



**Manitoba Law
Reform Commission**

ELECTRONIC WITNESSING OF AFFIDAVIT EVIDENCE

Final Report

August 2020

ELECTRONIC WITNESSING OF AFFIDAVIT EVIDENCE

Report #140

August 2020

Library and Archives Canada Cataloguing in Publication

Manitoba Law Reform Commission

Electronic Witnessing of Affidavit Evidence

(Report ; 140)

Cover title.

Includes bibliographical references.

ISBN 978-0-7711-1609-4

The Commission's Reports are available electronically at www.manitobalawreform.ca.

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The Manitoba Law Reform Commission is funded through grants from:



The Commission wishes to express its thanks to the Manitoba Law Foundation and to the Department of Justice for their continued support.

ACKNOWLEDGMENTS

The consultation for this report and the majority of the research was conducted by Kobra Rahimi in her role as legal counsel to the Commission.

The Commission gratefully acknowledges the following individuals for providing valuable feedback on this project: Honourable Malcolm McDonald and Honourable Theresa McDonald, Provincial Court of Manitoba; Honourable Gerald Jewers, former judge of the Court of Queen's Bench; Doris Young, Elder & Educator; Louis McGillivray, Aboriginal Justice Court Worker; Robert Pellizzaro, Mayer Dearman Pellizzaro Law; Ronald Coke, Taylor McCaffrey LLP; Rohit Gupta; Jon Robbins, Spencer Weisensel, Tristan Sandulak, and Aqvar Manhas of the Legal Aid Manitoba office in the Pas, Manitoba; Serena Puranen, Curtis Briscoe, and Gail MacAulay, of the Legal Aid Office in Thompson, Manitoba; Elliot Leven; Simon Jack; Margaret Carroll, Judy Eagle; Bjorn Christianson Q.C., TDS Law; Lena Koke and Jasmeet Ajrawat of Axxess Law (Ontario); Clark W. Dalton, National Coordinator of the Uniform Law Conference of Canada; David Clement, North American Affairs Manager, Consumer Choice Center, Ontario; Amy Jackson, Registrar, Court of Queen's Bench; Susan Boles, Director, Telehealth, Manitoba Northern Region and First Nations; Ana Kapralos, Director, Program Modernization & Appointments Branch, Ontario Deputy Attorney General's Office; Pamela Seidlitz, Project Manager, Intensive Case Management, Government of Manitoba and Daniel Gautron, President, Association of Manitoba Land Surveyors.

The views expressed in this report are those of the Manitoba Law Reform Commission and do not necessarily represent the views of those individuals who have so generously assisted the Commission with this project.

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EXECUTIVE SUMMARY

The taking of evidence under oath or affirmation is a fundamental aspect of our system of justice. The law governing the processes of providing and taking such evidence in written form for use in a legal proceeding is found in sections 62-66 of *The Manitoba Evidence Act*¹ (*MEA*).

Section 64(1) of the *MEA* provides that oaths, affirmations and statutory declarations shall be taken in the *presence* of a commissioner for oaths or other individual authorized under the legislation to administer them. While the common meaning of this provision is ambiguous given advancements in technology, it has generally been agreed that section 64(1) of the Act requires that the parties be *physically* present in the same room when the action occurs and that the presence requirement is not fulfilled with the use of video-conferencing technologies that enable the parties to see each other while in different geographic locations.

Initially and prior to the COVID-19 pandemic, the main issue considered by the Commission in the scope of this study was whether the physical presence requirement contained in section 64(1) of the Act creates a burden to persons residing in remote parts of Manitoba, including communities in remote northern Manitoba, that do not have ready access to a commissioner for oaths or others authorized to take affidavit evidence. Additionally, the Commission considered whether the use of video-conferencing technology is a viable solution to such a problem.

In January 2020, the Commission released a Consultation Report on this topic and received input from legal professionals providing services in remote areas in northern Manitoba. Through this process, the Commission learned that a variety of substantial barriers exist for those living in remote, northern and Indigenous communities in this province that makes the inhabitants of these areas far less able to participate fully and effectually in the justice system. An inability to have an oath, affirmation or statutory declaration administered and affidavit evidence taken remotely is just one of many issues being faced. While the Commission is inclined to continue its examination of the barriers to justice exacerbated by the remoteness of these locations, for the purposes of this report, the commission has focused on the interpretation of section 64(1) of the *MEA* only.

The realities of the COVID-19 pandemic emphasize the importance of considering the physical presence requirement of the *MEA*. Social (or physical) distancing, which prevents close contact of people in order to reduce the risk of transmission of the virus, make the physical presence requirement difficult, if not potentially dangerous. After the Commission's Consultation Paper was issued and after Canadian governments, including the Government of Manitoba, took action to address the seriousness of COVID-19, Manitoba issued orders eliminating the need for physical presence, but only for a time-limited period. The Commission is of the view that the concept of physical presence should be reconsidered and not tied to public health emergencies.

In addition to improving access to justice in specific geographic areas of the province and responding to the COVID-19 pandemic, the Commission also views the permanent removal of the physical presence requirement from section 64(1) of the *MEA* as a logical development in line with technological advances that would provide a benefit to all Manitobans.

¹ CCSM c E150.

The Commission makes 4 recommendations in this report to reform the *MEA* utilizing technology to improve access to legal processes. Most significant is the recommendation that the recent amendments to the *MEA*, which temporarily removed the physical presence requirement from section 64(1), should be retained permanently.

RÉSUMÉ

La consignation de la preuve sous serment ou affirmation solennelle est un aspect fondamental de notre système de justice. La loi régissant les procédures de remise et de consignation de la preuve par écrit en vue de son utilisation dans une poursuite judiciaire se trouve dans les articles 62 à 66 de la Loi sur la preuve au Manitoba

Le paragraphe 64(1) de la Loi sur la preuve au Manitoba stipule que les serments, les affirmations et les déclarations solennelles sont prêtés ou faits en *présence* du commissaire ou autre personne autorisée à les recevoir en vertu de la loi. Bien que le sens commun de cette disposition soit ambigu compte tenu des progrès technologiques, il est généralement admis que le paragraphe 64(1) de la loi exige que les parties soient *physiquement* présentes dans la même pièce lorsque l'action se produit et que l'exigence de présence n'est pas remplie avec l'utilisation de technologies de vidéoconférence qui permettent aux parties de se voir mutuellement alors qu'elles se trouvent dans des lieux géographiques différents.

Au départ, et avant la pandémie de la COVID-19, la principale question examinée par la Commission dans le cadre de cette étude était de savoir si l'exigence de présence physique contenue dans le paragraphe 64(1) de la Loi crée un fardeau pour les personnes résidant dans des régions éloignées de la province, y compris les collectivités éloignées du nord du Manitoba, qui n'ont pas facilement accès à un commissaire aux serments ou à d'autres personnes autorisées à recevoir la preuve par affidavit. En outre, la Commission s'est posé la question de savoir si l'utilisation de la technologie de la vidéoconférence est une solution viable pour un tel problème.

En janvier 2020, la Commission a publié un rapport de consultation sur ce sujet et a reçu des commentaires de professionnels du droit fournissant des services dans les régions éloignées du nord du Manitoba. Dans le cadre de ce processus, la Commission a appris qu'il existe toute une série d'obstacles importants pour les personnes vivant dans les collectivités éloignées, autochtones et du nord du Manitoba, ce qui rend la pleine et efficace participation des habitants de ces régions au système judiciaire beaucoup moins facile. L'impossibilité de faire prêter serment, affirmer ou une déclarer solennellement et de recevoir la preuve par affidavit à distance n'est qu'un des nombreux problèmes rencontrés. Bien que la Commission soit encline à poursuivre son examen des obstacles à la justice exacerbés par l'éloignement de ces régions, pour les besoins du présent rapport, elle s'est uniquement concentrée sur l'interprétation du paragraphe 64(1) de la Loi sur la preuve au Manitoba.

Les réalités de la pandémie de la COVID-19 ont souligné l'importance d'étudier l'exigence de présence physique dans la Loi sur la preuve au Manitoba. L'éloignement social (ou physique), qui prévoit d'éviter tout contact étroit entre les personnes afin de réduire le risque de transmission du virus, a rendu difficile, voire potentiellement dangereuse, l'exigence de présence physique. Après la publication du document de consultation de la Commission et après que les gouvernements canadiens, y compris le gouvernement du Manitoba, aient pris des mesures pour faire face à la gravité de la COVID-19, le Manitoba a émis des ordres éliminant la nécessité d'une présence physique, mais seulement pour une période limitée. La Commission est d'avis que le concept de présence physique devrait être réétudié et ne pas être lié aux urgences de santé publique.

En plus d'améliorer l'accès à la justice dans des régions géographiques spécifiques de la province et de répondre à la pandémie de la COVID-19, la Commission considère aussi que la suppression permanente de l'exigence de présence physique du paragraphe 64(1) de la Loi sur la preuve au Manitoba est une évolution logique conforme aux progrès technologiques qui serait bénéfique pour tous les citoyens.

La Commission fait quatre recommandations dans ce rapport afin de réformer la Loi sur la preuve au Manitoba en utilisant la technologie pour améliorer l'accès aux processus juridiques. La plus importante est la recommandation selon laquelle les récentes modifications à la Loi sur la preuve au Manitoba, qui ont temporairement supprimé l'exigence de présence physique du paragraphe 64(1), devraient être maintenues de façon permanente.

TERMINOLOGY

Affiant	The person who makes and subscribes an affidavit. The word is used interchangeably with the word <i>deponent</i> . The affiant may also be referred to as the <i>witness</i> in judicial proceedings.
Affidavit	A written statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having the authority to administer such oath or affirmation.
Affirmation	A solemn declaration by a person that an affidavit is true.
Jurat	The clause written at the foot of an affidavit, stating when, where, and before whom such affidavit was sworn or affirmed.
Oath	An outward pledge by a person taking it that his attestation or promise is made under an immediate sense of responsibility to God. A solemn appeal to the Supreme Being in attestation of the trust of some statement.
Statutory Declaration	Unlike an affidavit, a statutory declaration is not sworn, rather it is declared to be true.

CHAPTER 1: INTRODUCTION

In 2017, members of the legal profession brought to the attention of the Manitoba Law Reform Commission (the “Commission”) challenges facing clients living in remote (often northern and Indigenous) communities where an individual needs to swear or affirm written evidence contained in an affidavit. In some circumstances, this individual 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* (the “*MEA*”).²

For the sake of brevity, those persons authorized under the *MEA* to administer an oath or affirmation and before whom an affidavit may be signed will be collectively referred to as “authorized individual(s)” throughout this report.

Currently, the presence requirement under the *MEA* that an affiant be physically present before a lawyer or another 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 another authorized individual to sign their affidavit.

Until recently, the use of video-conferencing technologies to enable an authorized individual in one geographic location to administer the oath or affirmation to an affiant in another location and witness the affiant signing the affidavit was not allowed under the law in Manitoba or elsewhere in Canada. That changed with recent temporary amendments instituted in several jurisdictions, including Manitoba, in response to the COVID-19 pandemic and with permanent changes to Ontario’s *Commissioner for the Taking of Affidavits Act*³ and *Notaries Act*⁴.

There have been questions raised about the necessity of the in-person witnessing requirement and whether advancements in technology negate the need for in-person meetings. Video-conferencing technology, the use of a computer or other electronic device to transmit both audio and visual signals, has made witnessing interactions remotely possible and has been put forward as a possible solution to address the barriers to inhabitants of remote communities by the physical presence requirement in section 64(1) of the Act. As technology brings new opportunities, it also brings new risks. It is therefore necessary to balance the potential opportunities with the perils of digital transformation.

While the idea for this project arose several years ago, the Commission’s work was recently influenced by the implications of the COVID-19 pandemic. As in-person interactions were strongly discouraged but the public’s needs for legal services continued, the subject matter of this project became even more timely. On May 13, 2020, in response to the pandemic, the Province of Manitoba enacted an Order re: Temporary Suspension of In-Person Commissioning and Witnessing Provisions under *The Emergency Measures Act*⁵ [the “Emergency Order”]. Among other things, the Emergency Order temporarily suspended the requirement set out in the *MEA* that oaths, affirmations and statutory declarations must be taken “in the presence of a[n authorized]

² The relevant sections of the *MEA* are attached as Appendix “A”.

³ RSO 1990, c C.17.

⁴ RSO 1990, c N.6.

⁵ CCSM c E80 [Emergency Measures Act].

person”.⁶ This amendment to the *MEA* is temporary at this time and, unless extended, expires on October 1, 2020.

In January 2020, the Commission released a Consultation Paper seeking comment on 5 issues for discussion. The main issue to be considered was 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.

The responses to the Consultation Paper clearly indicated that amending the *MEA* to allow for the use of video-conferencing technology in the witnessing of affidavits will not in itself remove all of the barriers to accessing justice, or even all the barriers existing in participating in the civil court system, for those residing in remote, northern and Indigenous communities. Rather, eliminating the physical presence requirement in the *MEA* and enabling persons residing remotely to access certain legal services using video-conferencing technology is one crucial piece of the puzzle and would remove one barrier to accessing justice for those individuals.

Chapter 2 of this report provides a historical review of the relevant evidence legislation in Manitoba, describes recent legislative changes brought about by the COVID-19 pandemic, and provides an overview of the state of the law in the United States. Chapter 3 discusses potential areas of reform, specifically considering access to justice perspectives, options for statutory amendments, managing associated risks, and jurisdictional issues. Chapter 4 summarizes the recommendations from the preceding chapters.

⁶ *Ibid*, s 2.

CHAPTER 2: BACKGROUND

1. Affidavits and the Role of the Affiant and Authorized Individual

In addition to providing oral evidence, a witness supplies relevant evidence in a judicial proceeding in written form by way of an affidavit. This individual is the affiant, sometimes referred to as the deponent.

The affidavit is confined to the statement of facts within the personal knowledge of the affiant or other evidence the affiant could give if testifying as a witness in court.⁷ In Manitoba, the affidavit is presented in the form of a statement in the first person and is signed by the affiant and sworn or affirmed before a person authorized to administer oaths or affirmations.⁸ The governing legislation, the *MEA*, contains an enumerated list of persons who are authorized to administer oaths and affirmations respecting affidavit evidence.

It is the role of the authorized individual to administer the oath or affirmation of the affiant and to document the administration of the oath or affirmation on the body of the document by way of a jurat. It is not the responsibility of the authorized individual to verify the truth of the evidence that is given much less provide assurance of its truth.⁹ Rather, it is the duty of the authorized individual to take the evidence of the affiant in solemn form and properly attested.

While by administering the oath or affirmation and signing the jurat, the authorized individual is not guaranteeing the truth of the evidence, it is improper for a person to receive an affidavit where they are aware that the evidence it contains is untrue.¹⁰ Generally, the authorized individual is expected to exercise due diligence when taking an affidavit. The *MEA* establishes that it is an offence to administer an oath or affirmation and sign a jurat without duly administering the oath or affirmation or making or filing an affidavit when aware it was not properly taken.¹¹ If such an offence is committed, the authorized individual is liable to a fine of \$25.00-\$500.00.¹²

Prior to the enactment of the Emergency Order, there was little legislative guidance on how a commissioner for oaths or other authorized individual could fulfil its duties in administering oaths or affirmations and witnessing affidavits. The exception is the statutory obligation that the authorized individual satisfies themselves of the genuineness of the signature and administers the

⁷ Court of Queen's Bench Rules, r 4.07(2).

⁸ Court of Queen's Bench Rules, r 4.07(1)(e).

⁹ Halsbury's Laws of Canada (Online), *Civil Procedure*, "Motions in a Proceeding: Hearing Motions: Evidence: Affidavits" (VII.4(2)(b)) at HCV-151 (2017 Reissue).

¹⁰ *Ibid.*

¹¹ *MEA* at note 1, s 65.

¹² *Ibid.*

oaths, affirmation or declaration in the manner required by law.¹³ Similarly, a guidebook providing direction to persons appointed commissioners for oaths in Manitoba is silent on a commissioner's responsibilities in administering the oath and signing the jurat.¹⁴ Even the Rules and Code of Professional Conduct of the Law Society of Manitoba do not advise of the steps to be taken by a lawyer acting in his or her capacity as a commissioner for taking affidavits with the exception of rules regarding the verification of the identity of a client.¹⁵ In this way, the Emergency Order, which establishes cogent steps to be followed in the administration of an oath or affirmation virtually, provides much more detailed directions than had existed prior to its enactment.

2. *The Manitoba Evidence Act*

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.¹⁶ Similar to the language contained in the *MEA*, the Court of Queen's Bench Rules provide 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”¹⁷ [emphasis added]. Where an affidavit or statutory declaration is not executed in accordance with the rules, both the affiant and individual acting as witness may face criminal consequences including a fine, imprisonment or both.¹⁸

The *MEA* contains an exclusive list of those persons with the statutorily-imposed right to serve as witness to the swearing or affirmation of an affidavit:

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.

¹³ *Supra* note 1, s 64(1).

¹⁴ Government of Manitoba, “Guidelines for Commissioners for Oaths: Powers, Duties and Responsibilities”.

¹⁵ Law Society of Manitoba, Law Society Rules, Division 12.

¹⁶ *Supra* note 1, s 64(1).

¹⁷ Court of Queen's Bench Rules, Man Reg 553/88 [QB Rules], R 4.07(e).

¹⁸ *Supra* note 1, s 65. This section provides: “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 of for the purpose of making or maintaining any claim, makes, files, or uses any affidavit of 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”. Additionally, section 138 of the Criminal Code of Canada states: “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.”

- (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*.

While the Commission is not aware of any statistics indicating which of the authorized individuals take most affidavits, it would appear that citizens normally take affidavits before commissioners for oaths, notary publics and lawyers.

3. History of Section 64(1) of *The Manitoba Evidence Act*, the Presence Requirement and Section 62(1), the List of Authorized Individuals

In 1872, the Manitoba Legislature passed *An Act to Amend An Act to Establish a Supreme Court*¹⁹ which, for the first time, provided statutory guidance on 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.²⁰

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".

¹⁹ SM 1872, c 3.

²⁰ *Ibid* at s 35.

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 the taking of affidavit evidence. In 1880, the Legislature passed *An Act Respecting Public Officers, their Duties and Appointments* (“*Public Officers Act*”).²¹ This was the first legislation passed specifically dedicated to the signing and witnessing of affidavit evidence, albeit limited to the evidence of public officers. Section 69 of the *Public Officers Act* specified who could administer oaths when the affidavit was being taken outside the province and how the process should be carried out:

Oaths, affidavits, affirmations, or declarations, sworn, affirmed, or made, out of the Province of Manitoba before the mayor or chief magistrate of any city, borough, or town corporate in Great Britain [...] or made before a commissioners for taking affidavits in the next preceding section mentioned, or other competent authority of the like nature.²²

This was a shift by the Legislature as it introduced the requirement that the affidavit must be sworn or affirmed before an enumerated person. In 1884, amendments to the legislation established an exclusive list of persons authorized to administer oaths, affidavits, affirmations or declarations to take affidavit evidence.²³ The original list included: any Commissioner for taking affidavits, mayor or chief magistrate, Justice of the Peace, Judge of any Court, Notary Public, or “any other person authorized to take affidavits in th[e] Province”.²⁴

The language “in the presence of” first appeared in 1933, when the Legislature introduced a revised version of the *MEA*²⁵ amalgamating all provisions related to affidavit evidence. The new wording provided more clarity, requiring an affiant to be present when swearing or signing an affidavit.²⁶

While the presence requirement has remained the same since 1933, several changes have been made to the list of authorized individuals. In 1940, amendments to the legislation established a list of authorized individuals that closely resembled the list contained in the current rendition found

²¹ CSM 1880 c 7.

²² *Ibid*, s 69.

²³ *An Act respecting Affidavits or Declarations required by any Statute of Manitoba*, Cap VII, s 1. (assented to 9th April, 1884).

²⁴ *Ibid*. Subsequent amendment in 1933 removed mayor and chief magistrate and substituted magistrate.

²⁵ SM 1933 c 11.

²⁶ *Ibid*, s 53(1).

at section 62(1) of the *MEA* with few exceptions.²⁷ Subsequent amendments added Lieutenant-Governor and Clerk of the Executive Council in 1954²⁸ and mayor and reeve in 1961.²⁹

4. Other Jurisdictions

(a) The Presence Requirement

i. Canadian Jurisdictions

Statutory language pertaining to affidavit evidence is 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.³⁰

In most provinces, the legislative language is similar to that contained in the *MEA*. While Ontario's legislation³¹ provides that the oath, affirmation, declaration or affidavit be made *in the presence of* a witness³², the legislation of other provinces provides that such actions must occur *before* an authorized individual. This is the case in British Columbia³³, Alberta³⁴, Saskatchewan³⁵, Nova Scotia³⁶, Prince Edward Island³⁷, New Brunswick³⁸, Newfoundland³⁹, Yukon Territory⁴⁰, and Northwest Territories⁴¹. Quebec is the outlier as its legislation does not expressly provide that affidavit evidence be taken before or in the presence of an authorized individual.

²⁷ In addition to the noted additions, the 1940 version also included police magistrates, prothonotaries, clerks or deputy clerks of County Courts and persons commissioned as officers in Her Majesty's Canadian Forces holding at least the rank of Lieutenant-Commander in the Royal Canadian Military, Major in the Canadian Army, or Squadrom-Leader in the Royal Canadian Air Force. These authorized individuals were later removed.

²⁸ SM 1957, ch 13, s 58(1).

²⁹ RSM 1961, ch 53, s 8.

³⁰ For example, Saskatchewan's Court of Queen's Bench Rules, Sask Gaz December 27, 2013, 2684, at r 1331(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.

³¹ *Commissioners for Taking Affidavits Act*, RSO 1990, C17, s 9. This act provides that an oath or declaration shall be taken by the deponent "in the presence of" the authorized individual

³² RSO 1990, c 17.

³³ BC Reg 168/2009, s 5.

³⁴ *Alberta Evidence Act*, RSA 2000, c A-18, s 18.

³⁵ *Evidence Act*, SS 2006, c E-11.2, s 26.

³⁶ *Evidence Act*, RSNS 1989, c 154 at s 66(1).

³⁷ *Affidavits Act*, RSPEI 1974, Cap: A-2, s 3(1).

³⁸ *Evidence Act*, RSNB 1973, c E-11 at s 16.

³⁹ *Evidence Act*, RSN 1990, c E-16, s 33.

⁴⁰ *Evidence Act*, SY 2002, c 78, s 59.

⁴¹ *Evidence Act*, RSNNT 1998, c E-8, s 64.1.

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*.⁴² The plaintiff, a licensed insurance company, sought a declaration that lawyers could witness/certify mortgage instruments using live video-conferencing under the *Land Titles Act*.⁴³ 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.

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 suit. This changed recently when Ontario introduced a legislative bill in December 2019 paving the way for electronic notarization and commissioning of documents in that province and when the COVID-19 pandemic forced many Canadian jurisdictions to put into place temporary measures enabling remote witnessing and notarization of documents.

Recent Changes in Ontario

On December 9, 2019, 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*⁴⁴, or the *Smarter and Stronger Justice Act* (“Bill 161”) was introduced in Ontario’s Parliament. In its original version, the bill paved the way for oaths, affirmations, declarations and affidavits to be taken remotely by removing the physical presence requirement. The details of how and when electronic and remote witnessing of affidavits would be allowed was not contained in the Act but were to be set out in regulation.

While the proposed provisions in Bill 161 did not expressly authorize electronic notarial acts, comments by Ontario’s Attorney General make clear that this is the purpose of the legislative amendments.⁴⁵

⁴² 2004 BCSC 197 (CanLII), available electronically at: <<http://canlii.ca/t/1gfqp>>

⁴³ BCSC 2004, 197.

⁴⁴ 1st Sess, 42nd Leg, 2020 (assented to July 8, 2020) SO 2020 c11.

⁴⁵ Ontario, Official Report of Debates of the Legislative Assembly (Hansard), 1st Sess, 42nd Leg, 2020 (February 19, 2020) (Hon D Downey).

In response to the COVID-19 pandemic, the relevant provisions of Bill 161 amending the *Commissioners for Taking Affidavits Act* and the *Notaries Act* were removed during the committee stage and transferred to a new bill, Bill 190- *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*⁴⁶ which received Royal Assent on May 12, 2020. Bill 190 amends the *Commissioners for Taking Affidavits Act* and the *Notaries Act* to allow for remote or virtual commissioning and notarization. The amendment now permits for an oath or declaration to be taken by a deponent or declarant, in accordance with regulations, without being in the physical presence of a commissioner, notary public or other person administering the oath or declaration. The regulation⁴⁷ under the *Commissioners for Taking Affidavits Act* came into force on August 1, 2020, setting out the requirements of a properly executed remote commissioning and are attached as Appendix “B”.

Unlike other jurisdictions that have enacted such changes, the aforementioned amendments to Ontario’s legislation are permanent. That means that Ontario is the first Canadian jurisdiction to pave the way for virtual notarization and commissioning of affidavit evidence on a permanent basis.

ii. United States

In contrast with Canada, the formalities of witnessing the execution of affidavits and other legal documents have received significant attention in the United States in recent years.

A number of states have implemented legislation enabling notaries to perform notarial acts, including the administration of oaths and affirmations and taking of affidavits remotely. Much of the legislation enacted has followed, to some extent, the comprehensive revision of the Uniform Law of Notarial Acts⁴⁸ (“ULONA”) approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 2014. The revised ULONA was adopted in response to the development and growing implementation of electronic records in commercial, governmental and personal transactions occurring in the United States.⁴⁹ The Act sets out the requirements for a remote notarization to be valid, including: the licensing of the notary as an electronic notary, the proper identification of the individual⁵⁰ and the use of tamper-evident technologies.⁵¹ At least 22 states have now authorized remote notarization.

⁴⁶ 1st Sess, 42nd Leg, 2020 (assented to May 12, 2020) SO 2020 c 7.

⁴⁷ *Administering Oath or Declaration Remotely*, O Reg 431/20.

⁴⁸ National Conference of Commissioners on Uniform State Laws, *Revised Uniform Law on Notarial Acts (2018)*, approved at: Annual Conference Meeting: Louisville, KY, July 20-26, 2018.

⁴⁹ *Ibid*, at 1.

⁵⁰ *Ibid*, s 7(b).

⁵¹ *Ibid*, s 20.

In 2011, prior to the release of the revised ULONA, 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.⁵² 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.

The laws of each state vary significantly. For example, in Ohio, long-distance notarization through the use of electronic technology is allowed but the notary cannot remotely administer an oath or affirmation.⁵³ In Florida, the power to administer oaths and affirmations remotely for the taking of an affidavit using reliable electronic means is limited to correctional and law enforcement officers.⁵⁴

(b) Authorized Individuals

The legislation of each Canadian jurisdiction authorizes different individuals to witness the signing of affidavits. All jurisdictions, however, contain two separate groups of authorized individuals: those entitled to act as witness by virtue of their office or status and those who apply and are appointed commissioners for oaths.

Universally, commissioners for oaths, notaries, lawyers licensed to practise 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, deputy registrars and court clerks. Some, including Saskatchewan⁵⁵, Prince Edward Island⁵⁶, Alberta⁵⁷ and Ontario⁵⁸ 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 Columbia⁵⁹ or a Metis settlement councillor in Alberta⁶⁰ are also designated authorized individuals. In Saskatchewan, an

⁵² Va. Code Ann. § Ch 7231 (2012) [Va Code].

⁵³ *Notary Public Modernization Act*, SB 2018, 263.

⁵⁴ Florida Statutes, s 47.1-7.

⁵⁵ *Saskatchewan Evidence Act*, RSS 1978, c S-16, s 51(1).

⁵⁶ *Affidavits Act*, *supra* note 37, s 2.

⁵⁷ *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.

⁵⁸ *Commissioners and Other Persons who May Take Affidavits*, O Reg 386/12, s 1.(1).

⁵⁹ *Evidence Act*, RSBC 1996, c 124, s 61.1.

⁶⁰ 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.

enumerated list of government officials are entitled to serve as commissioners for oaths with responsibilities pursuant to their governing Act.⁶¹

Unlike Manitoba, some provinces restrict certain individuals' authority to serve as an authorized person to specific circumstances. For example, under British Columbia's legislation, social workers can act as commissioners for taking affidavits exclusively in the performance of their professional powers and duties.⁶² British Columbia's legislation also restrict the scope of police officers or members of the Royal Canadian Mounted Police in witnessing affidavits "for the purposes of exercising the powers and performing the duties of their office."⁶³

In addition to restricting the scope of an authorized individual's authority, some provinces limit the territorial authority of certain persons to witness the signing of an affidavit to certain geographic locations. For example, in Ontario, clerks, deputy clerks, treasurers and deputy treasurers of municipalities are commissioners for oaths in the statutory territorial division in which the municipality is situated.⁶⁴

⁶¹ *Supra* note 55, s 27(2).

⁶² *Supra* note 59, 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."

⁶³ *Ibid*, s 60.1.

⁶⁴ *Commissioners and Other Persons who May Take Affidavits*, O Reg 386/12, s 1(2).

CHAPTER 3: NEED FOR REFORM

1. 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 high cost of legal representation to availability of physical resources, lack of adequate transportation and availability of communication tools. These are issues within access to justice conversations, recently articulated in several major reports in Canada.⁶⁵ There has been a shift with respect to the meaning of the term ‘access’ from “issues about access to court and lawyers,” to new institutional [or legal] arrangements, and procedural initiatives.⁶⁶ 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 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.

In a 2013 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.”⁶⁷

While access to justice issues impact a large proportion of the Canadian public in some capacity, there are distinct issues facing remote communities and particularly Indigenous communities.⁶⁸ These additional challenges stem 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.”⁶⁹ The issues relate to “internal dispute resolution, transportation and access to external justice service

⁶⁵ 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).

⁶⁶ 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.

⁶⁷ CBA Report, *supra* note 65 at 61.

⁶⁸ 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.”

⁶⁹ 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.

difficulties, band membership and political status or affiliation issues, as well as economic resource and unemployment-related legal problems.”⁷⁰ Indigenous youth, whose legal needs are disproportionately impacted by the often rural or remote location of their communities, are most affected.⁷¹

The cost of transportation to access legal services by individuals living in remote communities is often an out of pocket cost. 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 and signing of their affidavit evidence. These extra expenses create hurdles to access legal services.”⁷²

The challenges caused by the *physical presence* requirement for remote and Indigenous communities in Manitoba is one of accessibility. These challenges include significant inconvenience, delay to proceedings and financial costs among others. During the consultation phase of this project, the Commission heard that a combination of factors, including delayed and unreliable postal services, slow or non-existent internet services, and an inability to locate an authorized individual to take affidavit evidence slows the administration of justice to a crawl. The consequences of this delay can be catastrophic. During consultations, the Commission was provided with the example of child custody matters where delays could trigger the involvement of child protection agencies.

In conducting this project, the Commission recognized that input from those residing in remote and Indigenous communities and who interact with the legal and justice systems was required to gain a better understanding of the implications of any proposed legislative changes. During the consultation phase, it was made clear that changes to the physical presence requirement in s. 64(1) of the *MEA* and enabling affidavits to be taken remotely will not remove all of the barriers to justice to those residing in remote communities. However, every individual who provided feedback to the Commission agreed that it would be a positive step in the right direction.

2. The Use of Video Conferencing Technologies

It was observed by comments received from those with knowledge of Manitoba’s most remote northern communities that unavailability of broadband internet and connectivity issues would render the proposed changes to the *MEA* unhelpful in many remote areas of the province. In communities without access to reliable broadband internet, affiants would have no ability to connect to the infrastructure necessary to meet with an authorized individual using video-conferencing technology.

In addition to the lack of internet connectivity, other issues cited including high rates of poverty in some remote and northern communities and the fact that a large portion of community members

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² 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).

do not own computers or smart phones pose challenges to those who would benefit from the proposed legislative change but for these additional impediments.

Despite the technological barriers, one commenter provided the very astute observation that the law should be “paving the way” for technological upgrades that may come in the future. While not all remote and Indigenous communities currently have the technology and internet capabilities or the connectivity to make use of the proposed reform, the law should be prepared for when such advancements come to be.

The Commission considers the above-cited barriers as separate challenges that should be rectified by the appropriate governments. It acknowledges that an amendment removing the physical presence requirement and enabling the taking of affidavit evidence remotely would have little to no impact on enhancing access to justice in the most remote communities of Manitoba where accessible and reliable internet connectivity does not currently exist. Such an amendment would, however, pave the way for when the necessary infrastructure is put in place and the necessary internet connectivity will be made available. Additionally, from the perspective of modernizing the law and bringing legislative procedures into the 21st century, affiants ought to be able to have evidence taken in written form remotely.

As outlined in the previous chapter, the Emergency Order enacted on May 15, 2020 temporarily removed the physical presence requirement from s. 64(1) of the *MEA* provided that certain steps set out in the appended Schedule to the Order were followed. The Commission recommends that, subject to additional recommendations contained in this report, this amendment be made permanent.

Recommendation 1: The Commission recommends that section 64(1) of *The Manitoba Evidence Act* be amended to remove the requirement that an oath, affirmation or statutory declaration be taken only in the presence of a person and to enable affidavits to be taken remotely using video-conferencing technology.

3. Minimizing the Risk Associated with Use of Video-Conferencing

Common objections to removing the requirement that a witness to the execution of an affidavit be *physically* present at the time the document is signed is that removing this condition increases the risk of fraud, jeopardizes solicitor-client privilege, reduces the quality of service that can be provided and limits the authorized individual’s ability to identify and avoid coercion.

Resistance to the introduction of video conferencing is evidenced by recent positions taken by the legal profession’s regulating bodies throughout Canada.⁷³

⁷³ For example, see the “Practice Resources and Supports” section of the Law Society of Ontario website, (available online: <https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/commissioner-for-taking-affidavits-and-notary-publ/virtual-commissioning>)[permanent link:<https://perma.cc/3AJL-QSLN>] although note that this resource has been updated to advise that “this guidance does not apply in context of COVID-19”; Law Society of Saskatchewan Ethics Committee, “Providing Legal Advice via Technology” 2017 SKLSPC 3

As stated in the previous chapter, despite the lack of guidance in either the *MEA* or the Court of Queen’s Bench Rules, the responsibilities of the authorized individual are commonly considered to be: meeting with the client, verifying their identity, ensuring the client understands the document, and determining that there is no fraud or undue influence, obtaining the client’s attestation as to the truthfulness of the written statements, ensuring the document is properly executed, and completing the jurat.⁷⁴

Different jurisdictions have implemented varying measures to manage the risks associated with virtual commissioning. For example, in the United States, every state has legislated the use of tamper-proof technologies and mandated the maintenance of a journal where the notary must keep track of the details of each remote notarial act.⁷⁵ Such technical requirements, however, are meant to ensure that the document sent electronically is the same for both the affiant and the authorized individual. Ensuring that the document reviewed by the affiant and the document witnessed by the authorized individual are identical is important but as technologies evolve, it is the view of the Commission that the legislation need not be prescriptive about the electronic methods of ensuring the consistency of documents. It is sufficient that authorized individuals take steps to ensure document consistency such as noting the email that was sent to the affiant and comparing the email that the affiant sent back or by physically examining each page of a document via video conference.

When considering what precautions ought to be imposed to minimize the risks associated with the removal of the physical presence requirement in Manitoba, it makes sense to consider first the obligations contained in the Emergency Order, which were created with input from the legal profession. The Order sets out the following steps that must be followed by the authorized individual prior to the execution of an affidavit by video conference. They are as follows:

- Step 1: Confirm identity- Authorized individual satisfies themselves as to the identity of the deponent by way of either the deponent being personally known to the them, or the deponent proving their identity to the satisfaction of the authorized individual;
- Step 2: Confirm communication method satisfactory
- Step 3: Authorized individual administers the oath, affirmation or declaration and sees and hears the deponent taking the oath or affirmation or making the statutory declaration. The authorized individual also sees the document in the deponent’s possession before they sign it;⁷⁶
- Step 4: Authorized individual sees the deponent sign the document;⁷⁷

issued November 30, 2017 available online: <https://www.lawsociety.sk.ca/lawyer-regulation/code-of-professional-conduct/professional-conduct-rulings-database.aspx>.

⁷⁴ *Supra* note 9.

⁷⁵ For example, see Montana Code, § 1-5-615, s 1(a).

⁷⁶ Note that in the Emergency Order, this is referenced as “Step 3A: Administer the oath, affirmation or declaration” and is an alternative step 3B which is applicable in circumstances where a written affidavit or statutory declaration is not taken.

⁷⁷ This step is referenced as Step 4A in the Emergency Order and is an alternative to step 4B which provides that the authorized individual may see a third party sign the document and the affiant acknowledge the signature of the third party where the affiant is capable of acknowledging the signature audibly and the authorized individual hears the affiant acknowledge the signature of the third party.

- Step 5: Confirm same document- Authorized individual sees the document immediately after the deponent signs it;
- Step 6: Receive signed document- Authorized individual receives the signed document and is satisfied that (a) it is the same one that they witnessed in the deponent’s possession; and (b) the signature on the document matches the one the authorized individual saw being made; and
- Step 7: Sign document and confirm how identity verified- Authorized individual signs the document and records in writing that the document was signed through a glass or plexiglass partition or by videoconference and how they satisfied themselves as to the identity of the deponent.⁷⁸

The Emergency Order also requires that where an oath, affirmation or statutory declaration has been taken either through glass or plexiglass or using video conferencing technology, a special jurat is used which makes clear precisely how the oath, affirmation or statutory declaration was taken.⁷⁹

The Commission has considered the requirements set out in the Emergency Order and, while it agrees that the majority are necessary to protect the confidentiality of the client and to restrict opportunity for fraud to occur, it is mindful of the need for proportionality. Any protections imposed to reduce risk of fraud, etc. should not be so onerous that any benefit from an access to justice perspective is lost. Where, for example, the amount of work required of the lawyer or other authorized individual is such that the cost of having evidence taken remotely is excessive, any benefit of the amendment to those residing in remote communities will be erased. Steps 5 and 6 of the Emergency Order require the authorized individual to confirm that the document signed by the affiant is the same document for which the oath or affirmation was administered and received by the authorized individual. Without any additional direction, the authorized individual’s obligation under these steps could be interpreted to mean that he or she must go through each page of the document separately. Where an affidavit runs to hundreds of pages, this would be an overly burdensome process. The Commission therefore recommends that additional consideration be given to what steps are necessary to confirm the genuineness of the document remotely and that more direction be provided with consideration for proportionality.

It should also be noted that a number of different software products can be used to confirm that the two parties are reviewing the same document at the same time. The legislation should be drafted in such a way to allow for the use of such products without being prescriptive of the particular products to be used.

Recommendation 2: An affidavit taken remotely using video-conferencing technology is validly taken only where the authorized person: (a) satisfies themselves as to the identity of the affiant either by (i) personally knowing them or (ii) the affiant proving their identity to the satisfaction of the authorized individual; (b) both parties confirming that they are able to both see and hear one another while the oath/affirmation is given and the affidavit is being taken; (c) administers the oath or affirmation and sees and hears the affiant taking the oath or

⁷⁸ The Schedule to the Emergency Order is appended as Appendix “C”.

⁷⁹ See note 5, Schedule, s 2.

affirmation; (d) sees the document in the affiant's possession before the affiant signs it, while it is being signed and immediately after it is signed; received the signed document and is satisfied that (i) it is the same document they saw in the affiant's possession and (ii) the signature on the document matches the one they saw the affiant make; and signs the document and records in writing how the document was signed (i.e. over video-conference) and how they identified the affiant.

Recommendation 3: The Commission recommends that a special jurat be used when an affidavit is taken remotely using video-conferencing technology that clearly states that video-conferencing was used.

4. List of Authorized Individuals

As previously described, section 62(1) of the *MEA* contains an enumerated list of persons authorized to take affidavit evidence for use in a Manitoba court. The Commission has received accounts of parties to litigation who have approached the authorized individuals residing or working in their community who have been unwilling to take their affidavit due to the mistaken belief that this would make them a participant in the legal matter. Given the limited number of authorized individuals living or working in many small remote locales, this exacerbates the issue for litigants and may cause delay or increased costs in a legal proceeding.

A possible solution is adding other individuals to the list of authorized individuals contained in the Act. In its Consultation Paper, the Commission posed the question of whether the list of authorized individuals should be broadened to include, for example, such regulated professionals as medical practitioners, nurses, social workers and teachers or persons in positions analogous to those currently listed such as the Chief and Councillors of First Nations. The Commission also questioned whether the list should be modernized by removing certain individuals from the list.

In conducting its consultations, the Commission received limited feedback on this issue. Therefore, the Commission is not prepared to recommend changes to s. 62(1) of the *MEA* at this time. Additionally, the Commission is cognizant of the fact that any person can apply to serve as a commissioner for oaths provided they meet the limited requirements for commissioners contained in the *MEA*. With the addition of video-conferencing as a means of administering oaths and affirmations and taking affidavit evidence, the Commission does not see a need for reform of section 62(1) of the *MEA* and therefore does not recommend changes.

5. Possible Restrictions on the Use of Video Conferencing Technology

The Commission considered whether the use of video-conferencing technology in the taking of affidavits ought to be restricted to certain persons or to particular circumstances.

There is no valid reason for the use of video-conferencing technologies for the taking of affidavits remotely to be restricted to certain geographical locations or circumstances. Therefore, the Commission does not believe that there should be any restrictions imposed such as who should be able to witness affidavits using video conferencing technologies, when or where it can be used, or in what circumstances. Provided the authorized individual complies with the requirements stated in recommendation 2, the act of witnessing an affidavit using video-conferencing technologies ought to comply with the statutory requirement in any circumstances.

6. Audio Only Executions

A possible solution put forward during the consultation phase of this project was amending section 64(1) of the *MEA* to remove the presence requirement entirely to allow for the taking of affidavits by telephone. This would enable those residing in remote communities without sufficient internet technology to swear or affirm their written evidence remotely even where they did not have access to the broadband infrastructure or the hardware required to conduct a video-conference call.

In considering whether this was a viable solution, the Commission considered the basics of the role played by the authorized individual and the action of witnessing the signing of affidavit evidence. The role of the authorized individual in the execution of an affidavit is to confirm identity and assess for coercion or fraudulent activity. Corresponding with this role is the statutory obligations to satisfy themselves of the genuineness of the signature of the affiant and ensure it is executed as required by law. The Commission fails to see how an authorized individual can confirm the identity of the affiant and ensure that the signature on the document is genuinely that of the affiant when he or she cannot visually witness the document being executed.

Similarly, the Commission fails to see how the authorized individual could meet its legislated responsibility to “satisfy himself of the genuineness of the signature of the deponent or declarant”⁸⁰ prior to signing the jurat if he or she is incapable of witnessing the signing of the document.

The Commission is aware that the practice of taking an oath or affirmation by telephone without video capability is not unheard of in Manitoba. It is allowed in the criminal law context albeit in very limited circumstances. The Criminal Code of Canada enables a peace officer, when applying for a warrant, to submit an information under oath by telephone to a designated justice.⁸¹ The oath would be administered over the telephone.⁸² The Criminal Code does, however, restrict the use of such telewarrants to circumstances where it would be impracticable to appear personally.⁸³ Additionally, courts in Canada can allow for witnesses to give evidence orally by audioconference where the court is of the opinion that it would be appropriate considering all circumstances.⁸⁴

Despite the very limited circumstances whereby an oath or affirmation can be administered using audioconferencing technology without video in the criminal law context, the Commission does not see the use of audio-only technology as an appropriate mode of taking affidavits, affirmations and declarations.

⁸⁰ *Supra* note 1, s 64(1).

⁸¹ Criminal Code of Canada, RSC 1985, c C-46, s 487.1(1).

⁸² *Ibid*, s 487.1(3).

⁸³ *Ibid*, s 487.1(1).

⁸⁴ *Ibid*, s 714.1.

7. Jurisdictions Issues

Under current law, an oath, affidavit, affirmation or statutory declaration for use in a Manitoba court may be administered in Manitoba before any of the persons listed in section 62(1) of the *MEA*. The Act also provides that any individuals who may take an oath, affidavit, affirmation or statutory declaration within Manitoba may also validly take an affidavit, oath, affirmation or statutory declaration outside of the province for use in Manitoba:⁸⁵

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.

The Act establishes a separate list of persons before whom an oath, affidavit, affirmation or statutory declaration may also be administered, sworn, affirmed or made *outside* of Manitoba, including commissioners for taking affidavits, notaries public and consular personnel, among others, when exercising their functions or having authority in that jurisdiction.⁸⁶ For example, an affiant in Ontario may have an oath administered by a notary public licensed as such in Ontario for use in a Manitoba court.

Given the common interpretation of section 64(1) requiring both parties to be in the same physical location, the Act does not speak to a scenario where one actor is in Manitoba and the other outside of the province. Enabling the administering of oaths and taking of affidavits using video-conferencing technology will make jurisdiction a live issue.

Under the Emergency Order, which temporarily removes the physical presence requirement, the above referenced sections were not revised. Reading the amended sections alongside section 63(2)

⁸⁵ *Supra* note 1, s 63(2). Note that despite section 63(2), the Companies Office, the governmental agency tasked with overseeing commissioners for oaths, directs that those who wish to administer oaths, affirmations and statutory declarations outside the province must apply for and obtain separate appointment to commission outside of Manitoba.

⁸⁶ *Supra* note 1, s 63(1). The list of individuals before whom an oath, affidavit, affirmation or statutory declaration may be administered, sworn, affirmed or made outside of Manitoba includes: (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.

above, the Act currently provides that those authorized individuals listed in section 62(1) may administer an oath, affirmation or declaration and take an affidavit by video-conference regardless of whether they are geographically located within or outside Manitoba.

It is an open question how a court would interpret the wording of section 62(1) of the *MEA*- that “any oath, affidavit, affirmation, or statutory declaration [...] may be *administered, sworn, affirmed, made, or declared*, within the province before [the list of authorized individuals]” [emphasis added] where the affiant is in one jurisdiction and the person administering the oath, etc. and signing the jurat is in another. Would an affidavit be sworn in Manitoba if the affiant was physically in the province but the authorized individual elsewhere? What if the locations were reversed?

As stated above, a reading of sections 62(1) and 63(2) together empower those individuals authorized to administer an oath, affidavit, affirmation or statutory declaration under s. 62(1) to do so regardless of whether they are present in Manitoba. However, the temporarily amended Act could be interpreted to invalidate an affidavit for jurisdictional reasons where the action of administering, swearing, affirming or making an oath, affidavit, affirmation or statutory declaration means the action occurs in the location of the affiant and that affiant is located outside of Manitoba.

Currently, the affiant is not required to be physically present in Manitoba.⁸⁷ The Commission sees no reason why a requirement that the affiant be physically present in Manitoba for an oath or affirmation to be validly administered and an affidavit to be properly witnessed should be added to the legislation.

Ontario’s reformed legislation, the only Canadian legislation to permanently permit taking of oaths, affirmations and affidavits remotely, does not address the jurisdictional question of whether the action occurs where the affiant or authorized individual is located.

In the United States, the jurisdictional question varies from state to state. For example, while electronic notaries in Virginia may execute a document regardless of the geographic location of the parties⁸⁸, in Montana, electronic notaries must be physically present in the state to perform remote notarizations while the affiant is not required to be in the state.⁸⁹

The Commission believes that there are valid concerns regarding the jurisdiction of Manitoba’s courts over both the affiants who file written evidence and those authorized individuals who administer oaths and affirmations and take affidavits. The Commission is of the view, however, that the introduction of technology to the process does not add additional challenges in this regard. Manitoba’s courts are currently comfortable with the extra-territoriality of accepting affidavits

⁸⁷ The *MEA* does not specifically say as much but does provide that authorized individuals entitled to commission affidavits and administer oaths and affidavits within Manitoba are also entitled to perform these actions outside of Manitoba. As, prior to the enactment of the Emergency Order, the action was required to be performed in the authorized person’s presence, when such actions were performed out-of-province, both the affiant and authorized individual would both be outside of Manitoba.

⁸⁸ Virginia Secretary of the Commonwealth, *The Virginia Electronic Notarization Assurance Standard*, version 1.0 (Richmond).

⁸⁹ Montana Code, § 1-5-603, s 10.

taken outside the province and the *MEA* contains a list of persons authorized pursuant to section 62(1) to administer oaths and take affidavits when that person is outside of Manitoba. In fact, section 63(1) provides that affidavits taken outside of the province will be accepted when taken by certain individuals not entitled to take affidavits within the province (ex. an officer of the Canadian diplomatic services). Given that the commissioner or other authorization individual is currently not required to be in Manitoba, it is unnecessary for this requirement to be added now.⁹⁰

Similarly, Manitoba courts currently accept affidavit evidence from affiants who were located outside the province when the oath or affirmation was administered and the affidavit was properly taken.

It should also be noted that Manitoba's courts have the jurisdiction to not accept written evidence where it was improperly taken regardless of the physical location of the affiant or the authorized individual. Additionally, where an affidavit is improperly taken by a lawyer, the issue can be addressed by a complaint to the lawyer's home law society.

For the foregoing reasons, the Commission also does not see a need to add a requirement that the affiant be inside the province when the affidavit is executed. For the sake of clarity, the Commission recommends that the *MEA* be amended to expressly provide that, when properly administered and performed, oaths, affirmations, statutory declarations and affidavits are validly administered, made or taken by a person authorized to take an affidavit both within and outside of Manitoba and regardless of the location of the affiant.

Recommendation 4: The Commission recommends that *The Manitoba Evidence Act* be amended to expressly provide that an oath, affirmation, or statutory declaration taken by an affiant, deponent or declarant by an individual authorized under section 62(1) of the Act using video conferencing technology is valid regardless of whether the affiant, deponent or declarant is physically in Manitoba at the time the action occurs.

⁹⁰ This view was concurred with by staff of the Law Society of Manitoba during a continuing professional development seminar held on May 15, 2020.

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 20th day of July, 2020.

Cameron Harvey, President

Myrna Phillips, Commissioner

Michelle Gallant, Commissioner

Jacqueline Collins, Commissioner

Sacha Paul, Commissioner

CHAPTER 4: LIST OF RECOMMENDATIONS

Recommendation 1:

The Commission recommends that section 64(1) of *The Manitoba Evidence Act* be amended to remove the requirement that an oath, affirmation or statutory declaration be taken only in the presence of a person and to enable affidavits to be taken remotely using video-conferencing technology. (p 15)

Recommendation 2:

An affidavit taken remotely using video-conferencing technology is validly taken only where the authorized person: (a) satisfies themselves as to the identity of the affiant either by (i) personally knowing them or (ii) the affiant proving their identity to the satisfaction of the authorized individual; (b) both parties confirming that they are able to both see and hear one another while the oath/affirmation is given and the affidavit is being taken; (c) administers the oath or affirmation and sees and hears the affiant taking the oath or affirmation; (d) sees the document in the affiant's possession before the affiant signs it, while it is being signed and immediately after it is signed; received the signed document and is satisfied that (i) it is the same document they saw in the affiant's possession and (ii) the signature on the document matches the one they say the affiant make; and signs the document and records in writing how the document was signed (i.e. over video-conference) and how they identified the affiant. (p 17)

Recommendation 3:

The Commission recommends that a special jurat be used when an affidavit is taken remotely using video-conferencing technology that clearly states that video-conferencing was used. (p 18)

Recommendation 4:

The Commission recommends that *The Manitoba Evidence Act* be amended to expressly provide that an oath, affirmation, or statutory declaration taken by an affiant, deponent or declarant by an individual authorized under section 62(1) of the Act using video conferencing technology is valid regardless of whether the affiant, deponent or declarant is physically in Manitoba at the time the action occurs. (p 22)

APPENDIX “A” - Sections of *The Manitoba Evidence Act*, CCSM c E150

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 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*.

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.

S.M. 2000, c. 35, s. 7; S.M. 2011, c. 35, s. 14.

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.

S.M. 2011, c. 35, s. 14

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”- Ontario Regulation 431/20- Administering Oath or Declaration Remotely

Remote administering of oath, declaration permitted

1. An oath or declaration may be taken by a deponent or declarant without being in the physical presence of the person administering the oath or declaration, if the following conditions are met:
 1. The oath or declaration is being administered by an electronic method of communication in which the person administering the oath or declaration and the deponent or declarant are able to see, hear and communicate with each other in real time throughout the entire transaction.
 2. The person administering the oath or declaration confirms the identity of the deponent or declarant.
 3. A modified version of the jurat or declaration is used that indicates,
 - i. that the oath or declaration was administered in accordance with this Regulation, and
 - ii. the location of the person administering the oath or declaration and of the deponent or declarant at the time of the administering.
 4. In the case of a commissioner to whom section 5 of the Act applies, the information on the stamp required to be used under that section appears on or in the document being signed.
 5. The person administering the oath or declaration takes reasonable precautions in the execution of the person’s duties, including ensuring that the deponent or declarant understands what is being signed.

Records

2. Every person who administers an oath or declaration in accordance with section 1 shall keep a record of the transaction.
3. Omitted (provides for coming into force of provisions of this Regulation).

APPENDIX “C” – Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions under *The Emergency Measures Act* (CCSM c E80)

THE EMERGENCY MEASURES ACT (C.C.S.M. c. E80)

Order re Temporary Suspension of In-Person Commissioning and Witnessing Provisions

Application

1 This Order applies to in-person commissioning and witnessing of the following:

- (a) oaths, affirmations and statutory declarations;
- (b) health care directives signed by a person other than the maker;
- (c) homestead consents and releases;
- (d) powers of attorney;
- (e) land titles or the registration of land titles documents;
- (f) wills.

Suspension and replacement

2 While this Order is in effect, the following provisions are suspended to the extent that they require an action to be taken only in the presence of a person:

- (a) subsections 64(1) and (4) of *The Manitoba Evidence Act*;
- (b) subsection 8(2) of *The Health Care Directives Act*;
- (c) subsections 9(3) and 11(2), section 13 and subsections 22(2) and 23(5) of *The Homesteads Act*;
- (d) clauses 10(1)(b) and (c) and (2)(a) and (b) of *The Powers of Attorney Act*;
- (e) subsections 72.5(1), (2), (3) and (4), 72.7(1) and (2) and 72.8(1) of *The Real Property Act*;
- (f) section 4 of *The Wills Act*.

Instead, the action is valid if it is taken through a glass or plexiglass partition or by videoconferencing and each applicable step set out in the Schedule to this Order is followed.

Definitions

3 The following definitions apply in this Order.

"**Column**" means a column of the table in the Schedule to this Order. (« colonne »)

"**document**" means a document or instrument referred to in section 1. (« document »)

Effective period

4 This Order takes effect on the date it is made and ends on October 1, 2020, unless sooner revoked.

SCHEDULE
(Section 2)

Taking an oath or witnessing the signing of a document

1 To take an **action** set out in Column 1 through a glass or plexiglass partition or by videoconferencing, determine the **actors** and comply with each applicable **step**.

ACTOR

- **Person A** — the administrator or witness set out opposite in Column 2
- **Person B** — the person taking the oath or affirmation, making the statutory declaration or signing the document set out opposite in Column 3
- **Person C** if applicable — the person signing the document on Person B's behalf set out opposite in

Column 1	Column 2	Column 3	Column 4	Column 5
Action	Actors			Additional requirements or steps
	Person A	Person B	Person C	
<i>The Manitoba Evidence Act</i>				
taking an oath or affirmation or making a statutory declaration	the commissioner or other officer or person administering the oath, affirmation or statutory declaration	the deponent or declarant	n/a	special jurat set out in section 2
<i>The Health Care Directives Act</i>				
signing a health care directive	the witness	the maker	the maker's signatory	additional requirement set out in subsection 3(2)
<i>The Homesteads Act</i>				
giving consent to a disposition, change or release of a homestead, or terminating a release of homestead, under section 9, 11, 13, 22 or 23	the witness	the person giving consent	n/a	additional step set out in section 4
<i>The Powers of Attorney Act</i>				
giving a power of attorney	the witness	the donor	the donor's signatory	additional step set out in subsection 5(2)
<i>The Real Property Act</i>				
executing a transfer under section 72.5	the witness	the transferor	n/a	additional steps set out in section 6
executing a mortgage under section 72.7 or 72.8	the witness	the mortgagor	n/a	additional steps set out in section 6
<i>The Wills Act</i>				

signing a will	each of the two or more witnesses	the testator	the testator's signatory	additional requirements set out in subsections 7(2) and (3)
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STEPS

STEP 1: Confirm identity

Person A satisfies themselves as to the identity of Person B (and, if applicable, Person C) by way of

- (a) Person B (and Person C) being personally known to Person A; or
- (b) Person B (and Person C) proving their identity to the satisfaction of Person A.

STEP 2: Confirm communication method satisfactory

Person A and Person B (and, if applicable, Person C) confirm that they are able to see and hear one another while the action is being taken.

STEP 3A: Administer the oath, affirmation or declaration

Person A administers the oath, affirmation or statutory declaration and sees and hears Person B taking the oath or affirmation or making the statutory declaration.

In the case of a written affidavit or statutory declaration, Person A sees the document in Person B's possession before Person B signs it.

[For an oral oath or affirmation, skip steps 4 to 7. For a written affidavit or statutory declaration, proceed to step 4.]

OR

STEP 3B: Confirm document

Person A sees the document in Person B's possession before Person B signs it or acknowledges the signing by Person C.

STEP 4A: See document signed

Person A sees Person B sign the document.

OR

STEP 4B: See signature and acknowledgement

Person A sees Person C sign the document, Person A sees Person B acknowledge the signature of Person C, and, if Person B is capable of acknowledging the signature audibly, Person A hears Person B acknowledge the signature of Person C.

STEP 5: Confirm same document

Person A sees the document immediately after Person B or C signs it.

STEP 6: Receive signed document

Person A receives the signed document and is satisfied that

- (a) it is the same one that Person A saw in Person B's possession; and
- (b) the signature on the document matches the one Person A saw being made.

STEP 7: Sign document and confirm how identity verified

Person A signs the document and records in writing that the document was signed through a glass or plexiglass partition or by videoconference and how Person A satisfied themselves as to the identity of Person B (and, if applicable, Person C).

ADDITIONAL REQUIREMENTS OR STEPS

Evidence Act — special jurat for videoconference

2 For the purpose of subsections 64(3) and (4) of *The Manitoba Evidence Act*, the following form of jurat may be used if an affidavit or statutory declaration is taken or made by videoconferencing:

Sworn (affirmed or declared) before me at the _____ of _____, in the _____ of _____, through the use of videoconferencing, as permitted by Order under *The Emergency Measures Act*, this day of _____, 20____.

A Commissioner for Oaths, Notary Public, etc.

Health Care Directives Act — reference to signatory

3(1) The maker's signatory referred to in Column 4 is the person who signs the health care directive at the direction and in the presence of the maker as permitted by clause 8(2)(b) of *The Health Care Directives Act*.

3(2) The signatory must meet the eligibility requirements set out in subclause 8(2)(b)(i) of *The Health Care Directives Act*.

Homesteads Act — additional step for videoconference

4 For the purpose of registering the consent, the following additional step must be completed:

STEP 8: Sign videoconference certificate

For a document presented for registration in the Land Titles Office that is witnessed by way of videoconferencing, Person A must sign a certificate in a form approved by the Registrar-General

- (a) indicating the manner in which the document was provided to Person B;
- (b) indicating the reason why the document was witnessed by way of videoconferencing; and
- (c) certifying that the required steps for witnessing the document were followed, including any applicable requirement for an acknowledgment to be made apart from the owner.

Powers of Attorney Act — additional step if power of attorney signed by donor's signatory

5(1) The donor's signatory referred to in Column 4 is an individual who meets the requirements in subsection 10(2) of *The Powers of Attorney Act*.

5(2) The following additional step must be completed:

STEP 8: Sign power of attorney certificate

Person A must sign a statement certifying that Person A is not the attorney or the attorney's spouse or common-law partner and, to the best of Person A's knowledge,

- (a) the power of attorney was signed by Person B or, if applicable, the signature of Person C was acknowledged by Person B;
- (b) if applicable, Person C is not the attorney or the attorney's spouse or common-law partner;
- (c) Person B appeared to understand the nature of the power of attorney;
- (d) Person B appeared to agree voluntarily to sign or acknowledge the power of attorney; and
- (e) the power of attorney was signed by Person B or, if applicable, Person C while Person B was physically apart from the attorney.

Real Property Act — other steps for registering land titles document

6 For the purposes of registering land titles documents, the following additional and alternate steps

must be completed:

BEFORE STEP 1: Send document

Person A sends the document to Person B.

STEP 3B: Confirm document

For a document that does not generate separate signature pages, Person A verifies that the document in Person B's possession is the same document that Person A sent to Person B.

For a document that generates separate signature pages (eTransfer, eMortgage, eDischarge), Person A sees both the control image and the 32-digit control number generated by the electronic form and confirms that they match the document Person A sent to Person B.

STEP 5: Confirm same document

For a document that does not generate separate signature pages, immediately after seeing Person B sign the document, Person A sees the document and confirms that it is the same document Person A sent to Person B.

For a document that generates separate signature pages (eTransfer, eMortgage, eDischarge), immediately after seeing Person B sign the document, Person A sees both the control image and the 32-digit control number of the signed page and confirms that they match the document Person A sent to Person B.

STEP 8: Sign videoconference certificate

For a document presented for registration that is witnessed by way of videoconferencing, Person A must sign a certificate in a form approved by the Registrar-General

- (a) indicating the manner in which the document was provided to Person B;
- (b) indicating the reason why the document was witnessed by way of videoconferencing; and
- (c) certifying that the required steps for witnessing the document were followed.

Wills Act — testator's signatory and additional requirements for witnesses

7(1) The testator's signatory referred to in Column 4 is the person who signs the will in the presence of and at the direction of the testator.

7(2) At least one of the witnesses must be a lawyer holding a valid practising certificate issued by the Law Society of Manitoba.

7(3) Each of the witnesses must be in each other's presence or be able to see and hear each other by way of multi-person videoconferencing.

7(4) For greater certainty, the reference to Person A is a reference to each witness to the signing of the will.