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Attacking and Avoiding Substantively Deficient Affidavits: A Compendium of Judicial Dicta

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Attacking and Avoiding Substantively Deficient Affidavits: A Compendium of Judicial Dicta*

* An asterisk denotes a Rule 18A decision.

This collection is not intended as a treatise on the proper drafting of affidavits, but seeks to serve as a resource for striking defective affidavits. For more comprehensive overviews of affidavit drafting, please see the Bibliography on the final page of this paper.

I. General

**Porchetta v. Santucci*, [1998] B.C.J. 348 (S.C.) at para. 12:

> ... it is the responsibility of counsel on an application under Rule 18A to present admissible evidence. It is not the duty of the court to act as censor going through an affidavit with a blue pencil and deleting those portions which the judge considers offends the rules of evidence. The summary trial must be conducted with due regard to the rules of pleading and evidence ...

R. v. Araujo, [2000] 2 S.C.R. 992 at para. 46:

> So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherché du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also *clear and concise*. It need not include every minute detail of the police investigation over a number of months and even of years. [emphasis in original]

A.J.C. v. R.C., 2006 BCSC 828 at para. 10:

> Deponents to affidavits should state only facts. They should not add their opinions, descriptive adjectives or include submissions in the guise of evidence ...

II. Misleading Omissions

R. v. Araujo, [2000] 2 S.C.R. 992 at para. 47:

> A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong—and much right—with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

III. Internal Inconsistency

**Tecson v. Bang Tian Complete Auto Services Ltd.* (2002), 3 R.P.R. (4th) 95 (B.C.S.C.) at paras. 43 and 45

> ...
>
> 7. In response to paragraphs 9, 11, 25, 20-25 and 38 of the Affidavit of Colin Schuss sworn May 30, 2002, I do not believe Mr. Schuss ever tried to explain the further requirements and difficulties in obtaining the necessary permits and if he did attempt to explain them to me his efforts were inadequate.

...

> Paragraph 7 is a masterpiece of duplicity in which conflicting sworn evidence is offered in the alternative.

IV. Opinion

Home Equity Development Inc. v. Crow, 2002 BCSC. 546 at para. 30:

> 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 unless the plaintiffs did not object to them.

Chamberlain v. School District No. 36 (Surrey) (1998), 60 B.C.L.R. (3d) 311 (S.C.) at para. 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 ...

V. Argument

Tsilhqot'in Nation v. Canada (Attorney General), 2004 BCSC 1374 at para. 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.

**Hi-Seas Marine Ltd. v. Boelman* (2006), 17 B.L.R. (4th) 240 at para. 58 (B.C.S.C.), aff'd, [2007] B.C.J. 532 (C.A.):

> Witnesses may not offer legal opinions and argument in the guise of sworn testimony. Such testimony is not only inadmissible as evidence but abusive of the summary trial process. In my opinion, the vast majority of Georgison's affidavit is an affront to the rules of evidence and largely inadmissible. To the extent that it contains admissible evidence, it can be afforded little weight due to his making a drawing of bald assertions and conclusions.

Gleeson v. J. Wippell & Co. Ltd., [1977] 3 All E.R. 54 (Ch. D.) at 63:

> In Mr. Brown's affidavit he quotes a passage from an opinion of a silk, and he exhibits an article in a journal concerned with patents. The object appears to be to demonstrate that the plaintiff has prospects of success against Wippell if her action is not halted. The main objection to the extracts from the article is that they do not appear to me to constitute any evidence; and the purpose of affidavits is, or should be, to provide evidence. As I told counsel for the plaintiff, I would listen with pleasure to any submission on the subject that he chose to put before me, whatever his source of inspiration, but I would not listen to the words of a Queen's Counsel, however eminent, or the author of an article, when proffered as evidence of the legal rights and prospects of a litigant. A court does not hear expert evidence on what the law of England is, or what the rights of parties are under that law ...

VI. Conclusions of Law

Bell Canada v. Canada (H.R.C.) (1990), 39 F.T.R. 97 at paras. 7 and 13:

> ... this and every other deponent must abstain from expressing any gloss or explanations on the interpretation of the law. The respondents' counsel may do that in submissions to, and discussions with, the Court, which is the proper ultimate interpreter of the law. An attempt to cross-examine a deponent on this matter would end up being an improper canvassing of the deponent's opinion about the meaning of records and the interpretation of law.
>
> ...
>
> ... the deponent's assertion is of the [Human Rights] Commission's having 'recognized' this, or having been 'concerned' about that, and it is entirely without reference to place, date, time or personal knowledge, but expresses personal opinions and further interpretations of the law including what 'humans rights enforcement was intended to be.' That is a defective deposition which must be struck out. Much historical speculation about the 1978 initiative and subordinate mandate of the CEIC and the consequent establishment of a commission of enquiry surfaces in paragraph 8, which has not the ring of personal knowledge at all. It must be struck out.

East Kootenay Realty Ltd. v. Gestas Inc. (1986), 12 C.P.C. (2d) 95 (B.C.S.C.) at 109-10:

> In paragraph 11 ... there is an averment that the Respondent has a good defence to the claim of the petitioner ... With respect, paragraph 11 is not something upon which Mr. Holburn would be allowed to give *viva voce* evidence at the trial of the issue ... It is argument and not evidence. Therefore it is irrelevant.

VII. Scandalous, Hyperbolic, Emotional Language

Creber v. Franklin, [1993] B.C.J. 890 (S.C.) at paras. 19-20:

> ... The 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 ...

Foote v. Foote (1986), 6 B.C.L.R. (2d) 237 (S.C.) at 241:

> ... It matters not that the respondent was arrested and charged with a criminal offence because those charges did not proceed to a conviction. To mention them is irrelevant and wilfully prejudicial. Paragraph 6 suffers the same objection and, in addition, reports what the police officers are said to have thought about the respondent's involvement. That is irrelevant and wilfully prejudicial, and highly improper to be contained in the affidavit. Paragraph 8, recounting the petitioner's shock, is irrelevant.
>
> There will be an order that the affidavit be removed from the file of these proceedings. The petitioner, if she wishes, may file a new affidavit, but it shall mention none of the matters contained in the paragraphs I have enumerated.

VIII. Hearsay and Double Hearsay

BMG Canada Inc. v. John Doe, [2005] 4 F.C.R. 81 (C.A.) at paras. 15 and 21:

> ... (b) The affidavits filed in support of the motion were deficient in that the evidence failed to satisfy the requirements of rule 81 because [at paragraph 17] "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."
>
> ...
>
> Much of the crucial evidence submitted by the appellants was hearsay and no grounds are provided for accepting that hearsay evidence. In particular, the evidence purporting to connect the pseudonyms with the IP addresses was hearsay thus creating the risk that innocent persons might have their privacy invaded and also be named as defendants where it is not warranted. Without this evidence there is no basis upon which the motion can be granted and for this reason alone the appeal should be dismissed.

Young v. British Columbia (Minister of Education) (2006), B.C.L.R. (4th) 163 (S.C.) at para. 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.

Bell Canada v. Canada (H.R.C.) (1990), 39 F.T.R. 97 at para. 14:

> ... Not least in objectionability is, for example, paragraph 48 which is hearsay upon hearsay:
>
> > 48 I am informed by Mr. Yalden and verily believe that on June 23, 2989, he spoke to Bell's Executive Vice-President, Legal and Environmental Affairs, Roger Tassé ...

**Tecson v. Bang Tian Complete Auto Services Ltd.* (2002), 3 R.P.R. (4th) 95 (B.C.S.C.) at paras. 49 and 69:

> A proceeding under Rule 18A is a form of trial and, as a result hearsay evidence is not admissible unless it falls within the exception in favour of hearsay which is shown to be both trustworthy and necessary ...
>
> ...
>
> It seems clear that, at best, Xinsheng Yi's description of the material conversations in his two affidavits is not evidence gleaned from his participation in the conversations, but rather what he was advised of the conversations by his interpreter. In the circumstances, particularly where there are material contradictions, Mr. Zeng's absence is a factor from which the court is entitled to draw an adverse inference. Ms. Wu, who served as an interpreter later on, is also notable in her absence.

IX. Documentary Hearsay

Ulrich v. Ulrich (2004), 25 B.C.L.R. (4th) 171 (S.C.):

> 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: *Re: Koscot Interplanetary (U.K.) Ltd*., [1972] 3 All ER 829 at 835, d to g Megarry J.
>
> > For the purposes of inspection and copying, I readily accept that there is no distinction between including a statement in the affidavit and exhibiting to the affidavit a document containing the statement; but I greatly doubt whether there is any deemed inclusion of the exhibit in the affidavit for all purposes. ...
> >
> > It may also be that the documents might be admissible for some purpose other than establishing the truth of the statements contained in them. But for the purposes for which they were tendered, namely of establishing such truth, I hold them inadmissible.

X. Unspecified Sources

Van Mol (Guardian ad litem of) v. Ashmore (1995), 16 B.C.L.R. (3d) 155 (S.C.) at 162:

> ... the affidavit is flawed because the source of the information to Mr. Mickelson is not disclosed. Mr. Mickelson deposes that the individual who provided him with the information did so on the basis that he and Mr. McAlpine would not disclose his name or the source of his information ... the source of information is a material fact which must be before the court. In that case the court held that the inadequacy of the affidavit was sufficient to dispose of the application.

Privest Properties Ltd. v. Foundation Co. of Canada Ltd., [1990] B.C.J. 1615 (S.C.) at [p. 11 of QL printout]:

> In my opinion Ms. Griffin's affidavit does not suffer from an irregularity in form but rather in substance. The identity of the source of the information is not disclosed. She is not qualified to testify on the meaning of the document attached as exhibit "A" to her affidavit.

XI. Attribution to a Non-Real Person

Snowbird Rentals Ltd. v. Sof-Slide, Inc., [1987] A.J. 1247 (Q.B.) at paras. 11-14:

> In regard to paragraphs 25 and 25A how was the solicitor advised 'by the Defendant'? The Defendant is a corporation. In *K. J. Preiswerck Ltd. v. Los Angeles – Seattle Motor Express* (1957), 22 W.W.R. 93 (B.C. S.C.) Lord J. states at p. 94:
>
> > The affidavits filed by the plaintiff before Sullivan, J., and before me were those of the solicitor for the plaintiff. The paragraphs in those affidavits alleged to show a good cause of action begin with the statement 'That I am advised by the plaintiff and verily believe ...'
> >
> > The plaintiff is an incorporated company and in *In re Mints; Malour v. Mintz*, [1930] 1 W.W.R. 198 (Sask. C.A.) it was held in respect of a similar affidavit, that a statement that a deponent was 'informed

> by The Canadian Credit Men's Trust Association, Limited' was objectionable because, as McKay, J.A. said at pp. 2020-3:
>
> > An incorporated association cannot give information, it can only do so by one or more o fits officers, and the officer or officers giving the information should have been mentioned.
>
> At p. 208 Mackenzie, J.A. said:
>
> > Seeing that an incorporated company is a purely legal entity, and so incapable of personally apprehending facts or to furnish information thereon, it cannot, in my opinion, be so used to substantiate grounds on belief, under Rule 392.
>
> I therefore hold that these paragraphs in the affidavits are worthless and cannot be used ...
>
> ... to be an admission both belief and source must be given: *Fabricated Plastics*.
>
> ...
>
> The quoted paragraphs must be disregarded: *Re Erinco Homes*, 3 C.P.C. 228 (Ont. S.C.).

XII. Speculation About Another Party's Thoughts

Creber v. Franklin, [1993] B.C.J. 890 (S.C.) at para. 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 ...

Interclaim Holdings Ltd. v. Down (2000), 16 C.B.R. (4th) 168 (B.C.C.A.) at para. 8:

> 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.

XIII. The Grounds of Belief Must be Given

Mooney v. Orr (1994) 98 B.C.L.R. (2d) 318 (S.C.) at para. 20:

> As noted in *Starr v. Gower et al.* (1956), 18 W.W.R. 184 (B.C.C.A.), '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' (at 188)

R. v. Board of Licence Commissioners (Point Grey) (1913), 18 B.C.R. 648 (C.A.) at 650, citing *Re J. L. Young Manufacturing Company, Ltd.* (1900), 69 L.J. Ch. 868:

> 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 for 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 in evidence, the better it will be for the administration of justice.

Scarr v. Gower et al. (1956), 2 D.L.R. (2d) 402 (B.C.C.A.) at 409:

> 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.

XIV. Remedies

A. Generally

**Kennedy v. Kennedy*, 2006 BCSC 190 at para. 10:

> The next question then is how to respond to these affidavits. One possibility, where the material before a court is riddled with inadmissible evidence, hearsay and argument dressed as evidence is that the court will conclude that the matter is inappropriate for summary determination pursuant to Rule 18A on the basis that the facts cannot be found ... A court also has the discretion to strike inadmissible portions from affidavits or, where the admissible and inadmissible portions are interwoven, to strike the whole affidavit. In the alternative, a court may elect merely to ignore assertions of fact in the affidavit which offend the rule ... That is the course that I have decided to follow in the present case. Therefore, the offending portions of the affidavits will be ignored.

B. Striking Portions of an Affidavit

Rossage v. Rossage and Others, [1960] 1 All E.R. 603 (C.A.) at 602:

> ... The peril of leaving the affidavits on the file is indicated by the passage in Cotton, L.J.'s judgment ... it makes it almost impossible for the mother in this case to answer the affidavits unless they are purged of the irrelevant and indeed scandalous matter.
>
> There has been some discussion as to what is meant by 'scandalous.' It is quite clear that we cannot strike out matters in a pleading or an affidavit simply because they are scandalous, because scandalous matter may be relevant, and may be the very matters which have to be investigated by the court. If, however, the matters are plainly irrelevant, as they are here, there is no doubt that the court can strike them out, either by virtue of its inherent power or by virtue of the power contained in [the Rules of Court]...

C. Disregarding Entire Affidavit

**Kour Estate v. Bhandar* (1996) 6 R.P.R. (3d) 173 (S.C.) at paras. 29-30:

> Where there are numerous instances of inadmissible evidence in a Rule 18A affidavit, it is not the responsibility of the trial judge to examine the affidavit and sort out the admissible evidence from the inadmissible. At his or her discretion the judge may ignore the whole of the affidavit.
>
> Where possible, I ignored the inadmissible parts of an affidavit ...

D. Diminish Weight of Evidence and Credibility of Affidavit

Chamberlain v. School District No. 36 (Surrey) (1998), 60 B.C.L.R. (3d) 311 (S.C.) at para. 15:

> The court has power to strike inadmissible evidence from affidavits: ... In practical terms, when there is no time between the application to strike admissible evidence and the hearing of the lis, this means portions of filed affidavits are given no weight by the court.

**Hi-Seas Marine Ltd. v. Boelman* (2006), 17 B.L.R. (4th) 240 at para. 58 (B.C.S.C.), aff'd, [2007] B.C.J. 532 (C.A.):

> Witnesses may not offer legal opinions and argument in the guise of sworn testimony. Such testimony is not only inadmissible as evidence but abusive of the summary trial process. In my opinion, the vast majority of Georgison's affidavit is an affront to the rules of evidence and largely inadmissible. To the extent that it contains admissible evidence, it can be afforded little weight due to his making a drawing of bald assertions and conclusions.

E. Time to Re-File Materials

Bell Canada v. Canada (H.R.C.) (1990), 39 F.T.R. 97 at para. 16:

> So, with some hesitation regarding the rule's ultimate utility here, but with no doubt about the rule's application here, the Court considers that such application leaves the respondent's misbegotten affidavit in such tatters that what is left of it ought mercifully to be struck out in its entirety ... Therefore the respondent will be permitted a period of 15 days after the date of the order giving effect to the Court's conclusions herein, in which to file a recast affidavit on the part of the respondent Falardeau-Ramsay, or some other officer or servant, past or present, of the CHRC ...

F. Costs Sanctions

Foote v. Foote (1986), 6 B.C.L.R. (2d) 237 (S.C.) at 241:

> The matter of costs should be dealt with. With one exception they should be reserved to the judge who hears and decides upon the merits of this matter. That exception has to do with the material which I have ordered to be removed from the record. I have categorized that material as wilfully prejudicial. It ought never to have been advanced. The costs thrown away in the preparation of the material expunged and the costs of preparing material to replace it will be borne by the petitioner in any event of the cause. The respondent was compelled to prepare argument and to make submissions against that material. He is entitled to the costs involved in that in any event of the cause.

XV. Bibliography

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