusion of the evidence by the court hearing the matter.

As well as identifying the administrator of the oath or affirmation, the requirement that the authorized individual signs the jurat attesting to the witnessing of the affiant's signature serves to ensure that the affiant is who he or she purports to be and that the court can rely on the affidavit evidence as that of the affiant who has sworn or affirmed the truthfulness of the evidence. It serves as a protection against the filing of fraudulent evidence.

C. The Use of New Technology in Manitoba Courts (Oral Testimony)

In Manitoba, the use of new technology to remove geographic distances is a reality in our courtrooms. If all parties involved in a hearing give their consent, testimony can be heard live by way of video-conferencing technology.²⁸ If all the parties do not consent to a witness giving evidence by telephone or video-conference, then it is open to the court on motion to make an order on how the application is to be heard.²⁹

Canadian courts have generally been in favour of live oral testimony via video-conferencing technology. In *Chandra v CBC*³⁰, the Ontario Superior Court of Justice permitted witnesses who lived outside of Canada to give live oral testimony via video-conferencing during trial. The court refers to the “culture shift” advocated for by the Supreme Court of Canada in *Hryniak v Mauldin*³¹, to suggest that video-conferencing is a modern tool that can be used to ensure a fair process.

While this example describes the use of video-conferencing technology in a courtroom setting, it is possible that the same principles may guide the use of such technology in the remote witnessing of affidavit evidence in the future.

²⁸ *Supra* note 6, Pursuant to r 38.08(1), “[i]f all the parties to an application consent and the court permits, an application may be heard by telephone, video conference or other means of communication.”

²⁹ *Ibid*, r 38.08(2).

³⁰ 2015, ONSC 5385.

³¹ 2014, SCC 7. The main principal from this decision was a balancing between ensuring judges hear all relevant facts and evidence during a trial but in a timely and cost-effective manner. While the case was concerned with the use of oral testimony and not concerned specifically with the use of video-conferencing, Canadian jurisdictions have looked to the principals set by the SCC relating to the modernization of court procedures to serve justice.

CHAPTER 3: OTHER JURISDICTIONS

In considering reforms to the *MEA*, it is helpful to review legislation in other jurisdictions in both Canada and abroad pertaining to affidavit evidence requirements.

A. Canadian Provinces

(a) The Presence Requirement

Statutory language pertaining to affidavit evidence is very similar amongst a number of provinces with respect to the presence requirement. Similar to Rule 4.07(1)(e) of Manitoba's *Court of Queen's Bench Rules*, most jurisdictions require that an affidavit be signed and sworn or affirmed *before* an authorized person.³²

Despite the trend of legislative reform in the United States enabling electronic commissioning and notarizing, which will be examined later in this chapter, Canadian jurisdictions had not followed the same trend. That changed recently when Ontario introduced legislation in December 2019 paving the way for electronic notarization and commissioning of documents in that province.

Bill 161, *An Act to enact the Legal Services Act, 2019 and to make various amendments to other Acts dealing with the courts and other justice matters*³³, or the *Smarter and Stronger Justice Act*, provides that, while oaths and declarations must still be taken in the physical presence of a commissioner, notary public or other person administering the oath or declaration generally, the government may, by regulation, set out conditions which, when met, remove the physical presence requirement.³⁴ The bill passed first reading on December 9, 2019 and must now be referred to a standing committee for consideration. The relevant schedules of Bill 161 are attached as Appendix "B".

The proposed provisions do not expressly authorize electronic notarial acts but comments by Ontario's Attorney General make clear that this is the purpose of the legislative amendments.³⁵

³² For example, Saskatchewan's *Court of Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684, at r 13-31(1)(f); Alberta's Rules of Court, Alta Reg 124/2010, r 13.19(1); Nova Scotia's *Evidence Act*, RSNS 1989, c 154 at s 66(1); and Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008 at r 39.08(2)(d); Prince Edward Island's *Affidavits Act*, RSPEI 1974, Cap: A-2, s 3(1) & (2); Newfoundland's Rules of the Supreme Court, 1986 c42 Sch D at 48.01(d); Yukon Territory's *Evidence Act*, SY 2002 c 78, s 59; North West Territory's *Evidence Act*, RSNWT 1998, c E-8, s 61.4.

³³ Bill 161, *An Act to enact the Legal Services Act, 2019 and to make various amendments to other Acts dealing with the courts and other justice matters*, 1st Sess, 42nd Leg, Ontario, 2019.

³⁴ *Ibid*, Schedule 5, s 9(2) & Schedule 19, 1(3).

³⁵ Amanda Jerome, "Downey stresses modernization in unveiling reforms to legal aid, law society legislation" (2019) *The Lawyer's Daily*. In this article, Ontario's Attorney General, Hon. Doug Downey is quoted as stating: "In terms of some of the other [changes], there's a commissioning and notarizing change that we're going to pave the pathway to allow for electronic commissioning and notarizing. And this is something that's being done in almost

Currently, Ontario’s *Commissioners for Taking Affidavits Act*³⁶ contains language similar to that in the *MEA*, requiring that “every oath and declaration shall be taken by the deponent *in the presence of* the commissioner, notary public, justice of the peace or other officer or person administering the oath or declaration who shall satisfy himself or herself of the genuineness of the signature of the deponent or declarant [...]”.³⁷ Notably, one of the amendments put forward in Bill 161 is the introduction of the word “physical” before the word “presence”. Should this change be enacted, Ontario will be the only Canadian jurisdiction with legislation that expressly clarifies that the presence requirement means *physical* presence.

Should Bill 161 be enacted, Ontario would also be the first Canadian jurisdiction to remove the physical presence requirement in certain situations as set out in regulation. Such regulations have not yet been released.

There has been no judicial interpretation of the presence requirement in Ontario’s current legislation. While there have been several findings of professional misconduct by lawyers and paralegals who have filed affidavits containing a jurat stating they had been sworn or affirmed in the lawyer’s presence when they had not, in these cases, the affiant has not been present before the witness in any manner and had not sworn or affirmed the truth of the contents of the affidavit.³⁸

The legislation of British Columbia does not explicitly require that an oath or declaration be taken “in the presence of” or “before” an authorized individual but has the same effect due to the *Supreme Court Civil Rules*³⁹, which states that “[t]he person *before whom* an affidavit is sworn or affirmed must confirm that the affidavit was sworn or affirmed in the person's presence by completing and signing a statement on the affidavit [...]”⁴⁰ [emphasis added].

Similarly, article 105 of *The Code of Civil Procedure*⁴¹ of Quebec, which addresses sworn pleadings and affidavit evidence, does not expressly require the presence of the witness during the taking of the affidavit. While the court rules do not address the *presence* requirement, the Services Quebec website advises that citizens may need to make a sworn declaration before a commissioner

half the U.S. states. So, once we build the safeguards in, that’ll change how some lawyers practice law. It could be everything from signing an affidavit to court documents, transferring assets, properties electronically.”

³⁶ RSO 1990, c 17.

³⁷ *Ibid*, s 9.

³⁸ See, for example, *Law Society of Upper Canada v. Kauzman*, [2005] ONLSHP 32, affirmed in [2006] ONLSHP 57 [2008] ONLSAP 7, and [2011] ONSC 3008; *Law Society of Upper Canada v. Maroon*, [2005] ONLSHP 21; and *Law Society of Upper Canada v. Jaffer*, [2017] L.S.D.D. No. 270.

³⁹ BC Reg 168/2009.

⁴⁰ *Ibid*, s 5.

⁴¹ CQLR, c 25.01, art 105.

for oaths and sign the document in the commissioner's presence in order to give a court document official status.⁴²

The *Federal Court Rules* require that, where an affidavit filed in the federal court refers to and attaches an exhibit, an endorsement on the exhibit or a certificate attached to it must be signed by the person "before whom" the affidavit is sworn.⁴³ This rule has the effect of requiring the presence of the witness for the signing of the affidavit. While the *Canada Evidence Act* does not speak generally to the issue, section 42 provides that for the purposes of transactions made by insurance companies, an "affidavit [...] may be taken *before* any commissioner or other person authorized to take affidavits, before any justice of the peace or *before* any notary public for any province, and the commissioner, person, justice of the peace or notary public is required to take the affidavit, solemn affirmation or declaration" [emphasis added].

To date, Canadian case law has not supported a legal interpretation that would extend the presence requirement for swearing or affirming affidavits in Canadian statutes to virtual interactions.

The issue of whether the presence requirement for the witnessing of an instrument can be met through the use of interactive video-conferencing has only been considered once, by the British Columbia Supreme Court in *First Canadian Title Company Ltd. v The Law Society of British Columbia*.⁴⁴ The plaintiff, a licensed insurance company, sought a declaration that lawyers could witness/certify mortgage instruments via live video-conferencing under the *Land Titles Act*. It was held that witnessing by video-conferencing technology fell short of the statutory requirement that the affiant "appear before" the authorized individual. In its decision, the court acknowledged concerns raised by the Ethics Committee of the Law Society of British Columbia about an overly broad interpretation of the presence requirement allowing for witnessing of documents remotely such as, how to ensure the affiant understands the content of the affidavit, ensuring the signature is genuine, proper identification of the affiant and concerns about changes to the document between the signature of the affiant and of the witness.

(b) Authorized Individuals

There is no universal list of authorized individuals shared amongst Canadian jurisdictions. However, all jurisdictions in Canada appear to have two separate groups of authorized individuals: those that are entitled to witness the signing of affidavits by virtue of their office or status; and those who apply and are appointed commissioners for oaths.

⁴² Services Quebec – Citoyens. "Making a Sworn Declaration Before a Commissioner for Oaths." [online] <http://www4.gouv.qc.ca/EN/Portail/Citoyens/Evenements/separation-divorce/Pages/services-commissaire-assermentation.aspx>.

⁴³ *Federal Court Rules*, SOR/98-106, r 3.

⁴⁴ BCSC 2004, c 197.

Universally, commissioners for oaths, notaries, lawyers licensed to practice in the given jurisdiction, and judges at each level of court are authorized individuals. Most provinces and territories also authorize justices of the peace, registrars and deputy registrars and court clerks. Some, including Saskatchewan⁴⁵, Prince Edward Island⁴⁶, Alberta⁴⁷ and Ontario⁴⁸ deem representatives in the provincial legislature or parliament of the given jurisdiction as authorized individuals. Officials of local administrations including the secretary treasurer of a board of school trustees or the directeur general of a francophone education authority in British Columbia⁴⁹ or a Metis settlement councilor, in Alberta⁵⁰, are also designated authorized individuals.

Unlike Manitoba, some provinces restrict an individual's entitlement to serve as an authorized person to specific circumstances. For example, under British Columbia's *Evidence Act*, social workers can serve as commissioners for taking affidavits exclusively in the performance of their professional powers and duties.⁵¹ British Columbia's legislation also restricts the scope of police officers or members of the Royal Canadian Mounted Police in witnessing affidavits to taking affidavits "for the purposes of exercising the powers and performing the duties of their office."⁵² The Commission is unaware of any other legislation that grants the right to a person to witness affidavits to be used in only specific instances. In Saskatchewan, an enumerated list of "government officials" are entitled to serve as commissioners for oaths with responsibilities pursuant to their governing Act.⁵³

⁴⁵ *Saskatchewan Evidence Act*, RSS 1978, c S-16, s 51(1).

⁴⁶ *Affidavits Act*, *supra* note 32, s 2.

⁴⁷ *Notaries and Commissioners Act*, SA 2013, c N-5.5, s 16(1)(c). Note that Alberta's legislation is not confined to provincial representatives and instead provides for "political representatives" to take affidavits.

⁴⁸ *Commissioners and Other Persons who May Take Affidavits*, O Reg 386/12, s. 1.(1).

⁴⁹ *Evidence Act*, RSBC 1996, c 124, s 61.1.

⁵⁰ The Alberta-Metis Settlements Accord (1989) was a political agreement between Alberta and the Federation of Metis Settlement Associations (now called the Metis Settlements General Council), which described both parties' intentions to develop a new land-based governance model for the Metis Settlements. Established by the Metis Settlement Act (1989) Metis Settlement Councillors are elected to work for the interests and goals of their communities.

⁵¹ *Supra* note 4, s 60. This section provides that social workers "are commissioners for taking affidavits for British Columbia only for the purposes of exercising the powers and performing the duties delegated to them under the following Acts: (a) for the *Adoption Act*, each person to whom a director of adoption under that Act has delegated powers or duties, except an administrator as defined in section 1 of that Act; (b) for the *Child, Family and Community Service Act*, each person to whom a director under that Act has delegated powers or duties; (c) for the *Employment and Assistance Act*, each person to whom the minister has delegated powers or duties under that Act; (d) [Repealed 2002-40-59.] (e) for the *Child Care Subsidy Act*, each person to whom the minister has delegated powers or duties under that Act; (f) for the *Child Care BC Act*, each person to whom the minister has delegated powers or duties under that Act; (g) for the *Employment and Assistance for Persons with Disabilities Act*, each person to whom the minister has delegated powers or duties under that Act."

⁵² *Ibid*, s 60.1.

⁵³ The full list can be found at s 6 of the *Commissioner for Oaths Act*, RSS 1978, c C-16. Several authorized individuals of interest include: a family support officer whose responsibilities include enforcement of maintenance orders pursuant to *The Enforcement of Maintenance Orders Act*, a northern municipal advisor appointed by the *Services Branch of the Ministry of Government Relations*, a land agent or land officer whose responsibilities include

In addition to restricting the scope of an authorized individual's authority, other provinces limit the territorial authority of certain persons to witness the signing of affidavits. In Ontario, certain municipal employees are entitled to witness the signing of an affidavit in certain geographic areas in which their municipality is situated.⁵⁴

B. Approaches from Canadian Law Societies

Prior to the introduction of Bill 161 in Ontario, the Law Society of Ontario (LSO) published "Best Practice Recommendation: Continue with In-Person, not Virtual, Commissioning."⁵⁵ It advises that the Law Society is aware that some members of the legal profession in Ontario have used video-conferencing tools or commercial remote notarization software to commission documents. In its directive to the profession, the LSO outlines four risks associated with virtual commissioning: (i) fraud and identity theft, (ii) undue influence, (iii) reduced level of client service; and (iv) technological limitations/uncertainty. The LSO concludes that "[...]without legislative change, the best practice for commissioning documents remains for a lawyer or paralegal who is acting as a commissioner to be in the *physical presence* of the deponent to commission the document(s)."⁵⁶

In contrast, the Law Society of Alberta is conducting a pilot project to create a secure on-line virtual meeting platform called "TreeFort Platform" to allow lawyers to interact with their clients.⁵⁷ The platform has various features including identity verification⁵⁸ and document execution and certification.⁵⁹

The objective of this pilot project is to make it easier for clients to communicate online and sign documents electronically. The steps required for a virtual meeting are:

1. Client receives and selects time for meeting;
2. Client identity is confirmed using Verified.Me at start of meeting;

preparation administration and enforcement, an officer or director as defined in *The Child and Family Services Act*, and a probation officer designated pursuant to *The Correctional Services Act*.

⁵⁴ *supra* note 48, s 1 (2).

⁵⁵ Available electronically at: <https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/commissioner-for-taking-affidavits-and-notary-publ/virtual-commissioning>.

⁵⁶ *Ibid.*

⁵⁷ Pilot Project Cover Letter, dated June 2, 2019. This document provides both an explanation of the pilot project and a demonstration with pictures of how a virtual meeting would occur between a lawyer and client using both the Verified.Me and Consigno applications. The pilot project is a collaboration between the Law Society of Alberta and Jay Krushell, a partner at Witten LLP and his corporation 100101075Tech Inc.

⁵⁸ Verification is being performed using a block chain identification platform called SecureKey Verified.Me which was launched May 6, 2019 and is currently being utilized by the Canada Revenue Agency. Verified.Me is a new tool to verify a client's identity online through any iOS or Android-enabled mobile device, using credentials from trusted sources such as the client's financial institution and other Verified.ME network members. Verified.Me was developed in cooperation with Canada's seven major financial institutions. It is a free application which can be downloaded onto a mobile device at which point a client can securely sign in using their online banking credentials and create a Verified.Me profile. This project was scheduled to commence in July 2019 and conclude in June 2020.

⁵⁹ Document execution and certification is performed utilizing the Notarius ConsignoCloud electronic signing platform. Consigno is a free web-based digital electronic signature platform. Document signers do not need to subscribe or install anything on their computers.

3. Lawyer meets with client using the TreeFort platform; and
4. Client signs documents in the TreeFort platform using the ConsignoCloud platform.

In November 1990, the Law Reform Commission of British Columbia issued a report titled *Report on Affidavits: Alternatives to Oaths*. This report was published prior to the technological capabilities of video-conferencing available today. The report recommended the elimination of the commissioning of affidavits in certain situations and a certification process with sanctions where false information is provided. This certification process has been used in a few regions in the United States, which will be discussed in more detail below.

C. United States

The formalities of witnessing the execution of affidavits and other legal documents have received significant attention in the United States in recent years.

In 2011, Virginia became the first state to allow documents to be signed by a person in one location and have that document notarized electronically by a notary using audio-video conference technology in another location.⁶⁰ When a document is signed electronically, the authorized individual affixes a digital signature or certificate to an electronic document, such as an electronic copy of an affidavit. The digital signature is composed of a series of numbers in a computer readable form rather than a paper document and rubber stamp and notary seal.⁶¹ At least 22 states have now authorized remote notarization.⁶² Remote notarization enables signatories to appear live before a notary on a video screen to have a document notarized.

The laws of each state vary significantly. For example, in Ohio, long-distance notarization through the use of electronic technology is allowed; however, the notary cannot remotely administer an oath or affirmation.⁶³ In Florida, the power to administer oaths and affirmations remotely for the taking of an affidavit using reliable electronic means is limited to corrections and law enforcement officers.⁶⁴

(a) Virginia as a Case Study

Under the law of Virginia, any person who holds the qualifications to serve as a notary within the state of Virginia may also apply to become an electronic notary.⁶⁵ Section 47.1-6.1 of the Virginia Code requires the Secretary of the Commonwealth to develop standards for electronic notarization. These standards were published in January 2013.⁶⁶

⁶⁰ Va. Code Ann. § Ch. 7231 (2012) [VA Code].

⁶¹ Mott Kornicki, Electronic Notarization: From Pen and Paper to Mouse & Keyboard, [2010] online: <https://activerain.com/blogsview/1545614/electronic-notarization---from-pen-and-paper-to-mouse---keyboard>.

⁶² Found online at <https://www.nationalnotary.org/notary-bulletin/blog/2019/02/19-more-states-propose-remote-notarization-in-2019>.

⁶³ *Notary Public Modernization Act*, SB 2018, 263.

⁶⁴ *Florida Statutes*, c 117, s 10.

⁶⁵ VA CODE, s 47.1-7.

⁶⁶ Virginia, Secretary of the Commonwealth, *The Virginia Electronic Notarization Assurance Standard*, version 1.0 (Richmond) [Virginia Standards].

The following standards are of interest:

- 1) Section 1.2 establishes that an electronic notary must continue to adhere to all rules governing paper-based notarial acts, except the requirement that signers must appear before the notary in person.
- 2) Any notary public performing electronic notarial acts must first be registered with the Secretary of the Commonwealth. Not every notary may engage in electronic notarization. The Secretary must sign off on the notary's proposed technologies to be used to engage in electronic notarization. There are a number of private companies who advertise the hardware and software required to fulfill this requirement.
- 3) The signer must appear before the notary either in person or by two-way video and audio conference at the time of the notarization.
- 4) The electronic notary must have an official electronic notary signature and seal. Both the signature and seal must be:
 - a. unique to the notary and capable of independent verification;
 - b. created using means under the control of the notary exclusively; and
 - c. linked to the electronic document in such a way that changes made to the document after signed and sealed are detectable.
- 5) All records must be protected by password, biometric verification, token, or another form of authentication.
- 6) A back-up system must be in place to save from lost electronic records and an electronic notary must keep a copy of the recording of the audio-video conference for at least five years from the date of the recording. Commentators on the law have noted that this has the effect of deterring would-be criminals and provides evidence of a criminal's identity should a fraud occur.
- 7) Reasonable steps must be taken to ensure that the use of two-way live video and audio communication is secure from interception through unlawful means.

The standards were developed in support of the state's laws on electronic notarization and demonstrates the purpose of implementing the scheme. The "Scope and Intent" section sets out, in part:

The challenges before notaries in the Commonwealth of Virginia, throughout the United States, and around the world are to preserve and strengthen the role of the notary in the rapidly emerging digital economy and to ensure reliability and cross-border recognition of notarized electronic documents in a global economy. Consequently, notaries in the Commonwealth of Virginia should transition to performing electronic notarizations that have the same legal effect and admissibility as currently presumed by their physical-world counterparts [emphasis added].⁶⁷

We have not found any indication or commentary that Virginian legislators were attempting to highlight access to justice issues particularly pertaining to notarial resources in remote communities. It seems that their intention has been to modernize notarial processes to keep up with an emerging digital economy. One can however assume that allowing for audio-video

⁶⁷ *Ibid.*

conferencing has had the effect of providing access to justice for remote communities within the state of Virginia.

In 2017, the Secretary of the Commonwealth of Virginia published a handbook for Virginia’s non-lawyer notaries reiterating the importance of strict adherence to Virginia’s laws and regulations pertaining to notarial acts⁶⁸

In terms of ensuring proper identification, under the Virginia Code, electronic notaries must still obtain “satisfactory evidence of identity.”⁶⁹ This may be based on audio-video conference technology that allows the notary to communicate with and identify the signatory at the time of the notarial act, provided that such identification is confirmed by: (1) personal knowledge; (2) reliance on prior in-person identity proofing by a trusted third party, or (3) a valid digital certificate accessed by biometric data or a Personal Identity Verification card issued in accordance with federal government specifications.⁷⁰

All relevant sections of the Virginia Code can be found in full at Appendix “C”.

D. United Kingdom

Similar to legislation in Canada, in the United Kingdom, an affidavit must be “completed and signed by the person *before whom* the affidavit was sworn whose name and qualification must be printed beneath his signature”.⁷¹

While the legislation is clear about the *physical presence* of a jurat when signing an affidavit, the courts in the United Kingdom have generally been in favour of video-conferencing for witness testimony in a trial. Part 32.3 of the *Civil Procedure Rules* provides that “a court may allow a witness to give evidence through a video link or by other means.”⁷² The landmark case on this issue is *Polanski v Conde Nast Publications Ltd.*⁷³ where the court applied part 32.3 of the *Civil Procedures Rules* allowing the use of video-conferencing. Even though this decision is in respect of giving witness testimony, it is possible that the same principles could guide the courts in the future regarding electronic witnessing of a signature.

Since *Polanski*, numerous decisions have been made on the basis that, as a matter of public policy, giving evidence by video-conferencing is preferable to giving no evidence at all.⁷⁴ In *Re ML*⁷⁵ the court allowed the signing of adoption consent forms to be witnessed using the video conferencing technology, Skype. This was a very fact specific case and, since then, there has not been the same

⁶⁸ Virginia, Secretary of the Commonwealth, *The Virginia Handbook for Notaries*, (Richmond).

⁶⁹ VA Code s 47.1-2.

⁷⁰ *Ibid.*

⁷¹ Practice Direction 32, r 5.2(2). Note that section 32.16 of *The Civil Procedure Rules* 1998 (UK), no 3132 (L. 17) provides that “[A]n affidavit must comply with the requirements set out in the relevant practice direction.”

⁷² *Ibid.*

⁷³ [2005] UKHL 10, (HL).

⁷⁴ In the case of *Belkovic v DSG International Plc* [2004] NIQB 25, the witnessing of evidence over Skype was permitted.

⁷⁵ *Re ML (Use of Skype Technology)*, [2013] EWHC 2091 (FAM).

level of support for the electronic witnessing of documents over Skype by the courts. In *R v C and S*⁷⁶ the court refused an application for taking evidence by Skype. The judge stated that there were limitations when using Skype including problems with privacy and confidentiality.

The principles used by the courts to allow the use of video-conferencing technology for witness testimony can inform courts in allowing such technologies or other electronic means for witnessing signatures.

⁷⁶ *R v C and S*, [2013] EWHC 1295 (FAM).

CHAPTER 4: NEED FOR REFORM

A. An Access to Justice Perspective

In recent years, the problem of access to justice has been framed as a broad concept, encompassing various aspects of the legal system from the availability of physical resources to adequate access to transportation or a reliable internet connection. In order to understand the barriers caused by the *physical presence* requirement under the *MEA*, it is important to look at it within this broader context. These are issues within access to justice conversations, recently articulated in several major reports in Canada.⁷⁷ There has been a shift with respect to the meaning of ‘access’ from “issues about access to court and lawyers,” to “new institutional [or legal] arrangements, and “procedural initiatives.”⁷⁸ In this respect, access to justice is about making it easier for people to use the legal system by making the legal system more accessible.

In its report, the Canadian Bar Association states that an inclusive justice system is “equally accessible to all, regardless of finances, capacity or social situation” and will be “based on people’s relationship to the justice system and their need for assistance in different situations.”⁷⁹

While access to justice issues affect the Canadian general public, there are distinct issues facing remote communities and particularly indigenous communities.⁸⁰ This stems from the unique geographical, demographic, social, and cultural characteristics that define remoteness. Not all Indigenous peoples live in remote communities but “a large segment of Canada’s Aboriginal population live in northern and isolated areas, further compounding issues related to service delivery and building community relations.”⁸¹ The issues relate to “internal dispute resolution, transportation and access to external justice service difficulties, band membership and political status or affiliation issues, as well as economic resource and unemployment-related legal

⁷⁷ The following two major national reports offer a comprehensive overview of the barriers impeding access to justice. Both reports suggest that “100% accessibility is the only defensible goal” in Canada. See Canadian Bar Association, “*Reaching Equal Justice: An Invitation to Envision and Act - Equal Justice: Balancing the Scales*” (Ottawa: Canadian Bar Association, August 2013) [Canadian Bar Association, *Reaching Equal Justice*][CBA Report] at 60 and The Action Committee on Access to Justice in Civil and Family Matters, “*Access to Civil & Family Justice: A Roadmap for Change*” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013).

⁷⁸ Martin Partington, “*The Relationship between Law Reform and Access to Justice: A Case Study -- The Renting Homes Project*” (2005) 23 Windsor Y.B. Access To Justice, at 375.

⁷⁹ CBA Report, *supra* note 74 at 61.

⁸⁰ See Rebecca L Sandefur & Aaron C Smyth, “*Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*” (Chicago: American Bar Foundation, 7 October 2011), online: American Bar Foundation [Sandefur & Smyth, *Access Across America*]. The legal needs of rural and remote communities often resemble that of individuals living in urban areas. However, these common barriers such as transportation, access to childcare, and costs are exacerbated for those living in remote communities. One of the glaring challenges for Indigenous communities to access justice is due to their geographical location in remote areas of the country. Sandefur and Smyth write that “geography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need or be able to use, but rather by where they happen to live.”

⁸¹ Nicole Aylwin, Lisa Moore, “*Rural and Remote Access to Justice: A Literature Review*, (2015) The Canadian Forum on Civil Justice for the Rural and Remote Access to Justice Boldness Project, (Toronto: Canadian Forum Civil Justice) at 18. See also L Gary Hart, Eric H Larson & Denise M Lishner, “*Rural Definitions for Health Policy and Research*” (2005) 95:7 Am J Public Health at 1149.

problems.”⁸² Indigenous youth, whose legal needs are disproportionately impacted by the often rural or remote location of their communities, are most affected.⁸³

The cost of transportation to access legal services by individuals living in remote communities is often out of pocket costs. Not only do individuals have to pay for the long-distance travel costs, they also have to pay for the extra time their lawyers spend arranging for and witnessing the signing of their affidavit evidence. These extra expenses create hurdles to access legal services.”⁸⁴

The challenges caused by the *physical presence* requirement for remote and Indigenous communities in Manitoba is one of accessibility. Some of these challenges are significant inconvenience, delay to proceedings and financial costs among others. Once the consultation phase of this project is completed, the Commission hopes to have a clearer understanding of how many Manitobans are impacted by the issue raised in this report.

In considering reforms to improve access to justice for northern and remote communities in Manitoba, the Commission has identified four broad issues where reform may be appropriate:

- Should the *MEA* be amended to remove the *physical presence* requirement for witnessing affidavit evidence upon certain conditions as is proposed by Bill 161 in Ontario?
- If so, should there be a review of safety measures to address privacy and security of documents?
- Should the list under Section 62(1) of the *MEA* be broadened to include additional authorized individuals?
- Should electronic witnessing be restricted to specific circumstances?

As this is a Consultation Paper, the Commission recognizes that input from those who interact with the justice system and have familiarity with the use of affidavit evidence is required to gain a better understanding of the implications of any proposed changes. The Commission has identified areas of possible reform but does not make provisional recommendations with respect to these areas, instead asking for feedback on a set of questions. The Commission will give careful consideration to the feedback received during the consultation process before making final recommendations.

B. Video-Conferencing Technology as a Potential Tool

The objective of reforms allowing for electronic witnessing of affidavit evidence is, at least in part, to prevent clients from having to travel long distances and incur significant expenses to have their

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ For a more general discussion on the impact of poverty on rural Canadians, see *Rural and Small Town Programme, Rural Poverty Discussion Paper*, by Ausra Burns, David Bruce, & Amanda Marlin (Ottawa: Government of Canada, 2007).

affidavit evidence properly witnessed. If electronic witnessing of affidavit evidence is to become a usable method of witnessing in Manitoba, the individuals must have reliable and secure access to internet or cellular data. Reliable Internet connection has been an issue for remote communities across Canada including in remote communities in Manitoba.⁸⁵

In recent years, the federal government has funneled large sums of money to address the Internet connectivity gap in remote communities. In its 2016 report, the government outlined its goal “to connect every Canadian to affordable, high-speed Internet no matter where they live, and to improve mobile cellular access from coast to coast to coast.”⁸⁶ However, the discussion about Internet connection in remote communities has largely been about economic development rather than about access to legal services.⁸⁷ It is still not clear if the federal government is going to invest the time and finances needed to fix the connectivity gap in remote Indigenous communities. Due to the connectivity gap that exists in some communities, during the consultation phase, an important task will be to determine the current state of Internet access and connectivity speed across Manitoba.

Issue for Discussion #1:

- (a) Should *The Manitoba Evidence Act* be amended to remove the physical presence requirement in certain circumstances as is proposed by Ontario’s Bill 161?**
- (b) If the Act is amended to enable electronic notarizing or commissioning of affidavit evidence, should standards be set to regulate those providing such services similar to the “standards of notarization” enacted in Virginia?**

C. Addressing Concerns of Privacy and Security of Documents

Another issue that may arise is with the technology that may be required to make electronic witnessing a reality. There are currently a variety of video-conferencing technologies on the

⁸⁵ High-Speed Access for All: *Canada’s Connectivity Strategy*, online:

https://www.ic.gc.ca/eic/site/139.nsf/eng/h_00002.html#c According to the report, in 2016 the federal government’s *Connect to Innovate* program aimed at enhancing internet access for 900 communities including 190 Indigenous communities. With the *Connectivity Strategy*, the federal government has included in its 2019 budget \$6 billion in investments to connect all Canadians. The three pillars of this strategy are 1) High Speed Access for All, 2) Investing for Impact and 3) Partnering for Progress. The Strategy aims to deliver 50/10 connectivity to 90% of Canadians by 2021, 95% of Canadians by 2026, and the hardest-to-reach Canadians by 2030. Canadians will also have enhanced mobile connectivity on highways and major roads.

⁸⁶ *Ibid.* There is a clear divide between rural and urban Canada as it relates to Internet connectivity. In 2017, only 37% of rural households had access to 50/10 Mbps, compared with 97% of urban homes and only 24% of households in Indigenous communities have access to 50/10 Mbps.⁸⁶ Overall, speeds of 50/10 Mbps are available to 84% of Canadian households, and the Government of Canada has committed to bring these speeds to 90% of Canadians in 2021, 95% in 2026 and 100% by 2030. There is a significant difference between the number of households with access to high speed Internet in rural communities versus the number in Indigenous communities.

⁸⁷ *Ibid.* This *Connectivity Strategy* was released alongside a new federal rural economic development plan, namely “Rural Opportunity, National Prosperity: An Economic Development Strategy for Rural Canada.”

market. However, it is not clear how secure such software is for the purposes of electronic witnessing. For instance, Skype⁸⁸ has experienced security concerns since it was first created.⁸⁹ Apple's FaceTime recently suffered a glitch which allowed video to be turned on without a user's knowledge.⁹⁰ These are just two examples of the issues that often plague technology, and while technology can appear to be safe and secure, software updates can cause issues that may severely impact security.

Another potential issue is the ability (or lack thereof) of lawyers being able to confirm that the client received the appropriate documents in the right order, as email can be unreliable especially if the document is too large to fit into one document. Sending a document by mail could create issues, as it is impossible to know where it is at every moment while it is in transit. One possible solution is combining the use of electronic witnessing with electronic signatures to ensure that the client is seeing the document exactly as the lawyer wants it to be seen. The use of electronic signatures is becoming increasingly relevant all over the world and in Canada, as it is convenient for everyone involved.⁹¹ In Canada, the *Personal Information Protection and Electronic Documents Act*⁹² was fully implemented in 2004 and provides for functional uniformity between paper and electronic documents. This federal legislation clearly outlines the requirements for a secure electronic signature as follows:

- the electronic signature should be unique and distinctive to the person using it;
- the signature is created using methods which the signer can keep under his/her sole control;
- the technology used should be able to identify and recognize the person executing the electronic signature; and
- any subsequent changes or alterations to the electronic signature should be detectable.⁹³

At the provincial level, many provinces have adopted the Uniform Law Conference of Canada's draft Uniform Electronic Commerce Act ("UECA").⁹⁴

⁸⁸ Information about this software can be found at www.skype.com.

⁸⁹ See, for example, Matthew Humphries "Skype accounts can be hacked with an email address", (14 November 2012), online: <https://www.geek.com/geek-pick/skype-accounts-can-be-hacked-with-an-email-address-1528410/>.

⁹⁰ Julia Carrie Wong, "Apple rushes to fix FaceTime bug that let users eavesdrop on others," The Guardian (29 January 2010), online: <https://www.theguardian.com/technology/2010/jan/28/apple-facetime-bug-listen-calls-iphone-glitch-privacy>.

⁹¹ For example, on September 4th 2019, The United Kingdom's Law Commission confirmed on their website that electronic signatures are accepted in most situations. See The Law Commission, online: <https://www.lawcom.gov.uk/electronic-signatures-are-valid-confirms-law-commission/>.

⁹² SC 2000, c 5.

⁹³ *Ibid*, s 48 (2)(a)-(d).

⁹⁴ Uniform Law Conference of Canada, "Uniform Electronic Commerce Act", Sept 1999. Most Canadian provinces have enacted legislation based on the UECA. Both the PIPEDA and the UECA provide that a contract should not be deemed invalid solely because it is in electronic form.

In Manitoba, electronic signatures have been permitted since the passage of *The Electronic Commerce and Information Act*⁹⁵ (“*ECIA*”). The *ECIA* defines an electronic signature as “electronic information that a person has created or adopted in order to sign an electronic document and that is in, attached to, or associated with the document.”⁹⁶ As per the *ECIA*, any requirement that documents are to be provided to a person in writing are satisfied by an electronic document when the document is “accessible by the person and capable of being retained by the person so as to be usable by subsequent reference”⁹⁷ and the person consents to the electronic document.⁹⁸ Under the *ECIA*, “providing” a document includes “making a statement or declaration, whether or not under oath or solemnly affirmed”.⁹⁹ Electronic signatures are valid under the *ECIA* if the signature is reliable for the purposes of identifying the person and associating the signature with the document for the purpose for which the signature is applied.¹⁰⁰ Meeting the following criteria satisfies requirements that documents be presented as originals:

- (a) there is a reliable assurance that
 - (i) the electronic document contains the information in the original document, and
 - (ii) the information has remained complete and unaltered, apart from any changes or additions made in the normal course of communication, storage or display, from the time the original document was first made in final form, whether as a paper document or otherwise; and
- (b) the applicable requirements of section 12 have been met.¹⁰¹

The above provisions suggest that sending, receiving and signing electronic documents is legal in Manitoba.

The use of electronic signatures is a good tool for use in conjunction with video-conferencing software in order to facilitate electronic witnessing of signatures. There are many platforms created to facilitate the sending and signing of electronic documents.¹⁰² The many platforms that exist have put in place mechanisms for security as they “lock down” the document, record IP addresses of both senders and receivers of documents, and can only be accessed by pre-determined signatories at specific email addresses.¹⁰³ Another benefit to electronic signature platforms is that they are generally free for recipients, who only require email and an Internet browser to access and sign

⁹⁵ SM 2000, c 32.

⁹⁶ *Ibid* s 1.

⁹⁷ *Ibid* s 12(1)(a).

⁹⁸ *Ibid* s 12(1)(c).

⁹⁹ *Ibid* s 12(4).

¹⁰⁰ *Ibid* s 13(1)(a)(i)-(ii).

¹⁰¹ *Ibid* s 14.

¹⁰² Acrobat Adobe, can be found online at: <https://acrobat.adobe.com/us/en/acrobat/how-to/electronic-signatures-online-e-signatures.html>. DocuSign is another platform and can be found online at: <https://acrobat.adobe.com/us/en/sign.html#>.

¹⁰³ *Ibid*.

the documents.¹⁰⁴ These security measures can address some of the concerns around fraud and control of documents during transit outlined in *First Canadian Title Co v Law Society (British Columbia)* described on page 9. If the lawyer can lock down a document before sending it to the client, the risk of fraud is reduced.

Note that Ontario has not proposed any privacy or security measures in the legislative amendments put forward in Bill 161. Such conditions would likely be incorporated into the corresponding regulations should the Bill be enacted.

Issue for Discussion #2:

- (a) What safety measures should be required to ensure the privacy and security of documents being witnessed electronically and to respond to the concerns in *First Canadian Title Company Ltd.* such as the integrity of the document and ability to verify the signatory's identity?**
- (b) What criteria should be used to determine what software is allowable? Should such criteria be established by regulation?**
- (c) What other issues relating to privacy and security may arise?**

D. The List Of Authorized Individuals Under Section 62(1)

As is detailed in chapter 2, the list of authorized individuals who can take an oath or affirmation and subsequently witness the signing of an affidavit has changed over time. The list of authorized individuals varies in each province. The Commission is considering whether a discrete change to the legislation adding persons to the enumerated list at s. 62(1) would address of issue of access to justice caused by an unavailability of persons currently listed in the Act.

In contrast to the *MEA*, which authorizes specified persons to take affidavit evidence in any circumstance, British Columbia has taken a different approach and has statutorily authorized certain professions to act as witness to the signing of an affidavit only in certain specific circumstances relating to their professional responsibilities.¹⁰⁵

For example, unlike other persons authorized in British Columbia such as a notary public or member of the Law Society of that province, social workers may serve as commissioners for oaths (and therefore witness the signing of an affidavit) “only for the purposes of exercising the powers and performing the duties delegated to them under the [enumerated Acts including the *Employment and Assistance Act*, the *Adoption Act*, etc.]”¹⁰⁶ Their authority to take affidavits is contextually limited to that within their scope of knowledge.

In contrast to Manitoba and British Columbia, where enumerated lists of individuals are designated the authority to witness affidavits, only commissioners of oaths may administer oaths and

¹⁰⁴ *Ibid.*

¹⁰⁵ *Supra* note 49, s 61.1.

¹⁰⁶ *Ibid.*

affirmations and witness an affiant's signature in both Alberta and Ontario. Alberta's *Notaries and Commissioners Act* ¹⁰⁷ provides that a lawyer who is a member of the Law Society of Alberta; law student, notary public; judge; police officer; member of the Canadian armed forces, certain elected representatives, including members of municipal councils, members of a Metis settlement council and members of a board of trustees of a school division; or any other person appointed as a commissioner of oaths by the Minister of Justice may administer oaths and affirmations in Alberta. ¹⁰⁸ In Ontario, a similar list of commissioners for taking affidavits is prescribed in regulations. ¹⁰⁹

While changes have been made to the list of authorized individuals over time, those changes have not made a difference for remote and Indigenous communities. The list also does not include many roles of individuals common in remote, northern or Indigenous communities. For example, the list includes municipal council, mayor or reeve but not Chief and council of First Nations. It includes a postmaster but not a principal or a teacher who are more likely to be accessible in remote communities. A modernized list would include individuals and groups of individuals who are accessible and relevant to remote and Indigenous communities.

Any changes to legislation that the Commission proposes concerning remote Indigenous communities must take into account the unique characteristics and needs of those communities. The Commission must be mindful of the "social and cultural barriers that Aboriginal people face in using legal information and education services, and to adapt these services in culturally appropriate ways to ensure Aboriginal people benefit from them."¹¹⁰

The most straightforward amendment to the legislation to address the barriers to executing affidavits in remote, northern and Indigenous communities may be the broadening of the list under section 62(1) of the *MEA* to add more authorized individuals. There is no doubt this would benefit some people, but it would also raise concerns around privacy, lack of anonymity and stigmatization for others. In early discussions, the Commission has learned that seeking legal help is sometimes a difficult task in remote communities where everyone is known to one another. Stigmatization has been recognized as a barrier to rural service access in the legal literature. ¹¹¹ Ultimately, in order for rural residents to choose to seek legal assistance, they must feel that accessing legal help will improve their situation. Legal services need to be perceived as an accessible and safe environment.

The other aspect of tight-knit and small communities is information sharing and the level of comfort and trust community members have to seek help from leaders and service agencies in the community. The Chief and Council, Elders or a principal of a school are individuals who are normally trusted by most members of a community. Cohl & Thompson state that "while social relations of place can have a negative impact upon service accessibility in rural areas, they can also provide an opportunity for service providers to build trust, increase local knowledge of

¹⁰⁷ *Supra* note 47.

¹⁰⁸ *Ibid.*, ss. 4(1), 15(1), 16(1).

¹⁰⁹ *Supra* note 44, s 1.

¹¹⁰ Karen Cohl & George Thomson, "Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services" (Toronto: Law Foundation of Ontario, December 2008) at 2.

¹¹¹ *Ibid.*

available legal services, and combat access barriers that result from the more challenging aspects of small town living.”¹¹²

Issue for Discussion #3:

- a) **Should the list of persons in section 62(1) of the *Manitoba Evidence Act* be broadened to include other authorized individuals? Should it be narrowed to include fewer?**
- b) **If the list should be broadened, who should be added? If it should be shortened, who should be removed?**
- c) **Should section 62(1) be amended to include regulated professions such as medical practitioners, nurses, social workers and teachers?**
- d) **Should section 62(1) be amended to add the Chief or Councillors of a First Nation?**
- e) **Are there potential issues such as stigmatization, lack of anonymity and privacy in simply broadening the list under s. 62(1) such that it would not be an appropriate way to address the need for reform?**

E. Restrictions on Electronic Witnessing

While the primary focus of this project is considering how to decrease barriers for Manitobans living in remote communities when swearing or affirming affidavits, none of the jurisdictions in which electronic witnessing has been introduced restrict the use of such technology to geographic areas where those able to take affidavit evidence are scarce.

In the United States, for example, much of the dialogue around the introduction of remote notarial acts focused on adaptation to consumer, business and governmental realities instead of enhancing access to services in under-served geographic areas.¹¹³

Even in urban centres and larger rural communities where persons have access to a lawyer, commissioner of oaths, or other person qualified to administer an oath or affirmation and take an affidavit, electronic witnessing may have the effect of making legal work more cost effective and efficient, with savings passed on to clients and hastening the legal process.

Issue for Discussion #4:

If the *Manitoba Evidence Act* should be amended to allow for affidavits to be taken using video-conferencing technology, should it be restricted to certain populations or certain situations?

¹¹² *Ibid.*, at 39.

¹¹³ See, for example: Reiniger, Timothy and Hansberger, Richard, “Virtual Presence: Online Notarization and the End of Physical Appearance in the Digital Age”, *Scitech Lawyer*; Chicago Vol. 8, Iss. 2, (Fall 2011): 16-21; and Reiniger, Timothy and Marston, Phillip, “The Deed is Done: On-line Notarization Becomes a Reality, 10 *Digital Evidence & Elec. Signature L. Rev.* 144 (2013), 144.

Another issue for consideration is whether either the affiant or the witness to the affiant's signature ought to be required to be in Manitoba during the electronic witnessing. Currently, the *MEA* allows oaths to be administered outside of Manitoba by Manitoba authorized individuals:

An oath, affidavit, affirmation, or statutory declaration administered, sworn, affirmed, or made outside Manitoba before any person before whom an oath, affidavit, affirmation, or statutory declaration may be administered, sworn, affirmed, or made within the province is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed, or made within Manitoba before a commissioner for oaths appointed under Part II.¹¹⁴

The Virginia Code does not provide specific guidance on whether an electronic notary may remotely notarize a document using video technology while outside the state. The Code does, however, state that, in addition to exercising their powers anywhere within the state¹¹⁵, notaries commissioned in Virginia may “perform notarial acts outside the Commonwealth [i.e. Virginia], where such notarial acts are performed in accordance with this chapter [of the Code]”.¹¹⁶ Additionally, the Code provides that “an electronic notarial act performed in accordance with this chapter shall be deemed to have been performed within the Commonwealth and is governed by Virginia law”.¹¹⁷

The Virginia Code does not necessitate that the client be located in Virginia at the time of the execution of the document. It may therefore be that a notary authorized to perform electronic notarial acts in Virginia can serve clients throughout the United States.

Issue for Discussion 5:

- a) Should a person witnessing the signing of an affidavit using video-conferencing technology be required to be physically present in Manitoba?**
- b) Should the affiant be required to be physically present in Manitoba when appearing before a witness using video-conferencing technology?**

In order to answer these questions, the Commission will look to the research, as discussed above, and will undertake a consultation process. The Commission will need to look beyond the legal profession in order to craft recommendations that are practical and will benefit those who are more directly affected by changes to the *MEA*.

¹¹⁴ *Supra* note 1, s 63(2).

¹¹⁵ *Supra* note 60, § 47.1-13(A).

¹¹⁶ *Ibid* § 47.1-13(B).

¹¹⁷ *Ibid*, § 47.1-13(D).

CHAPTER 5- ISSUES FOR DISCUSSION

Issue for Discussion #1:

- (a) Should *The Manitoba Evidence Act* be amended to remove the physical presence requirement in certain circumstances as is proposed by Ontario's Bill 161?
- (b) If the Act is amended to enable electronic notarizing or commissioning of affidavit evidence, should standards be set to regulate those providing such services similar to the "standards of notarization" enacted in Virginia? (p.19)

Issue for Discussion #2:

- (a) What safety measures should be required to ensure the privacy and security of documents being witnessed electronically and to respond to the concerns in *First Canadian Title Company Ltd.* such as the integrity of the document and ability to verify the signatory's identity?
- (b) What criteria should be used to determine what software is allowable? Should such criteria be established by regulation?
- (c) What other issues relating to privacy and security may arise? (p.22)

Issue for Discussion #3:

- (a) Should the list of persons in section 62(1) of the *Manitoba Evidence Act* be broadened to include other authorized individuals? Should it be narrowed to include fewer?
- (b) If the list should be broadened, who should be added? If it should be shortened, who should be removed?
- (c) Should section 62(1) be amended to include regulated professions such as medical practitioners, nurses, social workers and teachers?
- (d) Should section 62(1) be amended to add the Chief or Councillors of a First Nation?
- (e) Are there potential issues such as stigmatization, lack of anonymity and privacy in simply broadening the list under s. 62(1) such that it would not be an appropriate way to address the need for reform? (p. 24)

Issue for Discussion #4:

- (a) If the *Manitoba Evidence Act* should be amended to allow for affidavits to be taken using video-conferencing technology, should it be restricted to certain populations or certain situations? (p. 24)

Issues for Discussion #5:

- a) Should a person witnessing the signing of an affidavit using video-conferencing technology be required to be physically present in Manitoba?**
- b) Should the affiant be required to be physically present in Manitoba when appearing before a witness using video-conferencing technology? (p. 25)**

APPENDIX A: RELEVANT SECTIONS OF THE MANITOBA EVIDENCE ACT

DIVISION V

EVIDENCE BY AFFIDAVIT OR DECLARATION

STATUTORY DECLARATIONS

Statutory declarations

61 Any person authorized to take affidavits may receive the solemn declaration of any person voluntarily making it before him, in attestation of the execution of any writing, deed, or instrument, or of the truth of any fact, or of any account rendered in writing, in the following form:

I, A.B., do solemnly declare that (state the fact or facts declared to), and make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me at _____, this _____ day of _____, 19 ____.

AFFIDAVITS, AFFIRMATIONS AND DECLARATIONS

Affidavit, etc., to be taken within province

62(1) Any oath, affidavit, affirmation, or statutory declaration, for use in the province may be administered, sworn, affirmed, made, or declared, within the province before any of the following persons:

- (a) A commissioner for oaths.
- (b) The Lieutenant Governor.
- (c) The Clerk of the Executive Council of the province.
- (d) A justice of the peace in the province.
- (e) The judge of any court in the province.
- (f) The master, referee, Registrar or deputy registrar of the Court of Queen's Bench, or the deputy of any of them.
- (g) A district registrar, deputy district registrar, or a deputy of a district registrar, of any land titles office in the province, or the Registrar-General under *The Real Property Act*.
- (h) A barrister-at-law or attorney-at-law duly admitted and entitled to practise as such in the province.
- (i) A notary public appointed for the province.
- (j) The mayor, reeve, or clerk of any municipality, the resident administrator of any local government district, or the secretary-treasurer of any school district or school division, established under *The Public Schools Act*.
- (k) The postmaster of any post office in the province who is appointed under the *Canada Post Corporation Act* (Canada).

- (l) The chief sheriff or any sheriff in the province of the deputy of any of them.
- (m) A member of the Royal Canadian Mounted Police Force.
- (n) A surveyor authorized to practise under *The Land Surveyors Act*.

Designation of office

62(2) Every such officer shall designate his office below his signature to the jurat on any affidavit or statutory declaration sworn, affirmed, or declared, before him.

Oaths, etc., administered by commissioned officers

62(3) An oath, affidavit, affirmation, or statutory declaration administered, sworn, affirmed, made, or declared within or outside Manitoba before a person who holds a commission as an officer in the Canadian Forces and is on full-time service is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed, or made within Manitoba before a commissioner for oaths appointed under Part II.

Admissibility

62(4) A document that purports to be signed by a person mentioned in subsection (3) in testimony of an oath, affidavit, affirmation, or statutory declaration having been administered, sworn, affirmed, or made before him and on which his rank and unit are shown below his signature, is admissible in evidence without proof of his signature or of his rank or unit or that he is on full-time service.

S.M. 2005, c. 8, s. 11.

Oaths, etc., administered outside province

63(1) An oath, affidavit, affirmation, or statutory declaration administered, sworn, affirmed, or made outside Manitoba before,

- (a) a judge;
- (b) a justice of the peace;
- (c) an officer of a court of justice;
- (d) a commissioner for taking affidavits, or other competent authority of a similar nature;
- (e) a notary public;
- (f) the head of a city, town, village, township, or other municipality;
- (g) an officer of any of Her Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affaires, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;
- (h) an officer of the Canadian diplomatic, consular, or representative services, including, in addition to the diplomatic and consular officers mentioned in clause (g), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor, and secretary; or

(i) a Canadian Government Trade Commissioner or an Assistant Canadian Government Trade Commissioner; or

(j) a commissioner authorized by the laws of Manitoba to take affidavits outside Manitoba;

exercising his functions or having jurisdiction or authority as such in the place in which it is administered, sworn, affirmed, or made, is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed, or made within Manitoba before a commissioner for oaths appointed under Part II.

Oaths, etc., administered outside Manitoba by Manitoba officers

63(2) An oath, affidavit, affirmation, or statutory declaration administered, sworn, affirmed, or made outside Manitoba before any person before whom an oath, affidavit, affirmation, or statutory declaration may be administered, sworn, affirmed, or made within the province is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed, or made within Manitoba before a commissioner for oaths appointed under Part II.

Admissibility

63(3) A document that purports to be signed by a person mentioned in subsection (1) or (2) in testimony of an oath, affidavit, affirmation, or statutory declaration having been administered, sworn, affirmed, or made before him outside Manitoba and on which his office is shown below his signature, and

(a) in the case of a notary public, that purports to have impressed thereon or attached thereto his official seal;

(b) in the case of a person mentioned in clause (1)(f), that purports to have impressed thereon or attached thereto the seal of the municipality; and

(c) in the case of a person mentioned in clause (1)(g), (h) or (i), that purports to have impressed thereon or attached thereto his seal or the seal or stamp of his office or of the office to which he is attached

is admissible in evidence without proof of his signature or of his office or official character or of the seal or stamp, and without proof that he was exercising his functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation, or statutory declaration was administered, sworn, affirmed, or made.

S.M. 2004, c. 42, s. 28; S.M. 2005, c. 8, s. 11.

ADMINISTRATION OF OATHS

Mode of taking affidavits, affirmations, and declarations

64(1) Every oath, affirmation, and statutory declaration, shall be taken by the deponent or declarant in the presence of the commissioner or other officer or person administering it, who shall satisfy himself of the genuineness of the signature of the deponent or declarant, and shall administer the oath, affirmation, or declaration, in the manner required by law before he signs the jurat or attestation.

Form of oath, etc.

64(2) Where a person is about to swear or affirm an affidavit he may do so in the following form or to the same effect:

In the case of an affidavit sworn,

I/you, A.B., swear that the contents of this affidavit made and subscribed by me/you are true. So help me/you God.

and in the case of an affidavit affirmed,

I/you, A.B., do solemnly and sincerely affirm that the contents of this affidavit made and subscribed by me/you are true.

Jurat to state time and place

64(3) Every commissioner or other person before whom any affidavit or declaration is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the affidavit or declaration is taken or made.

Special forms of jurat

64(4) Where a person who has sworn or affirmed an affidavit or made a statutory declaration is incapable of reading the affidavit or declaration or is incapable of writing his or her name, or swore or affirmed the affidavit or made the declaration through an interpreter, or where an affidavit or declaration is severally sworn, affirmed, or made, by two or more deponents or declarants, the person before whom the affidavit or declaration was sworn, affirmed, or made, may make use of that one of the forms of jurat hereinafter set out that is relevant to the case:

FORM OF JURAT — INCAPABLE OF READING AFFIDAVIT OR DECLARATION

Sworn (affirmed or declared) before me at the of , in the of , this day of , 19 , having first been read over and explained by me to the deponent (or declarant) who, being incapable of reading the contents of the affidavit or declaration, appeared to understand the same and (choose one)

- (a) signed his/her signature in my presence; or
- (b) made his/her mark in my presence; or
- (c) verbally indicated his/her understanding of same.

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — TWO OR MORE DEPONENTS OR DECLARANTS

Severally sworn (affirmed or declared) before me at the of , in the of , this day of , 19 .

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — PERSON INCAPABLE OF WRITING NAME

Severally sworn (affirmed or declared) before me at the _____ of _____, in the _____ of _____, this _____ day of _____, 19____ by the deponent (or declarant) who, being incapable of writing his/her name (choose one)

- (a) made his/her mark in my presence; or
- (b) verbally indicated his/her understanding of the affidavit or declaration.

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — INTERPRETER USED

Sworn (affirmed or declared) before me at the _____ of _____, in the _____ of _____, this _____ day of _____, 19____, through the interpretation of _____, of the _____ of _____, in the _____ of _____, the said having been first sworn truly and faithfully to interpret the contents of this affidavit (affirmation or declaration) to the deponent (or declarant), and truly and faithfully to interpret the oath about to be administered to him (or declaration about to be taken by him).

A Commissioner for Oaths, Notary Public, etc.

Penalty for improper use of affidavits, etc.

65 Every person administering an oath, affirmation, or statutory declaration, who signs a jurat or attestation without the due administration of the oath, affirmation, or declaration, or who, in a proceeding in or out of court or for the purpose of making or maintaining any claim, makes, files, or uses, any affidavit or statutory declaration, knowing it has not been taken or made in conformity with this Act, is guilty of an offence and is liable, on summary conviction, to a fine of not less than \$25. but not more than \$500. for each offence.

Formal defects, when not to vitiate

66 No informality in the heading or other formal requisites to any affidavit or declaration, made or taken before a commissioner or other person authorized to take affidavits under this or any Act, is an objection to its reception in evidence, if the court or officer before whom it is tendered thinks proper to receive it.

APPENDIX B: RELEVANT SECTIONS OF BILL 161 OF ONTARIO

Schedule 5

COMMISSIONERS FOR TAKING AFFIDAVITS ACT

Administration of oath, declaration

In person

9 (1) Every oath and declaration shall be taken by the deponent or declarant in the physical presence of the commissioner, notary public, justice of the peace or other officer or person administering the oath or declaration.

Not in person

(2) Despite subsection (1), if the regulations made under this Act so provide and the conditions set out in the regulations are met, an oath or declaration may be taken by a deponent or declarant in accordance with the regulations without being in the physical presence of a commissioner, notary public, justice of the peace or other officer or person administering the oath or declaration.

Duty of commissioner, etc.

(3) A commissioner, notary public, justice of the peace or other officer or 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.

Transition, commissioners for specific purposes

12.1 A person who exercised powers, conferred by the Attorney General under section 3 immediately before its repeal by section 2 of Schedule 5 to the *Smarter and Stronger Justice Act, 2019*, to administer oaths and take affidavits in connection with the performance of his or her official duties may continue to exercise the conferred powers, subject to any limitations determined by the Attorney General when the powers were conferred, and continues to be subject to this Act in respect of the exercise of those powers until the person ceases or is no longer authorized to perform those duties.

8 (1) Clause 13 (a) of the Act is repealed and the following substituted:

(a) prescribing the fees payable to commissioners under this Act and requiring their payment;

(2) Section 13 of the Act is amended by adding the following clause:

(d) for the purposes of subsection 9 (2), providing that an oath or declaration may be taken by a deponent or declarant without being in the physical presence of a commissioner, notary public, justice of the peace or other officer or person administering the oath or declaration, specifying conditions that must be met in order for an oath or declaration to be administered without being in the physical presence of the deponent or declarant, and governing the administering of an oath or declaration without being in the physical presence of the deponent or declarant.

SCHEDULE 19

NOTARIES ACT

Requirements for appointment

(1) Any person, other than a barrister or solicitor, who wishes to be appointed a notary public,
(a) is subject to examination in regard to his or her qualification for the office by a judge of the Superior Court of Justice in the area in which he or she resides, or by a public servant employed for the purpose under Part III of the *Public Service of Ontario Act, 2006*; and
(b) shall not be appointed a notary public without a certificate from the judge or public servant referred to in clause (a) that he or she has examined the applicant and finds him or her qualified for the office.

Requirements for appointment

2 A person, other than a licensee under the *Law Society Act*, may not be appointed as a notary public unless the person meets the requirements specified by the regulations made under this Act for determining the person's qualification for the office.

Powers

3 (1) Subject to subsection (2), a notary public may,
(a) witness or certify, and attest, the execution of a document;
(b) certify and attest a true copy of a document;
(c) exercise the powers of a commissioner for taking affidavits in Ontario; and
(d) exercise any other powers and perform any other functions specified by the regulations made under this Act.

Restriction

(2) The powers a notary public, other than a notary public who is a licensee under the *Law Society Act*, may exercise under subsection (1) are subject to any restrictions that may be imposed in the notary public's appointment or reappointment that limit the territory and cases in which he or she may exercise his or her powers.

Not in person

(3) Despite any requirement in law to exercise his or her powers in a person's physical presence, if the regulations made under this Act so provide and the conditions set out in the regulations are met, a notary public may, in accordance with the regulations, exercise his or her powers without being in the person's physical presence.

When seal not needed

(4) If a notary public is authorized by an Act to administer oaths or to take affidavits or declarations in Ontario, it is not necessary to the validity of any such oath, affidavit or declaration that the notary public affix his or her seal.

APPENDIX C: RELEVANT SECTIONS OF THE VIRGINIA CODE

§ 47.1-6.1. Standards for electronic notarization.

The Secretary of the Commonwealth shall develop standards for electronic notarization and the Virginia Information Technologies Agency shall provide assistance to the Secretary of the Commonwealth relating to the equipment, security, and technological aspects of the electronic notarization standards. The process for developing and maintaining such standards shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.).

§ 47.1-7. Additional requirements for performing electronic notarial acts.

A. An applicant shall submit a registration form established by the Secretary for registering and being commissioned as an electronic notary public, which shall include:

1. The applicant's full legal and official notary names;
2. A general description of the technology or technologies the registrant will use to create an electronic signature in performing official acts;
3. Certification of compliance to the Secretary of the Commonwealth with electronic notary standards developed in accordance with § 47.1-6.1; and
4. The electronic mail address of the registrant.

B. The registration form shall (i) be signed by the applicant using the electronic signature described in the form; (ii) include any decrypting instructions, codes, keys, or software that allow the registration to be read; and (iii) be transmitted electronically to the Secretary.

C. Nothing herein shall be construed to prevent an electronic notary from using updated technology or technologies during the term of the commission; however, the electronic notary shall notify the Secretary electronically within 90 days of installation or use of such updated technology or technologies and provide a brief description thereof.

§ 47.1-11.1. Evidence of authenticity of electronic notarial act.

A. Form of evidence of authority of electronic notarial act. On a notarized electronic document transmitted to another state or country outside of the United States, electronic evidence of the authenticity of the official signature and seal of an electronic notary of the Commonwealth of

Virginia, if required, shall be attached to or logically associated with the document and shall be in the form of an electronic certificate of authority signed by the Secretary that is independently verifiable, will be invalidated if the underlying document is improperly modified, and is in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States.

B. Certificate of authority for electronic notarial act. An electronic certificate of authority evidencing the authenticity of the official signature and seal of an electronic notary of the Commonwealth of Virginia shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act

I,..... (name and title), certify that..... (name of electronic notary), the person named as Electronic Notary Public in the attached or associated electronic document, was commissioned as an Electronic Notary Public for the Commonwealth of Virginia and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this ... day of....., 20....

(Electronic signature and seal of commissioning official)

C. For issuing an electronic certificate of authority, the Secretary may charge a fee in an amount set by the Secretary.