Preparing Proper Affidavits

Avoiding Hearsay, Inferences and Conclusion, and Opinions, Within Affidavits

Avoiding Improper Affidavit Documents

An Affidavit document is a document sworn or affirmed, under Oath, and a document for which the truthfulness of the statements within must be genuinely true. Where an Affidavit is sworn, or affirmed, while lacking truthfulness, meaning containing contents that are known as false or made recklessly without due diligence and reasonable regard for truth, such as an Affidavit containing wilfully blind statements, such failure to adhere to truthfulness may constitute as a criminal act.

In many courts and tribunals, an Affidavit document may be entered into evidence, and accepted as accurate without the *viva voce* testimony of the deponent (the person who swore that the information and statements within the Affidavit are true). In other courts and tribunals, *viva voce* testmony is required and an Affidavit is more likely to appear as a document that is relied upon at a Motion, or other hearing, prior to Trial.

Just the Facts Ma'am, Just the Facts

In most circumstances, an Affidavit should contain only factual information relating to the 'who, what, where, and when' of things that the deponent heard or saw firsthand without details added merely for colour such as deponents subjective viewpoints or interpretations, especially where such viewpoints or interpretations are self-serving. This was stated within ***Creber v. Franklin***, [1993] B.C.J. 890 (S.C.) as follows:

> ... affidavits should state the facts only, without stooping to add the deponent's descriptive opinion of those facts ... For counsel to permit affidavits to be larded with adjectives expressing an opinion about the conduct of the other side contributes nothing to the fact finding process. On the contrary, it does a disservice. It exacerbates existing ill feeling, it pads the file with unnecessary material and it wastes the court's time.

> ... Self serving protestations of surprise, shock, disgust or other emotions claimed by a deponent are a waste of time and counsel would do well to remember that ...
>
> ... The court is not concerned to know whether he was "shocked" or otherwise offended by what the other did, unless that is made relevant by some condition induced in him which explains some act attributed against him. It is the court's opinion of a party's actions that is important. Self-serving protestations of surprise, shock, disgust or other emotions claimed by a deponent are a waste of time and counsel would do well to remember that. It is even more objectionable when a deponent is permitted by counsel to swear what a third person's feelings were as the result of what the opposite party did, or swear to what a third person has or has not experienced in his or her lifetime. If that is relevant at all, and it can rarely be so, then that third person should depose to it directly and give the factual foundation upon which he or she relies. If it is to be tendered by hearsay ... then the source of the information and a belief in it must be deposed to.

Refrain From Opinion Unless Expert

As above, an Affidavit should contain factual information only without opinions or personal viewpoints or feelings as emotional reactions; however, expressing opinions within an Affidavit is permissible, and appropriate, when the deponent is providing such an opinion in the context of an expert witness per ***Home Equity Development Inc. v. Crow***, 2002 BCSC 546 at paragraph 30 where it is stated:

> Opinion evidence is inadmissible unless given by an expert witness. Personal opinions or a description of the deponent's or another person's reaction to events is inappropriate and is nothing more than argument in the guise of evidence. It should not be admitted, and those portions of the affidavits containing opinion and reaction will be struck ...

This mandate to refrain from providing opinion unless an Affidavit is tendered by an expert witness also includes the mandate to refrain from including argument on the issues relating to the legal proceedings whereas such argument should be properly contained within the submissions intended to persuade the Judge, or other Trier of Fact, who holds the responsibility of determining findings of fact

based on the evidence, including Affidavit documents received as evidence. Disguising legal argument within an Affidavit was deemed improper per ***Chamberlain v. School District #36 (Surrey)***, 1998 CanLII 6723:

> [28] In general, opinion evidence is not admissible except when authored by an expert witness. Nor is it proper to submit argument in the guise of evidence. Personal opinions or a deponent's reactions to events generally should not be included in affidavits; argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact finding exercise. To the extent that objection is taken to inclusion of argument or opinion from persons not qualified as expert, the objection is valid and those portions of affidavits have been disregarded.

This rule requiring that an Affidavit be restricted only to what the deponent saw or heard or was told or did, while omitting argument and opinion as well as to refrain from drawing subjective inferences from the 'who, what, when, and where' was also stated within ***William et al v. British Columbia et al***, 2004 BCSC 1374 at paragraph 16:

> [16] Affidavits are limited to what the witness saw, what he or she heard or was told, or what she or he did. They should not contain argument. They should not draw inferences from the stated facts, for that is the duty of the court after all of the evidence has been heard. In the final analysis, all of the evidence must be carefully weighed in the process of finding facts that will be at the foundation of the court's judgment.

Avoiding Hearsay

With rare exceptions, an Affidavit should contain only information directly known to the deponent, being the 'who, what, when, and where' known on a first-hand basis rather than as learned from another person and thus known only on a second-hand basis (even worse still would be a double hearsay). When information is known only on a second-hand basis from another person who knowns the information on a first-hand basis, it is only the person with the first-hand knowledge that should be

deposing to the Affidavit. At best, where hearsay may, in rare cases, be acceptable, the deponent must provide a reasonable basis for the factual beliefs stated within the Affidavit per ***BMG Canada Inc. v. Doe***, 2005 FCA 193:

> [15] The Motions Judge held that: ... b) The affidavits filed in support of the motion were deficient in that the evidence failed to satisfy the requirements of Rule 81 because "*major portions of these affidavits are based upon information which Mr. Millin gained from his employees. Accordingly they consist largely of hearsay.... Mr. Millin gives no reason for his beliefs.*"

Hearsay will generally be inadmissible, or given very little weight where hearsay is admissible, especially where the Affidavit is submitted without efforts to explain the hearsay such as how the deponent learned of the facts stated within the Affidavit. Such was stated by the court within ***Young v. British Columbia (Minister of Education)***, 2006 BCSC 1415:

> [29] I have ruled much of the affidavit evidence inadmissible as hearsay. In each case I have concluded that the petitioner has not shown the necessity of receiving the evidence as hearsay. As well, there has been no real attempt to demonstrate the reliability of such evidence, beyond vague assertions that, for example, either Mr. Young or Mr. Gaiptman know that what they assert is true based on their long experience. If that is meant to suggest that the knowledge has come to each through a process of osmosis, it does little to demonstrate that the source of the knowledge is sufficiently reliable to be safely admitted. Otherwise, there has been no attempt to assert that either has been informed of the facts asserted by a named person, whose reliability can be weighed by me, nor has the source of the asserted facts been sufficiently identified that the reliability of the deponent's assertion of the facts can be evaluated.

With the above said in respect of hearsay, in some circumstances courts may use discretion and find that hearsay is permissible and may be given weight. For example, per s. 27 of the ***Courts of Justice Act***, R.S.O. 1990, c. C.43 as relates to proceedings within the Small Claims Court, hearsay is permissible and may be given weight. Such was stated in ***Lamka v. Waterloo Regional Police Services Board***, 2012 CanLII 98291 where it was said:

> 39. The Small Claims Court has a broad discretion to receive and act on evidence which might be inadmissible in other courts. To the extent that Sergeant Rose's hearsay evidence is contained in documents which were admitted into evidence, his evidence is before the court and the court is entitled to accept it for the truth of its contents, subject to the court's general discretion as to weight: see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 27(1); *Small Claims Court Rules*, O.Reg. 258/98, rule 18.02; *Central Burner Inc. v. Texaco Canada Ltd. (1989)*, 36 O.A.C. 239 (Div. Ct.); in this regard I also rely on my oral reasons given at the start of trial for admitting the defendant's brief of documents despite the plaintiff's objection as to certain specific items.

Stating Views of Other Persons

Similarly to concerns relating to hearsay whereas a deponent should refrain from the second-hand stating of what another person saw or heard, and also in keeping to the requirement to state only facts rather than feelings or views, a deponent should also refrain from stating the feelings or views of other people whereas the feelings or views of other people, which is generally improper on a first-hand basis, becomes further improper if deposed to on a second-hand basis per ***Khan v. Khan***, 2014 BCSC 289 wherein it is stated:

> [44] In *Kennedy v. Kennedy*, 2006 BCSC 190 (CanLII), Madam Justice Ross dealt with a preliminary objection to evidence filed on a summary trial application in a family law action. She cited the decision of Mr. Justice Spencer in *Creber v. Franklin*, [1993] B.C.J. No. 890, where he said at paras 19-20:

19 There are unsworn letters attached to the affidavits that express the opinions of their authors. Save where they may be admissible as expert opinions they are inadmissible. There are adjectival descriptions by one side of the alleged acts or statements of the other. They are irrelevant. The affidavits should state the facts only, without stooping to add the deponents descriptive opinion of those facts. It should be left to argument to persuade the trier of fact what view he or she should take of them. For counsel to permit affidavits to be larded with adjectives expressing an opinion about the conduct of the other side contributes nothing to the fact finding process. On the contrary, it does a disservice. It exacerbates existing ill feeling, it pads the file with unnecessary material and it wastes the court's time.

20 In this material there are descriptions by the petitioner of how he views some of the respondent's actions. The court is not concerned to know whether he was "shocked" or otherwise offended by what the other did, unless that is made relevant by some condition induced in him which explains some act attributed against him. It is the court's opinion of a party's actions that is important. Self-serving protestations of surprise, shock, disgust or other emotions claimed by a deponent are a waste of time and counsel would do well to remember that. It is even more objectionable when a deponent is permitted by counsel to swear what a third person's feelings were as the result of what the opposite party did, or swear to what a third person has or has not experienced in his or her lifetime. If that is relevant at all, and it can rarely be so, then that third person should depose to it directly and give the factual foundation upon which he or she relies. If it is to be tendered by hearsay under Rule 51(10), then the source of the information and a belief in it must be deposed to.

Stating of Beliefs

If it is appropriate for a deponent to make statements, a deponent must state a reasonable foundation for the belief by providing details of the source of information from which the belief is founded and should be corroborated by supporting documents such as the proper Affidavit statement of another person or an Exhibit document that reasonable provides credence to the belief. Such was said in ***R. v. Licence Commissioners of Point Grey***, 1913 CanLII 323:

> The affidavits offered to shew that the petition for the license was informal cannot be accepted as evidence for this reason, that the deponents state the essential matters on belief only, and do not state the grounds of that belief. Statements founded on mere belief are not evidence. There is, therefore, no evidence that the petition was insufficiently signed.
>
> With respect to this class of evidence I should like to quote some of the observations of the Judges in Re *J. L. Young Manufacturing Co., Young v. J. L. Young Manufacturing Co. (1900)* , 69 L.J.' Ch.D. 868. Lord Alverstone, C.J., said :—
>
> > I notice that in several instances the deponents make statements on their "information and belief," not only without saying what is the source of the information and belief, but in many respects what they so state is not confirmed in any way. In my opinion, so called evidence on "information and belief" ought not to be looked at at all unless the Court can ascertain not only the source of the information and belief, but also that the deponent's statement is corroborated by some person who speaks from his own knowledge. It should be understood that such affidavits, in case they should be made in future, are worthless, and ought not to be received as evidence in any shape Whatever. The sooner that affidavits are drawn so as to avoid stating matters that are not evidence, the better it will be for the administration of justice.

Failure to provide a foundational basis for a belief was also deemed improper in ***Scarr v. Gower***, 1956 CanLII 276 where it was stated:

> In conclusion, failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are regarded as worthless and not to be looked at by the Court.

Practitioner Preparing Affidavit Documents

While it is relatively common that a lawyer or paralegal, or a law clerk under the supervision of a lawyer or paralegal, will interview the person who will become the deponent to Affidavit, and that lawyer or paralegal or supervised law clerk will prepare the Affidavit on behalf of the deponent, the contents of the Affidavit must remain as the factual 'who, what, when, and where' information as genuinely known to the deponent. A lawyer or paralegal must prepare an Affidavit based on what the lawyer or paralegal was told by the deposing witness rather than preparing an Affidavit that serves as the 'who, what, when, and where' as may be known to the lawyer or paralegal. The Affidavit must contain evidence as statements of the deposing witness per ***William et al v. British Columbia et al***, 2004 BCSC 1374:

> [14] The use of affidavit evidence places a heavy onus on the lawyer preparing the document. It is not a transcript of the conversation between lawyer and witness. It is a document prepared by a lawyer based on what he or she has been told by a witness. While the document reads as the words of the witness it is only the words of the witness as heard and placed on paper by the lawyer. It would be naïve in the extreme to expect that no leading questions would be put to the witness in the course of affidavit preparation. In the end however, the obligation of the lawyer is to prepare a document that contains the evidence of the witness and not the evidence of the lawyer.

Avoiding Ultimate Decision Opinions

In a legal matter, the Judge (or other Trier of Fact) holds the duty to make the ultimate decision on the legal issues involved; and accordingly, a deponent to an Affidavit should refrain from expressing opinions, if an opinion is even proper, that avoid addressing the ultimate issue that is before the court such as whether an accused

person is guilty or whether a party to the proceeding acted improperly. This determination is for the Court rather than a deponent who may only contribute information intended to assist the Judge rather than to make the decision for the Judge; ***Bankruptcies of Down, Street and Barnes***, 2000 BCCA 218 at paragraph 8:

> [8] Mr. Andrews argues that all three affidavits are objectionable for many reasons. I do not intend to review his arguments and the arguments of Mr. Fulton in response with respect to each paragraph of each affidavit. I am persuaded that there is much in each of the affidavits that is objectionable either because of the assumption that Mr. Down is guilty of "fraud" and the co-petitioners are his "victims"; because much of the information in the affidavits is argument or is barely relevant to the questions raised in the appeal and prejudicial or inflammatory; and because of the use of double and triple hearsay. In a case such as this, where "abuse of process" and the rationale behind the rules relating to champerty and maintenance is in issue, these deficiencies must concern the Court.

Absolute Privilege, avoiding defamation concerns

Generally, absolute privilege attaches to an Affidavit document submitted in the course of litigative proceedings; however, the privilege, if any, attaches only to that which reasonably relates to the subject of judicial inquiry; ***1522491 Ontario Inc. v. Stewart, Esten Professional Corporation***, 2009 CanLII 15656 (ON SCDC):

> [11] In *Moseley-Williams v Hansler Industries Ltd.*, 2004 CanLII 66313 (ON SC), [2004] O.J. No. 5253, Cullity J. analyzed Ontario cases and concluded that the principles in Sussman still apply in Ontario and subsequent cases have further developed where to draw the line. He held that in order to determine whether or not a particular occasion is one of absolute privilege, all the facts, including the purpose of the communication, must be considered to determine whether an impugned communication was "*for the purpose of, or preparatory to, the commencement of judicial proceedings*". The approach of the Ontario courts is consistent with the often cited passage from the text Fleming on Torts:

> The privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings....but the statement or document must be directly concerned with actual contemplated proceedings; not just remotely so, like a factual report containing allegations which merely might provide a ground for future prosecution.

> The privilege attaches to any utterance reasonably related to the subject of the judicial inquiry...

The same was stated within ***Rybachuk v. Dyrland***, 2007 MBQB 305 where it was said:

> [26] *Dukes v Pats* is thus authority for the proposition that absolute privilege does not attach to gratuitous irrelevant statements about a third party made in a judicial or quasi-judicial proceeding, and that the threshold of relevancy is low – a statement is relevant if it has some nexus or connection with the proceedings even if it does not contribute to the resolution of the matter.

Furthermore, the statement must refrain from containing superfluous information lacking relevance or something incidental to the processing of the proceeding; ***Rizvi v. Syed***, 2016 ABQB 400:

> [23] Generally speaking, absolute privilege does protect those who make malicious statements in court proceedings. See paragraph 12.4(1) of Raymond E. Brown, The Law of Defamation in Canada, 2nd ed., looseleaf (Scarborough: Carswell, 1994) vol. 2, cited in the Liboiron decision, which states that absolute immunity applies to statements made in judicial proceedings and:

> ... it makes no difference that the words may be totally and knowingly false and spoken mala fide and with actual malice

[24] What the underlined portion of the above quote is meant to remove from the protection of absolute privilege are statements which are malicious in that, while they may have been made in the context of litigation, were not made during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings.

[25] A hypothetical example of this more narrow type of malice is in the following quote from the judgment of Lord Cockburn in *Seaman v. Netherclift*, (1876), 2 C.P.D. 53, where, after noting that absolute privilege applies to statements notwithstanding that they may be malicious, he observed:

Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked.: Were you at York on a. certain day? and he were to answer: Yes, and A.B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege. (emphasis added)

[26] And so statements of a witness may be malicious and still be subject to absolute privilege, provided they are made in circumstances connected with the advancement of the litigation.

[27] The Seaman case is quoted with approval by the Saskatchewan Court of Appeal in *Duke v. Puts*, 2004 SKCA 12 (CanLII), where the narrow exception to absolute privilege was expressed to apply to "statements not made with reference to the person being complained of, but gratuitous irrelevant statements against a third party".

[28] Again, another example of a statement made in the context of legal proceedings, but not in fact intended to advance those proceedings, is found in in the *Liboiron* decision itself.

[29] In *Liboiron* an RCMP officer stopped the defendant for speeding and issued a voluntary payment ticket. When the defendant made payment (effectively a guilty plea) he enclosed a letter to the Clerk of the Provincial Court implying that the RCMP officer was acting out of racial bias in issuing the ticket to him. The RCMP officer sued for defamation and was successful at trial. On appeal the defendant argued that the trial judge erred in failing to consider that the letter was sent in the context of a judicial proceeding, Majola's guilty plea to the speeding charge, and was therefore protected by absolute privilege.

[30] The Court of Appeal observed that to qualify for absolute privilege the letter must fall within a recognized step of the judicial proceeding. It held that "in other words, it must take place during, incidental to, and in the processing and furtherance of the proceeding" and that:

> To enter Majola's guilty plea under s. 36, the court clerk needed only the offence notice and payment. Majola's letter was not required, did not directly or indirectly fit within the process prescribed by s. 36, and did not further the proceedings. Nor can the letter be characterized as an essential step, as it was not necessarily incidental to the process prescribed by s. 36. Consequently, the letter is not protected by absolute privilege.

[31] A case cited with approval in *Liboiron* is *M.(M.J.) v M. (D.J.)*, 2000 SKCA 53 (CanLII), where the Saskatchewan Court of Appeal allowed a husband's defamation claim to proceed to trial notwithstanding his wife's claim of absolute privilege.

[32] In *M. (M.J.)*, supra, the wife had complained to the Law Society about the conduct of her husband's lawyer, but had included in that complaint letter an irrelevant allegation against her husband (that he had sexually assaulted their son).

Furthermore, the absolute privilege would only apply to those statements which would be admissible by a witness within the witness box within a judicial proceeding. If the statement would be impermissible, such as statement based

on hearsay or another rule of law that would make the statement inadmissible and therefore without potential use as a statement within a judicial proceeding, the absolute privilege fails to apply; ***Larche v. Middleton***, 1989 CanLII 4404 (ON SC), [1989] O.J. No. 1120 (QL) at paragraphs 33 to 34:

> If the doctrine does not protect statements made by witnesses from the witness-box which do not touch on the matters in issue, it should not afford protection to statements based on hearsay evidence which could not be made by a witness in the witness-box.

> The doctrine should only protect statements which could be made in court, and which would be subject to cross-examination. If all statements made to a lawyer or investigator in contemplation of litigators were privileged, a potential witness could use the occasions to defame another with the security of immunity. The statement of Middleton contained a great deal of hearsay evidence and would not have been admissible at trial. In my opinion, the doctrine of absolute privilege is not applicable to the statement of Middleton.

Similarly, it was said by the Court of Appeal in ***Fabian v. Margulies***, 1985 CanLII 2063 absolute privilege protection applies where a statement is made within the "... *ordinary course of proceedings* ..."; and accordingly, an Affidavit document must contain statements that are relevant and germane to the proceeeding in which the Affidavit is tendered. Specifically, it was stated that:

> It is clear that an action for libel or slander does not lie for words written or spoken in the ordinary course of any proceedings before a court recognized by law. In Dawkins v. Lord Rokeby (1873), L.R. 8 Q.B. 255, Kelly C.B. stated at p. 263:

> > The authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.

Furthermore, and finally, a statement within a judicial proceeding should contain something more than that which is just remotely connected; ***Wickham v. Hamdy***, 2019 ONSC 1960:

> [34] It is settled law that statements published on an occasion of absolute privilege are not actionable, see ***Admassu v. Macri***, 2010 ONCA 99 (CanLII) at para. 19 and *Big Pond Communications 2000 Inc. v. Kennedy*, 2004 CarswellOnt 872 (ONSC). Lawyers, parties and witnesses, are all protected by the privilege.

> [35] The privilege seeks to create a zone of protection for lawyers acting in pursuit of their clients' interests. Lawyers are to be free to present their clients' cases without fear of a lawsuit. The privilege is not simply confined to statements made in court. It also extends to all preparatory steps taken with a view to judicial proceedings so long as the step in question is directly concerned with actual or contemplated proceedings, see *Dingwall v. Lax*, 1988 CarswellOnt 1070 (ONSC) at para. 16. The privilege extends to statements that are incidental or preparatory to judicial proceedings, see *Salasel v. Cuthbertson*, 2015 ONCA 115 (CanLII) at para. 36. Determining whether a statement is preparatory to or intimately connected with a judicial proceeding involves an assessment of remoteness. A statement that is only remotely connected to a judicial proceeding may fall outside the scope of absolute privilege.

Summary Comment

hen an Affidavit is deposed to, the deponent should hold first-hand knowledge of the facts stated within and should avoid stating opinions unless the deponent is providing expert witness information. Furthermore, where hearsay is permissible, an explanation as to why the deponent believes what was learned from another person or source, with supporting documents as proper Exhibits should attach to the Affidavit. Deponents should also refrain from stating the views of other persons. Deponents should also refrain from expressing beliefs or opinions that go to the legal issue and ultimate decision. Furthemore, legal practitioners should ensure that the statements within an Affidavit consist only of the information known to the deponent rather than information that may be

known to the legal practitioner. The practitioner should at all times refrain from coaching a deponent on what to state within an Affidavit (or any other document).