

## AFFIDAVIT SECRETS

PAPER 2.1

# Affidavit Tips: Baker's Dozen

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## AFFIDAVIT TIPS: BAKER'S DOZEN

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### I. Organization of Affidavits and Exhibits

- a. There is a link between organization and persuasion. If the affidavits and exhibits are lengthy, prepare an index of exhibits. This will save time in chambers by assisting the court in locating material and focusing the court on what you say is important to your client's case. Madam Justice Adair commended counsel for doing so in *Murray v. Langley* (Township), 2010 BCSC 102.
  
- b. Master Baker wrote in the 1999 CLE course on affidavits ("Views from the Bench"):
 

Edit your materials ruthlessly: I recently was required to read two affidavits (one for, one against) in a fairly routine matrimonial chambers matter; they totalled well over 200 paragraphs. It is unreasonable to expect the chambers judge or master to read, absorb, and retain such sheer volume of materials in advance, or during, an application.
  
- c. Master Doolan wrote for the same course:
 

... if the Court is forced to wade through page after page of irrelevant narrative to find the one, two or three pieces of fact that are important, you incur the risk that an importance fact may be missed in its entirety.
  
- d. Counsel risks the wrath of the court when stumbling and fumbling to cross-reference text and affidavits. Ensure that the exhibit pages are numbered which makes cross-referencing in your written submissions both easy and effective.

## II. Cross-Examination on Affidavits

- a. Rule 22-1(4)(a) allows the court to order an affiant to be cross-examined.
- b. A party must usually file its own affidavit before cross-examination on the opposing party's affidavit can be ordered: *Royal Bank of Canada v. Jones*, 2000 BCSC 520. There should usually be contrary depositions in the affidavit material in support of an order for cross-examination, but this is not always necessary.
- c. Cross-examination is restricted to matters relevant to the application and credibility, and does not extend to matters that might be relevant in the action: *The University of British Columbia v. James A. Rice Limited*, 1995 CanLII 518 (B.C.S.C.).
- d. In exercising its discretion the court will consider whether there are material facts in issue, whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application, or whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue: *Greenwood v. Greenwood*, 1999 CanLII 5910 (B.C.S.C.); *Brown v. Garrison* (1967), 63 W.W.R. 248 (B.C.C.A.)
- e. In *L.M.U. v. R.L.U.*, 2004 BCSC 95, Mr. Justice Bouck said that cross-examination on an affidavit held before a court reporter is of limited persuasive value, because a chambers judge can seldom assess a deponent's credibility just by reading an affidavit or a copy of a cross-examination transcript.
- f. If the purpose, however, of adducing the transcript is not to make submissions on credibility, but instead, for example, to adduce a factual admission, this reservation should not apply.
- g. It may not be necessary to immediately leap to application for cross-examination on an affidavit. If counsel has questions raised by affidavit evidence, the questions can be put to the witness by letter to counsel which may be answered thereby saving unnecessary time and expense in making application.

## III. Affidavits of Attempted Service

- a. In an oral ruling in *Brownhill v. TD Securities Inc. and Trahan*, Victoria Registry 02-4950, Master Barber said:
 

The affidavits in support of a substitutional order are getting to be less acceptable over time. That does not mean they are acceptable now.
- b. The process server should explain why he or she went to a particular place. Instead of deposing "I went to such and such business address," he or she should say who told him to go there and why (for example, it was the last residence known to the plaintiff).
- c. Include detailed information about attempts to find the person, where they may have gone, whether a skip trace has been undertaken, etc.
- d. Give evidence of reasonable steps taken to locate the person. What is reasonable depends on the circumstances including the type of relief claimed, the amount involved, and the avenues taken to locate the person: *Credit Foncier Franco-Canadien v. McGuire*, [1979] B.C.J No. 944.
- e. In *Director of Civil Forfeiture v. Angel Acres Recreation and Festival Property Ltd.*, 2008 BCSC 302, the plaintiff said that the cost of serving the named persons would be expensive and time consuming, but offered no evidence other than a bare assertion to that effect in an affidavit. There was no evidence that the named persons could not be located. The application was dismissed.
- f. A modest degree of inconvenience and expense in effecting personal service is not sufficient to warrant an order for substitutional service: *Osburn v. Khoo*, 1996 CanLII 1375 (B.C.S.C.) at para. 11.

#### IV. Information and Belief

a. Rule 22-2(12) and (13):

**Limitation on contents of affidavit**

(12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial.

**Exception**

(13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if

- (a) the source of the information and belief is given, and
- (b) the affidavit is made
  - (i) in respect of an application that does not seek a final order, or
  - (ii) by leave of the court under Rule 12-5 (71)(a) or 22-1(4)(e).

b. The source of information is a material fact that must be before the court. Seckel & MacInnes, *British Columbia Supreme Court Rules Annotated 2011*, Thomson Reuters 2010. Affidavit evidence as to what unidentified sources said or wanted is inadmissible: *B.C. Bottle Depot Association v. Encorp Pacific (Canada)*, 2009 BCSC 403.

c. However, an affidavit that does not set forth the grounds of information and belief is not worthless if the court can otherwise ascertain the source of the information and belief: *Re Howell Estate v. Gill*, 2008 BCSC 1270; *British Columbia Society for the Prevention of Cruelty to Animals v. Barr* (1946), 63 B.C.R. 250, [1947] 1 D.L.R. 292 (C.A.).

d. Just because documents are marked as exhibits to an affidavit does not convert them into admissible evidence, particularly where they are tendered for proof of their truth: *L.M.U. v. R.L.U.*, 2004 BCSC 95; *Re: Koscot Interplanetary (U.K.) Ltd.*, [1972] 3 All ER 829.

e. Any facts that enhance the credibility of the source should be given: McLachlin & Taylor, *British Columbia Court Forms, 2<sup>nd</sup> ed.*, edited by Frederick Irvine, at 3-13.

f. The requirement that the deponent state the source of hearsay evidence and the fact of his or her belief in the evidence is not a mere formality where the evidence is contentious: *Toronto-Dominion Bank v. Schrage*, [2009] O.J. No. 3636.

#### V. Opinion Evidence and Argument

a. If opinions are given, the expertise of the deponent and the basis upon which his opinions are founded must be set out: *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1598*, [1982] B.C.J. No. 87.

b. In *Creber v. Franklin* (August 26, 1993), Vancouver Registry DO83222 at 8-9, [1993] B.C.D. Civ. 1549-03 (S.C.), cited in *L.M.U. v. R.L.U.*, 2004 BCSC 95, Spencer J. commented that affidavit deponents should state facts only. They should not add their descriptive opinions of the facts. In *L.M.U. v. R.L.U.*, Mr. Justice Bouck gave an additional reason for not including such statements (as well as statements expressing surprise, shock, disgust, etc.): not only may they be inadmissible, but they may affect the weight given the rest of the admissible affidavit material, and may result in a costs penalty.

c. In *Ross River Dena Council v. The Attorney General of Canada*, 2008 YKSC 45, Mr. Justice Gower found an affidavit to be replete with objectionable adjectives and qualifiers. He gave the following examples, many of which are commonly found in affidavits:

#### 2.1.4

- “The most important communications to this effect”
- “There was considerable effort placed in”
- “the massive amount of”
- “but seemingly geographically undefined”
- “the active pursuit of”
- “The growing movement”
- “a significant public policy objective”
- “the key parties to the negotiation process were”
- “became an active policy objective of”
- “Foremost amongst these was”
- “the key constitutional legislation that”
- “An extensive selection of”
- “there is a great deal of documentation that”
- “that dealt with aboriginal interests in some measure”
- “considerable documentary evidence to prove”
- “one important realization that”

### VI. Reply Affidavits and Affidavit Wars

#### a. Rules 8-1(13) and (14):

##### **Applicant may respond**

(13) An applicant who wishes to respond to any document served under subrule (9) must file and serve on each application respondent any responding affidavits no later than 4 p.m. on the business day that is one full business day before the date set for the hearing.

##### **No additional affidavits**

(14) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13).

b. In practise this is often ignored by counsel, many of whom who show up on the day of the hearing with last minute affidavits.

c. A judge has residual discretion to permit further evidence after a hearing has begun: *Leskun v. Leskun*, 2004 BCCA 422, aff'd [2006] 1 S.C.R. 920, 268 D.L.R. (4th) 577. This case did not involve a reply affidavit, but the reasoning applies. Madam Justice Southin said at para. 36:

In order to prevent the hearing becoming unfair, the judge, if he or she decides to receive the further evidence, and if he or she is asked for an adjournment to meet that further evidence, should usually grant it.

d. An applicant should not split its case by leading “reply” evidence it should have anticipated would be necessary to counter any defence: *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 42.

e. This also relates to the first tip, organization, because parties who fail to follow these rules can create “a confusing multi-stage process with both sides trying to get in the last word.” *L.M.U. v. R.L.U.* at para. 45.

## VII. Affidavits Sworn Outside British Columbia

- a. The following people can take affidavits outside BC for use within BC (*Evidence Act*, ss. 63 and 64):
- i. judges and persons with other similar positions authorized to administer oaths in the courts of justice of that province or country;
  - ii. mayors;
  - iii. specified Canadian diplomats;
  - iv. notaries public, within their territorial jurisdiction, under seal;
  - v. Canadian trade commissioners;
  - vi. commissioners authorized by the laws of British Columbia to take affidavits; and
  - vii. all commissioned officers in the Canadian Armed Forces on active service in or outside of Canada.

## VIII. Alterations

- a. Rule 22-2(11):
- Alterations to be initialled**
- (11) The person before whom an affidavit is sworn or affirmed must initial all alterations in the affidavit and, unless so initialled, the affidavit must not be used in a proceeding without leave of the court.
- b. Deletion of sentences or words from an affidavit constitutes an alteration: *Langley Stainless Products Ltd. v. 2051 Investments Ltd.*, [1986] B.C.J. No. 2572 (S.C.).
- c. The usual method of making alterations is to place check marks at both ends of the alteration and to place initials between the check marks or in the opposite margin: *McLachlin & Taylor* at 3-20.

## IX. Joint Affidavits

- a. The PLTC materials note that the 1961 Rules of Court specifically provided for affidavits with more than one deponent, and say that because such a rule is not present in the current Supreme Court Civil Rules, the practise of joint affidavits arguably is no longer authorized.
- b. There are, however, scattered references to joint affidavits in cases in recent years when the previous Supreme Court Rules (which also did not mention joint affidavits) were in effect:
- i. *Gurtins v. Panton-Goyert*, 2007 BCSC 1511: joint affidavit sworn by a couple in response to an application to find them in contempt;
  - ii. *Mintz Estate (Re)*, 2007 BCSC 1922: joint affidavit sworn by two brothers who were executors of an estate in an application to remove a third executor; and
  - iii. *Tong (Re)*, 2006 BCSC 962: joint affidavit sworn in a bankruptcy proceeding by the parents of the bankrupt deposing to interest in property.
- c. Counsel wishing to be on the safe side may elect instead to have one deponent simply adopt the contents of a first deponent's affidavit.

## **X. Adopting the Contents of Another Affidavit**

a. Suggested wording:

I adopt as true the facts in paragraph [nos.] of the affidavit of [name], sworn on [date].

or

I have read the affidavit of [name] sworn [date], which is now produced and shown to me and marked as Exhibit A to this affidavit.

The facts deposited to in paragraphs [nos.] of Exhibit A are to my knowledge true and correct in all respects.

McLachlin & Taylor at 3-112.

b. It is critical that omnibus incorporations by reference be entirely and precisely accurate. If there are exceptions, or facts of which the witness is not aware, those circumstances must be clearly addressed in the affidavit. Obviously, credibility could be seriously impacted by any failure to address each and every fact before adopting statements in other pleadings.

## **XI. Affidavits Sworn Through a Translator**

a. Rule 22-2(7):

**Interpretation to person swearing or affirming the affidavit who does not understand English**

(7) If it appears to the person before whom an affidavit is to be sworn or affirmed that the person swearing or affirming the affidavit does not understand the English language, the affidavit must be interpreted to the person swearing or affirming the affidavit by a competent interpreter who must certify on the affidavit, by endorsement in Form 109, that he or she has interpreted the affidavit to the person swearing or affirming the affidavit.

## **XII. Consequences of Improper Affidavits Inside and Outside the Proceedings**

a. Affidavits replete with irrelevant assertions, including wilfully prejudicial ones, double hearsay, personal opinion, argument, or unnamed sources are inadmissible, and may attract an award of costs against the offending party, as well as a direction to expunge the offending material: *Sovereign General Insurance Co. v. McNeill*, <http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc988/2007bcsc988.html> 2007 BCSC 988.

b. An affidavit that is unnecessary, scandalous, frivolous, vexatious, that may prejudice, embarrass or delay a trial or hearing, or that is an abuse of process may be struck, and may result in an order for special costs: Rule 9-5(1). See also *MacKay v. Boucher*, 2001 NSCA 171, where 75% of solicitor-client costs were awarded against deponent of a false affidavit, because it drew the respondent into disproving the allegations.

c. An affidavit may be struck by removing it from the file, rendering the offending portions illegible, destruction by the registrar, or having the registrar seal the affidavit: McLachlin & Taylor at 3-121.

d. Perjury is making a false statement by affidavit with intent to mislead and with knowledge that the statement is false: *Criminal Code* s. 131 (see also subsection (3)). A person committing perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

### **XIII. Other Quick Tips**

- a. The deponent's occupation should be stated as briefly as possible (John Smith, teacher; not John Smith, employed as an elementary school teacher by the Vancouver School Board). The deponent can be described as retired or unemployed: McLachlin & Taylor at 3-102.
- b. Pleadings may be referred to, but should not be attached as exhibits: McLachlin & Taylor at 3-111.
- c. Use headings to organize lengthy affidavits.