

## 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*<sup>1</sup> (*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.

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<sup>1</sup> 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.