

THE CHALLENGE

Like other jurisdictions, witnessing of documents by video conference brings certain challenges. This is because we have rules for witnessing many types of instruments in the physical presence of the signor/deponent/declarant (the "Signing Party"), which are codified in various legislation (e.g. *The Real Property Act* (Manitoba), *The Manitoba Evidence Act*).

New measures have been introduced in response to the ongoing COVID-19 pandemic, both through directives of the Registrar-General of Manitoba and more recently, an order issued under *The Emergency Measures Act* (Manitoba).

It is important to note, firstly, that these measures are temporary. For obvious reasons, policy makers do not know how long such measures will need to stay in place. As such, the general approach so far has been to set deadlines with a view to revisit same as matters continue to unfold with COVID-19 and the provincial government's response.

Many documents used in the course of commercial law/real estate activities can be signed and witnessed without these challenges (e.g. commitment letters, most standard agreements, undertakings and directions, etc.). It is the presence of statutory requirements that deal with certain instruments that requires further measures to be taken by practitioners.

Generally speaking, when it comes to most real estate and mortgage-related transactions there are three key areas in Manitoba that require our special attention:

1 Land titles registry (Teranet) documents (e.g. transfers of land, mortgages, transmissions, etc.)

2 Oaths, affirmations and statutory declarations (i.e. providing statutory evidence)

3 Homestead consents and releases (under *The Homesteads Act*)

THE SOLUTION

Video witnessing of the first category was addressed by the Registrar General of Manitoba by way of a directive on April 1, 2020 and the second and third categories were addressed by way of legislative order on May 15, 2020. For a number of weeks there were some limitations for practitioners due to this gap. For example, a declaration would be of limited value for evidence purposes

because it would not be captured by evidence legislation (which could pose issues for, say, someone acquiring real property or a lender requiring evidence from a borrower to induce it to advance funds). It is important to recognize that these matters are evolving rapidly and, given that we are in unprecedented times, policy makers are coming up with new solutions in an effort to allow these business activities to continue.

Where special measures are taken by the party witnessing the document, a Signing Party can sign an instrument before a certain witness by videoconference provided that:

- The witness must have **authority to act as witness** (e.g. practising lawyer, notary, commissioner, etc., depending on the circumstances and the instrument).
- The witness must take specific steps to **verify the identity** of the Signing Party.
- The witness must **clearly be able to see and hear** the Signing Party sign the document(s) in real time.
- Following execution, the **original documents** must then be sent to the witness.
- Upon receipt of the document(s), the witness must verify that he or she witnessed the Signing Party's execution of the **same document(s)** before affixing his or her signature as witness to the original document(s).
- The witness must then complete **additional requirements** to show that he or she video witnessed the document(s), pursuant to the specific requirements.
 - For land titles/Teranet documents, including registrable homestead consents and releases, this is by way of a certificate (newly created Form 32) with special requirements for practitioners, which must be provided in addition to the actual instrument at the time of registration.
 - For other documents such as affidavits (i.e. administering of oaths, affirmations and other declarations) there is specific verbiage which must be included in the actual document, including a statement that the document has been witnessed by videoconference under the legislative order.